

# The **LUTHERAN** **CLARION**



Lutheran Concerns Association  
1320 Hartford Avenue, Saint Paul, MN 55116

May 1, 2013  
Volume 5, Issue 6

## 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." <sup>1</sup> 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 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." <sup>2</sup> 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 Saxony, 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. <sup>3</sup> 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. <sup>4</sup>

Other groups of confessional Lutherans were sent from Bavaria by J.K.W. Loehe (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." <sup>5</sup>

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. <sup>6</sup> 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." <sup>7</sup>

### 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, <sup>8</sup> which provides that:

In this Issue of

*The Lutheran Clarion*

Religious Liberty Requires Constant Vigilance .... 1  
2013 LCA Conference Videos on the Web ..... 11

"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,<sup>9</sup> 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."<sup>10</sup>

According to legal history scholar Stephen Presser, Rehnquist "who eloquently sifted the historical evidence ... was, of course, right."<sup>11</sup> 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*.<sup>12</sup> 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."<sup>13</sup> 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;<sup>14</sup> a moment of silence for meditation and prayer;<sup>15</sup> prayers at high school football games;<sup>16</sup> teaching of creation science;<sup>17</sup> posting of the Ten Commandments on public school premises;<sup>18</sup> and nonsectarian prayer at a middle-school graduation ceremony.<sup>19</sup> In these cases, what had been accepted practice for nearly two centuries in America was abruptly outlawed by the U.S. Supreme Court.<sup>20</sup> 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 decomposition" which is due to a large extent to the "forced eradication of the inculcation of traditional moral values" in the public school?<sup>21</sup>

**"Is it not any wonder that our nation is being overtaken by a 'social decomposition'...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*.<sup>22</sup> In that case, Justice Henry Blackman, who is more well-known for legalizing abortion,<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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."<sup>26</sup>

Now go fast forward to 2005, when in the House of Representatives here in this great state of Indiana, the Speaker had 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.<sup>27</sup> 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."<sup>28</sup> 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.<sup>29</sup>

### 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."<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup>

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.<sup>34</sup> 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*).

### We Need Your Help: The Lutheran Clarion to Publish Monthly March—July 2013



With the March 2013 issue, *The Lutheran Clarion* began monthly publication leading up to the 2013 LCMS Synodical convention. In order to address the wide range of issues and concerns facing the upcoming convention, it is necessary to increase the publication frequency from bi-monthly to monthly.

Whereas in a non-convention year we would have published four issues in the January to July time frame, in this convention year we will publish six issues. This means, of course, our costs of publication and mailing will increase proportionately. Accordingly, we would ask, you our readers, to increase your donations in support of this convention-year effort.

Please send checks to:

**Lutheran Concerns Association**  
1320 Hartford Avenue  
Saint Paul, MN 55116-1623

Thus, the U.S. Court of Appeals for the Ninth Circuit held that parents' right to control the upbringing of their children "does not extend beyond the threshold of the school door."<sup>35</sup> The three liberal judges based their decision on "our evolving understanding of the nature of our Constitution." This philosophy by a secularized judiciary which designates the **state as parent** is an affront to the Judeo-Christian view that the **family** is the fundamental institution of society. It also contravenes "a canon of the common law that parents speak for their minor children," as was affirmed by William Blackstone (1723-80), the renowned English jurist whose *Commentaries* played a leading role in forming the basis of American law.<sup>36</sup> In a Seventh Circuit case, the Court ruled against parental rights and held that the **school** has a constitutional right of "the autonomy of educational institutions."<sup>37</sup> In a Third Circuit case, the court held that parents have no right to stop privacy-invading interrogation of their own children in public schools.<sup>38</sup> It is thus seen that, contrary to U.S. Supreme Court rulings, the lower courts have permitted the public school to usurp the traditional and God-given parental role in matters of fundamental importance.

### State Encroachment on the Teaching Ministry

The first of the two most recent and far-reaching instances of state encroachment on religious liberty to be discussed in this essay involves the meaning of the term "minister of religion" under federal statutory law. For Missouri Synod Lutherans, this also involves the issue of the place of the teacher in the doctrine of the ministry.<sup>39</sup>

In his Thesis VIII, of *Kirche und Amt* (Church and Ministry), Dr. Walther states his position that: "The pastoral ministry (*Predigamt*) is the highest office in the church, and from it stem all other offices in the church."<sup>40</sup> Although at times the pastor-teacher relationships in the Missouri Synod were not clear-cut, in a series of articles in 1919 by Rev. W.C. Kohn, a member of Synod's first General School Board,<sup>41</sup> it was af-

firmed that the teacher "is called as an assistant to the pastor (*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 *Pastorale*, p. 391.)"<sup>42</sup>

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.<sup>43</sup> 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 explained in a 1981 report of the Commission on Theology and Church Relations (CTCR).<sup>44</sup> 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."<sup>45</sup> 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."<sup>46</sup>

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 Ministry' 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!"<sup>47</sup> 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 concluded 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 understanding of the AC XIV [*Augsburg Confession*] and doctrine of the call."<sup>48</sup> 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."<sup>49</sup>

**"...the generic use of the terms 'ministry' and 'minister,' which grew out of the concept of *Everyone a Minister* creates theological and doctrinal confusion."**

Dr. George Wollenburg

## Thank You Balance-Concord, Inc.



Balance-Concord, Inc., has been a most faithful contributor to *The Lutheran Clarion* in honor of the sainted **Rev. Raymond Mueller** and the sainted **Rev. Edgar Rehwaldt**, both of whom faithfully served the Synod and Balance-Concord, Inc., for many years.

*The Clarion* is most appreciative of such continued support from Balance-Concord, Inc., as well as the wonderful support of our readers. These contributions make it possible to bring you substantive articles by respected and qualified authors on issues affecting YOUR Synod. Please continue your support. It is both appreciated and needed.

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.<sup>50</sup> 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 Government's position expressed in a case before the U.S. Supreme Court commonly known as the *Hosanna-Tabor* case.<sup>51</sup> 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.<sup>52</sup> 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 favor of Hosanna-Tabor on the basis of the "ministerial exception,"<sup>53</sup> 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.<sup>54</sup> 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."<sup>55</sup> 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 solitude 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.<sup>56</sup>

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."<sup>57</sup>

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.<sup>58</sup>

### 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,<sup>59</sup> 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."<sup>60</sup>

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."<sup>61</sup> 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.<sup>62</sup>

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."<sup>63</sup> 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."<sup>64</sup> 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."<sup>65</sup> 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]."<sup>66</sup> 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,"<sup>67</sup> 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.<sup>68</sup>

As bluntly stated by Harvard Law School Professor Mary

### Concordia Catechetical Academy 2013 Annual Symposium



The 20<sup>th</sup> Annual Symposium on Catechesis "Catechesis and Contemporary Challenges to the Christian Faith" will be held **June 19-21, 2013**, at County Springs Hotel, Waukesha, Wisconsin. Contact the CCA for more information at 262-246-3200 or online at <http://lutherancatechesis.org/>

Ann Glendon, the 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." <sup>69</sup>

These twelve lawsuits were separately filed in the respective federal district courts that had jurisdiction but were coordinated with many identical statements in the pleadings. For example, in the cases filed by the Archdiocese of Saint Louis, <sup>70</sup> the University of Notre Dame, <sup>71</sup> and The Catholic University of America <sup>72</sup> 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, <sup>73</sup> Colorado Christian University, <sup>74</sup> Eternal Word Television Network (EWTN), <sup>75</sup> and Ave Maria University. <sup>76</sup> The Alliance Defending Freedom filed lawsuits against the ObamaCare mandate for Louisiana College <sup>77</sup> and Geneva College, <sup>78</sup> 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. <sup>79</sup>

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. <sup>80</sup> 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 inexorable 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 <sup>81</sup> under the Religious Clauses of the Constitution, Wheaton College joined the above-cited suit previously filed by the Catholic University of America. <sup>82</sup> 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." <sup>83</sup> 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. <sup>84</sup> 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. <sup>85</sup>

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). <sup>86</sup> 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. <sup>87</sup> In an early and somewhat surprising ruling, <sup>88</sup> 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). <sup>89</sup>

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. <sup>90</sup>

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.

### A Foreign Mission Effort Worthy of Your Support

*Clarion* readers are encouraged to provide financial support for a worthy endeavor. Rev. Jeffrey Horn, a CTS graduate who served Zion Lutheran Church in Garrett, Indiana, from 2003-2012, and his wife Lora, will serve the Lord in Papua, New Guinea, as missionaries. Rev. Horn will teach at Timothy Lutheran Seminary and will look for ways to strengthen the education there.



While the LCMS is willing to "send" him and his family, it is up to Rev. Horn himself to raise the \$164,000 that is needed. Pilgrim Evangelical Lutheran Church, West Bend, Wisconsin, through its Horizon Fund, will match the first \$500 received.

*Clarion* readers, please send checks payable to:

**Lutheran Concerns Association**  
1320 Hartford Avenue  
Saint Paul, MN 55116-1623

Mark the memo line of your check "New Guinea Mission Project." LCA will see to it the funds are mailed in and specifically earmarked for the mission of Rev. Jeffrey Horn.

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."<sup>91</sup> 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.<sup>92</sup>

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).<sup>93</sup>

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. . . .<sup>94</sup>

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*." <sup>95</sup> 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."<sup>96</sup> 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."<sup>97</sup> 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;
- Collision of Conscience: A Bible Study, by Rev. Bryan Wolfmueller;
- What the Affordable Care Act Means for You, Describes Care, Cost and Coverage;
- God Values Life, by Rev. Christopher Esget;
- 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.<sup>98</sup> The complaint was brought under the Religious Freedom Restoration Act (RFRA),<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

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.<sup>102</sup> 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."<sup>103</sup> 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.<sup>104</sup> 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 Sotomayer. 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, <sup>105</sup> and the other in the Seventh Circuit, <sup>106</sup> 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; <sup>107</sup> the order not to defend the constitutionality of the Defense of Marriage Act (DOMA); <sup>108</sup> and the legalization of so-called "same-sex marriages" or "civil unions." <sup>109</sup>

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

Mark 13:13 (AAT)

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. <sup>110</sup>

What Christians are now facing is further fulfillment of Christ’s prophecy that "Everyone will hate you because of my name" (Mark 13: 13 AAT), and teachings of the Apostle Paul that "All who want to live a godly life in Christ Jesus will be persecuted" (2 Tim. 3:12, AAT). Even non-Christians ought to be concerned that the encroachment on the sanctity of marriage constitutes a "radical transformation of the most fundamental of social institutions. One that ... was heterosexual in all societies and in all places at all times." <sup>111</sup>

At the risk of some redundancy, consider some recent warnings of four astute observers of this cultural decline.

- Thus, as stated by Tim Wildmon, President of the American

Family Association: "The survival of our civilization as we know it is at stake," <sup>112</sup>

- 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." <sup>113</sup>
- Veteran columnist Cal Thomas said we are becoming a "nation out of control." <sup>114</sup>
- Rev. Franklin Graham put it even stronger and posited that we are on "The Road to Destruction." <sup>115</sup>

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. <sup>116</sup> Vocal groups such as exemplified by *The Shriver Report* now consider the traditional family a thing of the past. <sup>117</sup> 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. <sup>118</sup>

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 apostasy, 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." <sup>119</sup>

### 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, <sup>120</sup> does not bode well for religious liberty in America. President Obama wants judges who believe in a "living constitution" that changes with the times. <sup>121</sup> 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. <sup>122</sup> 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). <sup>123</sup> 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.<sup>124</sup> 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,<sup>125</sup> 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.<sup>126</sup> We Lutherans and other devout Christians may be disheartened and discouraged by the issues of the unborn<sup>127</sup> and the legal definition of marriage,<sup>128</sup> 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."<sup>129</sup>

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;<sup>130</sup> and who when he presumes to quote from the **Declaration of Independence**, consistently and conspicuously omits the significant definitive word "Creator."<sup>131</sup> In that historic document, the unalienable rights of men are declared to be "endowed by their Creator" and not by government as misconstrued by Obama.

In conclusion, the proposition of this essay rests: Religious Liberty Requires Constant Vigilance! Thank you for your kind attention.<sup>132</sup>

Copyright © 2013

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.

2 Phyllis Schlafly and George Neumayr, *No Higher Power: Obama's War on Religious Freedom* (Washington, DC: Regnery Publishing, Inc., 2012), pp. 9, 15. Phyllis Schlafly has been a national leader in the conservative movement since 1964 and has given close attention to issues of religious liberty in her monthly "Reports" and the "Eagle Forum."

3 That term has been ascribed to Walther, who with F. C. D. Wyneken and J. K. W. Loehe, 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. Schmelder, "A Synod is Born," *The Lutheran Witness*, Vol. 116, No.4, April 1997, pp. 8-14, at p. 10.

4 Walter O. Forster, *Zion on the Mississippi* (St. Louis: Concordia Publishing House, 1953), p. 9.

5 Theodore Graebner, *Church Bells in the Forest: A Story of Lutheran Pioneer Work on the Michigan Frontier* (St. Louis: Concordia Publishing House, 1944), at p. 17.

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*

*Witness*, July 1987, reprinted in booklet 1989.

9 *Wallace v. Jaffree*, 472 U.S. 38 (1985), Justice Rehnquist dissenting at 91-114.

10 For a scholarly discussion on that point, see John Baker in *The Heritage Guide to the Constitution*, Edwin Meese III, Chairman of The Editorial Advisory Board. The Heritage Foundation (Washington: Regnery Publishing, Inc., 2005), pp. 302-07. Edwin Meese III is a member of an LCMS congregation and a former U. S. Attorney General. See also Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* (New York University Press, 2002). Daniel Dreisbach is professor at American University in Washington, DC, and a First Amendment expert.

11 Stephen B. Presser, *Recapturing the Constitution: Race, Religion, and Abortion Reconsidered* (Washington, DC: Regnery Publishing Inc., 1994), at p.116. Stephen B. Presser, Raoul Berger Professor of Legal History at Northwestern University, taught courses in the law school, the history department, and the Kellogg Graduate School of Management.

12 *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947).

13 See the history of this loss of religious liberty documented by William Bentley Ball, *Mere Creatures of the State?* (Notre Dame, IN: Crisis Books, 1994), especially pp. 28-39.

14 *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963).

15 *Wallace v. Jaffree*, 472 U.S. 38 (1985).

16 *Sante Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

17 *Edwards v. Aquillard*, 482 U.S. 578 (1987). In his dissent at 616-40, Justice Scalia said that "the fact that creation science coincides with the beliefs of certain religions, ... does not itself justify invalidation of the [Louisiana] Act."

18 *Stone v. Graham*, 449 U.S. 39 (1980).

19 *Lee v. Weisman*, 505 U.S. 577 (1992). In his dissenting opinion, Justice Scalia said the Court had slighted a practice with "deep foundations in the historic practices of our people" and called the case a "jurisprudential disaster."

20 George Washington in his Farewell Address (1796) said that: "Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports." U.S. Supreme Court Justice Josiah Brewer gave an excellent documentation of the religious foundations on which America was built, whereby he concluded: "This is a Christian nation." *The Church of the Holy Trinity v. the United States*, 145 U.S. 457,471 (1892).

21 Ball, supra note 13, at p.119, and William J. Bennett, *The Index of Leading Cultural Indicators*. The Heritage Foundation 1993, pp. i - ii. William Bennett was U. S. Secretary of Education during the 1980s.

22 *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).

23 *Roe v. Wade*, 410 U.S. 113 (1973).

24 *Edwards v. Aquillard*, 482 U.S. 578 (1987), Justice Scalia dissenting at 616-40.

25 *Prayers Offered by the Chaplain, The Rev. Peter Marshall, D. D. at the Opening of the Daily Sessions of the Senate of the United States, During the Eightieth Congress, 1947-1948* (Washington, D.C.: United States Government Printing Office, 1949).

26 *March v. Chambers*, 463 U.S. 783 (1983). Historic principle affirmed by Chief Justice Warren Burger in his majority opinion.

27 *Hinrichs v. Bosma*, 400 F.Supp. 2d 1103 (S.D. Ind. 2005).

28 News report by Franklin Graham, President, Billy Graham Evangelistic Association, June 2010.

29 Elizabeth Williamson, "Pastor Opts Not to Deliver Inauguration Benediction," *The Wall Street Journal*, January 11, 2013. David Boyer and Cheryl Wetzstein, "Pressure from gays pushes pastor off inaugural agenda," *The Washington Times*, January 14, 2013.

30 H. C. Schwan, "On Preserving Unity While Avoiding Either Faddishness or Sluggishness," 1890 Synodical Address, tr. Everette Meier, in Matthew C. Harrison, *At Home in the House of My Fathers*. Lutheran Legacy, 2009, pp. 541-7, at 546.

31 For a history of these laws, see August C. Stelhorn, *Schools of the Lutheran Church-Missouri Synod* (St. Louis: Concordia Publishing House, 1963), pp. 235-47; Wayne E. Schmidt, *The Lutheran Parochial School: Dates, Documents, Events, People* (St. Louis: Concordia Seminary Publications, Monograph Series, 2001), pp. 175-99.

32 *Meyer v. State of Nebraska*, 262 U.S. 390 (1923). For a history of this case, see Schmidt, supra, note 31, at pp. 275-301; Ball, supra, note 13, at p. 12.

33 *Pierce v. Society of Sisters of the Holy Name of Jesus and Mary*, 268 U.S. 510, 535 (1925). For a history of this case, see Schmidt, supra, note 31, at pp. 303-28; Ball, supra, note 13, at pp. 12-13.

34 *Troxel v. Granville*, 530 U.S. 57 (2000). The court upheld the "presumption that fit parents act in the best interests of their children."

35 *Fields v. Palmdale School District*, 427 F.3d 1197 (9th Cir. 2005). On November 16, 2005, only eleven days after the decision, the House passed Res. 547 to reassert the settled law of *Meyer-Pierce* doctrine, by a vote of 320 to 91.

36 William Blackstone, *Commentaries on the Laws of England* (1765-1770), cited by Justice Potter Stewart in his concurring opinion in *Parham v. J. R.*,

- 442 U.S. 584 (1979).
- 37 *Crowley v. McKinney*, 400 F.3d 965 (7th Cir. 2005). The court denied the father's constitutional right to participate meaningfully in the upbringing of his children.
- 38 *C. N. v. Ridgewood Board of Education*, 430 F.3d 159 (3rd Cir. 2005). Students had to answer questions probing their personal lives and activities, e.g., about sex, illegal drugs, suicide, incriminating behavior, spirituality, tolerance, etc.
- 39 For a thorough historical background on the place of the teacher in the doctrine of the ministry, see John C. Wohlrabe, Jr., *Ministry in Missouri Until 1962*, Lutheran Concerns Association, Private Printing, 1992, pp. 39-47, and "Office of the Ministry: Current Concerns," *The Lutheran Clarion*, Vol. 4, Issue 4, March 2012, pp. 2-7.
- 40 C. F. W. Walther, *Church and Ministry (Kirche und Amt)* (St. Louis: Concordia Publishing House, 1987), tr. J. T. Mueller, pp. 289-302 and 297-98.
- 41 The first General School Board was established by resolution of the Synod in 1914, with F. Pfothenhauer as chairman. *Synodal Bericht*, 1914, p. 174; *ibid.* 1917, pp. 44-50.
- 42 W. C. Kohn, "Christian Day-Schools of the Lutheran Church," *Evangelisch-Luth. Schulblatt* 54, no. 1 (January 1919), pp. 8-15; *ibid.* 54, no. 2 (February 1919), pp. 38-50, at 47, "The Office of the Christian Day-School Teacher."
- 43 *Commissioner v. Eldor N. Eggen*, Sept. 26, 1950. For history of this case, see William C. Rietschel, *An Introduction to the Foundations of Lutheran Education* (St. Louis: Concordia Publishing House, 2001), pp. 82-3. The qualification as a minister of the Gospel was later applied under Section 107 of the IRS Code of 1954 in a technical advisory memorandum of the District Director, Indianapolis, IN, May 1, 1964, for a teacher, Alfred R. Manske, at Bethlehem Lutheran School, Fort Wayne, IN.
- 44 "The Ministry Offices, Procedure and Nomenclature," A Report of the Commission on Theology and Church Relations, 1981. For historical background and significant parts of this document, see: *Heritage in Motion*, ed. August R. Suelthlow (St. Louis: Concordia Publishing House, 1998), Jerald C. Joersz, "The Ministry," pp. 56-75, and Quentin F. Wesselschmidt, "The Teaching Ministry," pp.462-505.
- 45 Suelthlow, *ibid.*; p. 62.
- 46 Suelthlow, *ibid.*, p. 467.
- 47 Kurt Marquart, "Responses to Presentation II," in *Church and Ministry: The Collected Papers of the 150<sup>th</sup> Anniversary Theological Convocation of the Lutheran Church—Missouri Synod*, ed. Jerald C. Joersz and Paul T. McCain (St. Louis: The Office of the President, LCMS, 1998), pp. 100-112, at p. 101.
- 48 Robert David Preus, "The Doctrine of the Call in the Confessions and Lutheran Orthodoxy," *Church and Ministry Today*, ed. James A. Maxfield (St. Louis: The Luther Academy, 2001), pp. 1-49, at p. 49, originally published 1991.
- 49 Quoted by Rev. Raymond Hartwig in *Church and Ministry, The Collected Papers ...*, ed. Joersz and McCain, p. 196. Dr. Wollenburg was a former president of the Montana District of the LCMS and a former vice president of the LCMS.
- 50 "To Classify Ministers of Religion," *Proceedings*, 1983, Res. 5-09A, 178-80. See Suelthlow, *Heritage in Motion*, pp. 67-68.
- 51 *Hosanna-Tabor Evangelical Lutheran Church and School, Petitioner v. Equal Employment Opportunity Commission*, et al., cert. granted, October 28, 2010, on petition from the decision of the United States Court of Appeals for the Sixth Circuit, 597 F.3d 769 (6th Cir. 2010), March 9, 2010.
- 52 The church had concerns about the safety of the students and described Perich's conduct as "regrettable."
- 53 582 F. Supp. 2d, 881 (E.D. Mich. 2008).
- 54 597 F.3d. 769 (6th. Cir. 2010).
- 55 Review & Outlook., "Hosannas for the Court," *The Wall Street Journal*, January 12, 2012.
- 56 565 U. S. ---- (2012), No. 10-553, Jan. 11, 2012, slip opinion at 14.
- 57 Quoted by Paula Schleuter Ross, "Unanimous Supreme Court ruling supports Hosanna-Tabor," *Reporter*, February 2012, p.2.
- 58 565 U.S. ----(2012), No. 10-553, Jan. 11, 2012, slip opinion at 15, 18, 19 and 21.
- 59 ObamaCare is a popular (trivial) name used for the Patient Protection and Affordable Care Act ("ACA"), which was rushed through Congress for passage to become law March 23, 2010, at the insistence and pressure of President Obama, Pub. L. No. 111-148, 124 Stat. 119 (2010).
- 60 Donald Wuerl, Charles Colson, and Meir Y. Soloveichik, "United We Stand for Religious Freedom," *The Wall Street Journal*, February 10, 2012. Cardinal Wuerl is the archbishop of Washington, D. C. Charles Colson (d. 2012) was the founder of Prison Fellowship and the Colson Center for Christian Worldview. Rabbi Soloveichik is director of the Straus Center for Torah and Western Thought at Yeshiva University.
- 61 Phyllis Schlafly and George Neumayr, p. 11.
- 62 See discussion by this essayist, "Lutherans Should Speak Out for Religious Liberty," *The Lutheran Clarion*, Vol 4, Issue 6, July 2012, pp. 1-4.
- 63 "Missouri Synod President issues statement on recent HHS decision and religious freedom," *Christian News*, February 13, 2012, p. 11, www.lcms.org. February 3, 2012.
- 64 Quoted by Tim Townsend, "Lutheran leader sides with Catholics on health ruling in fiery testimony," *St. Louis Post-Dispatch*, February 18, 2012, pp. A1, A5. See also Adriane Dorr and Joel Gehrke, "Harrison defends religious freedom on Capitol Hill," *Reporter*, March 2012, pp. 1 and 9.
- 65 Quoted by Adriane Dorr and Joel Gehrke, *ibid*
- 66 Quoted by Phyllis Schlafly and George Neumayr, p. 176.
- 67 Review & Outlook, "Catholics in Court," *The Wall Street Journal*, May 22, 2012.
- 68 Louis Radnofsky, "Catholics Sue Over Health Mandate," *The Wall Street Journal*, May 22, 2012.
- 69 Mary Ann Glendon, "Why the Bishops are Suing the U. S. Government," *The Wall Street Journal*, May 22, 2012.
- 70 *Archdiocese of St. Louis and Catholic Charities of St. Louis v. Sebelius*, et al., E.D. Mo, May 21, 2012.
- 71 *The University of Notre Dame v. Sebelius*, N.D. Ind, May 21, 2012.
- 72 *The Catholic University of America*, v. *Sebelius*, D.D.C., May 21, 2012.
- 73 *Belmont Abbey College v. Sebelius*, Case No.1:2011cv01989. D.D.C., November 10, 2011.
- 74 *Colorado Christian University v. Sebelius*, Case No.1:20011cv03350, D. Colo., December 22, 2011.
- 75 *Eternal Word Television Network, Inc. v. Sebelius*, Case No. 2:2012cv00501, N.D. Ala., February 9, 2012.
- 76 *Ave Maria University v. Sebelius*, Case No. 2:2012cv00088, M.D. Fla., February 21, 2012.
- 77 *Louisiana College v. Sebelius*, Case No.1 :2012cv00463 , WD. La., February 18, 2012.
- 78 *Geneva College v. Sebelius*, Case No. 2:2012cv00207, WD. Pa., February 21, 2012.
- 79 *Grace Schools and Biola University, Inc. v. Sebelius*, Case No. 3:2012cv00459, N.D. Ind., Aug, 23, 2012.
- 80 *Roman Catholic Archdiocese of New York v. Sebelius*, Case No. 1:2012cv02542, E.D.NY, May 21, 2012.
- 81 *Wheaton College v. Sebelius*, D.D.C., July 18, 2012.
- 82 *The Catholic University of America v. Sebelius*, D.D.C., May 21, 2012. See also Philip Ryken and John Garvey, "An Evangelical-Catholic Stand on liberty," *The Wall Street Journal*, July 19, 2012. Philip Ryken and John Garvey are the presidents, respectively, of Wheaton College and the Catholic University of America.
- 83 *ibid.*
- 84 Quoted by Kathryn Jean Lopez, "Evangelicals & Catholics Go to Court Together over the HHS Mandate," *National Review Online*, July 19, 2012. [www.nationalreview.com](http://www.nationalreview.com)
- 85 Expedited appeal against the HHS mandate, *Belmont Abbey College and Wheaton College v. Sebelius*. Case Nos. 12-5273 & 12-5291, D.C. Cir., consolidated September 12, 2012.
- 86 *National Federation of Independent Business, et al. v. Sebelius, et al., cert. granted*, November 14, 2011, on petition from the decision by the United States Court of Appeals for the Eleventh Circuit, 648 F.3d 1235 (11th Cir. 2011), August 12, 2011.
- 87 Anon, "Liberty and ObamaCare," *The Wall Street Journal*. March 23, 2012. Michael Doyle and David Lightman, "Supreme Court to weigh reach of health law," *St. Louis Post-Dispatch*, March 25, 2012.
- 88 *Nat'l Fed'n. of Indep. Bus v. Sebelius*, 567 U.S.---- (2012), No. 11-393; 132 S.Ct. 2566 (June 28, 2012).
- 89 The tax basis of the ruling was severely criticized. See, e.g., John Yoo, "Chief Justice Roberts and His Apologists," *The Wall Street Journal*. June 30, 2012. Anon. "A Vast New Taxing Power," Review & Outlook *ibid.*, July 2, 2012. John Yoo is a professor at the University of California at Berkeley School of Law.
- 90 567 U.S.----(2012), No. 11-393, June 28, 2012, (Roberts, C.J.), slip opinion at 20 and 24.
- 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).
- 92 *Liberty University v. Geithner*, U.S. Supreme Ct., Nov. 26, 2012.
- 93 567 U.S. ----(2012), No. 11-393, June 28, 2012. (Ginsburg, J., concurring), slip opinion at 29.
- 94 PRWeb.com Newswire, June 28, 2012, reported by Vicki Biggs, The Lutheran Church—Missouri Synod.
- 95 "Leaders of LCMS, WELS, ELS, NALC, Catholics, Muslims, Others Release Joint Statement," *Christian News*, July 2, 2012, pp.1 and 11. See also: Adriane Dorr, "Harrison, CPS, Karner respond to health-care ruling," *Reporter*, July 2012, pp. 1 and 4.
- 96 <http://www.lcms.org/jfreetobefaitful>. 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 Vivki J. Biggs, "LCMS

- launches 'free to be Faithful' awareness campaign." <http://reporter.lcms.org>, September 25, 2012.
- 98 *Wm. Newland et al. and Hercules Industries, Inc. v. Sebelius*, Case No. 1:12-cv-1123-JLK, D. Colo., filed April 3, 2012, preliminary injunction granted July 27, 2012.
- 99 The RFRA, signed, November 16, 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."
- 100 Alliance Defending Freedom, Case Study, "Family business fights for survival," October 2012.
- 101 Steven Ertelt, "Obama Admin. Appeals Decision Against Abortion-HHS Mandate," <http://www.lifenews.com/2012/09/126>
- 102 *Hobby Lobby Stores Inc. et al v. Sebelius*, Case No. 5:2012cv1000, W.D. Okla., September 12, 2012.
- 103 Neil W. McCabe, "Hobby Lobby Sues Over HHS Mandate," *Human Events*, Week of September 12, 2012
- 104 *Hobby Lobby Stores. v. Sebelius*, U.S. Court of Appeals, Tenth Circuit, Case No. 12-6294, November 20, 2012.
- 105 *O'Brien v. U.S. Dep't of HHS*, U.S. Court of Appeals, Eighth Circuit, Case No. 12-3357, November 28, 2012.
- 106 *Korte v. Sebelius*, U.S. Court of Appeals, Seventh Circuit, Case No. 12-3841, December 28, 2012.
- 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 Lutherans, Capt. John C. Wohlrabe, Jr., CHC, USN (Ret.) and Capt. Mark J. Schreiber, CHC, USN (Ret.), reported in *Christian News*, May 17, 2010.
- 108 This 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.
- 109 Carol E. Lee, "Obama Backs Gay Marriage," *The Wall Street Journal*, May 10, 2012. In the November 6, 2012, state elections, the Gay-Marriage backers won ballot victories in four states to end their losing streak in popular voting.
- 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 condemned," 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 "homophobic." Mollie Ziegler Hemmingway, "When New England Progressives Won't Tolerate Evangelicals," *The Wall Street Journal*, December 29, 2012.
- 111 Charles Krauthammer, "Empathy or right," *St. Louis Post-Dispatch*, May 26, 2012. Charles Krauthammer is a Pulitzer Prize-winning conservative commentator and syndicated columnist.
- 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 Rots From The Inside Out*, [www.afa.net](http://www.afa.net) July 12, 2012.
- 113 Kevin Anderson, "Not So Gay," *Creation Research Society Quarterly*, Vol. 48, no. 3, winter 2012, pp. 196-203, at p. 201. Dr. Anderson, Editor, documents the history of "this slide toward such depravity."
- 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.
- 116 Ed Fuelner, "Marriage at risk in America," *The Washington Timers*, October 8, 2012. Ed Fuelner is president of The Heritage Foundation, Washington, D. C. ([heritage.org](http://heritage.org)). See also, Rick Sanatorium, "Standing up for marriage and families," *ibid.*, November 11, 2012.
- 117 *The Shriver Report. A Woman's Nation Changes Everything* (Washington, DC: Center for American Progress, 2009). See also Suzanne Venker and Phyllis Schlafly, *The Flipside of Feminism* (Washington, DC: WND Books), pp. 15-16.
- 118 David Aikman, "America's Religious Past Fades in a Secular Age," *The Wall Street Journal*, October 26, 2012. The "nones" have risen from 15.3% of adults in 2007 to 19.3% in 2012, according to the Pew Forum on Religion & Public Life.
- 119 *Lawrence v. Texas*, 539 U.S. 558 (2003), Justice Scalia dissenting, 586-605, at 589 and 602.
- 120 As provided by the Twentieth Amendment to the U.S. Constitution.
- 121 See Maria Diaz, "The Obama 2nd term threat to the Supreme Court," *The Washington Times*, October 29, 2012. Maria Diaz is legal counsel for Concerned Women for America.
- 122 See case, *supra*, note 119.
- 123 *United States v. Windsor*, Case No. 12-307.
- 124 *Hollingsworth v. Perry*, Case No. 12-144.
- 125 See: Alan E. Sears, "Activist judges beware: Voters favor traditional marriage," *Washington Times*, November 5, 2012. Alan Sears is CEO of the Alliance Defending Freedom and a former federal prosecutor during the Reagan administration.
- 126 Mary Harned, "Abortionists feeding at Obamacare trough," *The Washington Times*, November 12, 2012. Mary Harned is staff counsel at Americans United for Life Action.
- 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 40<sup>th</sup> anniversary of *Roe v. Wade*, Pastor Harrison reminded us that "we—the soldiers and very liberators of Germany from the darkness of the Third Reich—have largely ignored and continue to ignore the deaths of some 50,000,000 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 dropped 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 *Walter A. Maier Still Speaks: Missouri and the World Should Listen* (New Haven, MO: Lutheran News, Inc. 2008), p. 117.
- 129 Although "hate speech," whatever that "vague" term may mean, currently is 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."
- 130 Quoted by Phyllis Schlafly, *The Phyllis Schlafly Report*, Vol. 46, No.5, December 2012, p. 2.
- 131 *Ibid*, Vol. 45, No. 12, July 2012, p. 1.
- 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 Hecht, *Two Wars We Must Not Lose* (Fort Wayne: Concordia Theological Seminary Press, 2012). Bill Hecht is an insider to the political scene who worked more than 40 years in various capacities in the Nation's Capital. He also has been a Lutheran pastor.



## LCA Conference Videos Available on the Web!

Did you know that you can view the LCA Conference Videos on the web? Right now!

Just go to **The Lutheran Clarion** web site at <http://www.lutheranclarion.org> and click on [Videos] on the left side of the page. Here you will find the videos from our 2012 and 2013 conferences.



These videos will help inform you about ongoing issues in the Synod. They are also a valuable source of information if you are a delegate or visitor to the July 20-25, 2013, national convention in Saint Louis, Missouri.

**The Lutheran Clarion**

The official publication of the Lutheran Concerns Association, a non-profit 501(c)(3) organization.  
Circulation: 5,400



Published regularly to support issues and causes within The Lutheran Church—Missouri Synod which build faithfulness to true Confessional Lutheranism and to be a clear voice of Christian concern against actions and causes which conflict with faithfulness to the One True Faith.

The address for all matters pertaining to the LCA is:  
1320 Hartford Avenue  
Saint Paul, MN 55116-1623

Editorial Board: Mr. Walter Dissen (Chairman)  
Mr. Scott Meyer  
Rev. Jerome Panzigrau

Faithful Lutheran individuals who are members of LCMS congregations are invited to submit articles of approximately 500 words for consideration. Inquiries are welcome. Manuscripts will be edited. Please send to: Mr. Walter Dissen  
509 Las Gaviotas Blvd, Chesapeake, VA 23322  
(757-436-2049; wdissen@aol.com)

The Board of Directors for the LCA:  
Mr. Walter Dissen (President)  
Rev. Thomas Queck (Vice-President)  
Rev. Dr. Daniel Jastram (Secretary-Treasurer)

Mr. Scott L. Diekmann      Rev. David Ramirez  
Mr. John Klingler         Mr. Leon L. Rausch  
Mr. Scott Meyer            Mr. Donald Zehnder  
Rev. Jerome Panzigrau

<http://www.lutheranclarion.org>

Lutheran Concerns Association  
May 1, 2013



Lutheran Concerns Association  
1320 Hartford Avenue  
Saint Paul, MN 55116-1623