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Selected U.S. Supreme Court Cases Viewed Through the Lenses of the Lutheran Two Kingdoms Doctrine

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**SELECTED U.S. SUPREME COURT
CASES VIEWED THROUGH THE
LENSES OF THE LUTHERAN
TWO KINGDOMS DOCTRINE**

by

Larry F. Hendricks

**A Thesis Submitted in Partial
Fulfillment of the Requirements for
the Master of Divinity Degree**

**Course SYTH 7F98 M.Div. Thesis
Dr. Albert G. Huegli, Advisor**

**Concordia Lutheran Theological Seminary
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Dedication

As I close this year of my seminary training with this thesis, I dedicate it to my wife, Suanne, who has patiently endured this... taken a second job away from teaching at St. Peter's to help fund this... It is also dedicated to our children, Lori, Tammy, David and Jonathan, who I pray will be in God's grasp always. I thank my Lord and Savior, Jesus Christ... for the way...

I would like to acknowledge the following for their help: Samuel E. Ericsson, Dr. John R. Stephenson, Philip Draheim, GIO, Dean Edward M. Gaffney, Jr., Rev. Chris C. Wicher, Rev. Richard J. Neuhaus, Rev. Karl E. Lutze, Rev. David R. Liefeld, Dr. Arnold E. Kromphardt, Rev. Eugene W. Linse, and especially, my advisor, Dr. Albert G. Huegli.

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Foreword

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Dr. Albert G. Huegli, Advisor

The aim of this research is to prove how the Lutheran traditions (Scripture, Luther's writings, the Confessions, and Lutheran statements) to the citizen of a twentieth century democracy can help form a perception of selected cases of the Supreme Court of the United States in the light of the Two-Kingdom Doctrine of Luther. Certain Supreme Court decisions concerning the First Amendment of the United States Constitution will be chosen for their importance to the Lutheran Church - Missouri Synod.

The world is in need of the truth of the grace of God. This is especially true of the Christian as a citizen and of how he perceives Supreme Court decisions as one important aspect in the relations of church and state.

The writer's major thrust, first from a systematic point of view, is that this topic is more timely today than during the eighteenth and nineteenth centuries. The Lutheran position as outlined by theologians of the past and more recent scholars will be shown to be relevant to the

perplexing problems of church-state relations in the present.

Certain Supreme Court decisions have been interpreted by scholars as being totally acceptable to Lutheran precepts, while other scholars would disagree. Michael W. McConnell has stated that "we need a definition of constitutional religious liberty that preserves the protections of separation without stifling religious choice."¹ He would propose to replace "separation" with the ideals of neutrality and accommodation.

Why should a Christian support the U.S. Constitution and Supreme Court in the first place? The answer is that the Christian's willingness to influence the democratic process in a way consistent with his perceptions while maintaining proper respect for the God-ordained authority can serve as a witness to his faith. Where should we take a stand in support of the American Constitution and Supreme Court decisions while at the same time asserting some of the theological insights of the Lutheran position? As the Supreme Court becomes referee in the contest between conflicting interests, under a constitutional umbrella the final authority is often viewed as determining the limits and boundaries of conflicts of concern to Lutherans .

¹ Michael W. McConnell, "Why 'Separation' Is Not the Key to Church-State Relations," The Christian Century 106.2 (1989): 46.

In confessional theology it is not the pragmatic approach one seeks when the problems are something legal and acts immoral which society has sanctioned to some degree, but an understanding of "in accordance with God's will". Because the Christian is in the Kingdom of the Left Hand, this never permits him to be anything other than a Christian. In medical decisions we do things sometimes because they work. Some are mystifying. Yet this delicate balance must be maintained and confessionalism preserved in this pluralistic society. There is a broad and narrow definition of this too. The state of society in which members of diverse ethnic, racial, religious, or social groups maintain culture or special interests within the confines of a common civilization is my broad definition.

This writer will proceed to develop an argument for Luther's Two-Kingdoms Doctrine by compiling evidence in Christian tradition that supports a theologically correct position. It is the assumption of this study that the Lutheran position on church-state issues seems to be the only workable option for our pluralistic society. We must provide a continuity in our traditions that can apply to the concerned citizens in the future.

I. THE DOCTRINE OF THE TWO KINGDOMS IN HISTORY

The state carries on its work by the authority of God, as one sees in Romans 13:4: "for he is God's servant for your good. But if you do wrong, be afraid, for he does not bear the sword in vain; he is the servant of God to execute his wrath on the wrongdoer," and in Matthew 22:21: "They said, 'Caesar's.' Then he said to them, 'Render therefore to Caesar the things that are Caesar's, and to God the things that are God's.'" In the conflicts between church and state, Luther used the narrow pluralistic sense of "church" when many interpreted it as broad and particular. Luther stated that he had done more to separate the temporal sword, which is the state's authority, from the spiritual than any of his predecessors.² Very clearly he wrote in a letter of 1525: "The spiritual rule of the Gospel must therefore be separated from the external secular rule and the two must not be mixed with each other."³

Since the time of Charlemagne, governments intertwined the two kingdoms, a concept from Constantine's time.⁴ The

² Luther Werke, Briefwechsel, Vol. III, 484-486. See also LW, AE, 46:95.

³ Luther Werke, Briefwechsel, Vol. II, 484-486.

⁴ Robert Kolb, "An Historian's Reflections on Luther's Concept of the Two Governments", Office of Government Information Opening, St. Louis, Dec. 3, 1986, 10.

letter of Pope Gelasius I, 492-496, sent to the Byzantine Emperor Anastasius I, which somewhat administrated the Two-Kingdoms doctrine's ambiguity applied with equal freedom.⁵ But, medieval life was pervaded by religious concerns, and as a consequence medieval political thought was intensely preoccupied with the problem of the relations between Church and State, between religion and politics. In its most general form, the problem was the same for all thinkers: What should be the respective powers of the secular and the ecclesiastical authorities, the *regnum* and the *sacerdotium*? The problem itself received widely differing interpretations at the hands of different thinkers. These interpretations were integrally related to different conditions of the time and even the nature of the "priesthood" concerns were themselves involved in disputes.

SCRIPTURE

Scripture gives us many directives and for Lutherans, the *sola Scriptura* principle is very important. One ratifies decisions made on the basis of right reason and natural law. This may be inferred from the command of God: "We must obey God rather than men".⁶ This applies in such situations when we further read: "There is one lawgiver and judge, he who is able to save and to destroy".⁷ If the

⁵ "Gelasian Letter," New Catholic Encyclopedia, 1967 ed.

⁶ Cf. Acts 5:29.

⁷ Cf. James 4:12.

State is to punish evil it must know what evil is. This the Bible tells us: "Every one who commits sin is guilty of lawlessness; sin is lawlessness".⁸ Since, however, government is human, i.e., it is composed of human beings, it is naturally limited by the natural limits of human powers and of human abilities. These commandments deal with a personal relationship between individuals and God and so do not properly fall under the jurisdiction of human government. However one reads in the "Of the Power and Primacy of the Pope," that Quest. 9, canon 3 is in error and kings and princes are to guard the interests of the church.⁹ Religion is primarily a matter of the heart and "thou, thou only, knowest the hearts of all the children of men."¹⁰ God is furthermore not in need of governmental protection. The State is, however, to protect the rights of all to live in proper relationship to God and to practice their religion according to the command of God. The state cannot do this without relinquishing some absolute neutrality on the First Table of Law. The authority of government is outlined in Romans 13:1-5.¹¹ Luther states on Romans 13:1 that there is

⁸ Cf. 1 John 3:4.

⁹ P. Bente and W.H.T. Dau, Concordia Triglotta, (St. Louis: Concordia Publishing House, 1921) 519.

¹⁰ Cf. 1 Kings 8:39.

¹¹ Martin Luther, "Temporal Authority: To What Extent It Should be Obeyed, 1523" trans. J.J. Schindel, Luther's Works, American Edition, Vol. 45 of 55 vols.: The Christian in Society (St. Louis: CPH and Philadelphia: Fortress Press, 1955-1975), 87-92, 110, (Hereafter LW, AE).

a sense of being "twin-born, one has two forms within himself, just as Christ does".¹²

One recognizes the fact that, according to Scripture, God deals with people in two different ways. He works forgiveness and mercy through the Word. A government, for example, has not been entrusted with the power to forgive sins; the church has the Office of the Keys. The church, however, does not "bear the sword" as government does. Historically speaking, the concept of the state has been affected by the church's teachings and practice of mercy.

As a pastor one must attend to the inner dynamics of church body theology and practice as well as to the broader social issues. James says that we should not merely listen to the Word, rather but do what it says. This involves the pastor and his flock. The Augsburg Confession issued a request for objective listening, perhaps from the transfiguration proclamation, "to hear,"¹³ and noted to obtain a justifying faith God instituted the Office of the Ministry, that is, provided the Gospel and Sacraments.¹⁴ It is not the temporal force which is the pastor's tool, but the Gospel which has the power (Rom. 6:14) to make disciples. Luther states "for the sake of comforting consciences" a mandate does not exist for either the Christian state or for submission by the state to the

¹² LW, AE, 25:468.

¹³ Cf. Luke 9:35.

¹⁴ Cf. Rom. 10:17, 1 Thess. 3:13.

authority of Scripture because that would entangle Scripture and its Gospel with temporal force. Neither the Gospel nor compassion can be legislated. The pastor has only the Gospel as central authority to those who freely listen. It is the Word of God in a world of darkness and deceit. God's Word is truth and love.¹⁵ Telling the truth is a very difficult and dangerous undertaking; for the committed it sometimes puts us in conflict with those we love. For the pastor to know the truth and to build up the body in love is primary. How best can we speak the truth in love? C.F.W. Walther says the Gospel must predominate.¹⁶

Unam Sanctam

Between the New Testament and Luther lay a long and tortuous struggle of ecclesiastical and temporal rulers for the realization of that relationship most congenial to their own interests. The high tide of papal power was reached with the reign of Innocent III (d.1216), who considered himself the true emperor of Christendom. "Unam Sanctam" a bull, number 103, issued 18 November 1302 by Pope Boniface VIII, written by A. Egidius Colonna, Archbishop of Bourges, presented most extravagant claims for the spiritual order in

¹⁵ Cf. Eph. 3:17-19, 4:11-15.

¹⁶ C.F.W. Walther, The Proper Distinction Between Law and Gospel, W.H.T. Dau, ed., (St. Louis: Concordia Publishing House, 1897, Rep. 1928, 4.

comparison to the secular order.¹⁷ "One sword ought to be under the other and the temporal authority subject to the spiritual power."¹⁸ From this premise the bull then draws six points concerning the relationship between the spiritual power of the Church and the secular authority:

1. There is one church, one body, and one head.
2. The pope is the head.
3. The premise is supported by Luke 22:38, Matt. 26:52.
4. Both swords are in the power of the Church. The spiritual is wielded in the Church by the word of clergy and the secular is employed for the Church by the hand of civil authority, but under the directions of spiritual power. The spiritual power is above the temporal power.
5. Spiritual power has the right to establish and guard the secular and also to judge it when it does not act rightly. The "lower spiritual" is governed by the "higher spiritual" power and God is the highest.
6. Divine authority is granted to Peter by divine commission. "*Declaratio subesse Romano Pontifici est omni humanae creaturae de necessitate salutis.*"

Philip IV's new minister, Guillaume de Nogaret, who was later detained, denounced Boniface before a council of

¹⁷ "Unam Sanctam," The Catholic Encyclopedia, 1912 ed.

¹⁸ The bull *Unam Sanctam* (November, 1302), ed. E. Friedberg, *Corpus Iuris Canonici*, II (Leipzig, 1881), col. 1245-46 as found in Brian Tierney, *The Crisis of Church and State 1050-1300*, (Englewood Cliffs: Prentice-Hall, Inc, 1964) 189.

French bishops and nobles. After much turmoil, Philip was able to extract an admission, that, whenever the king so willed, reason of state took precedence over clerical privilege.¹⁹ During this time the territorial princes achieved the maximum control over the church.

Marsilius of Padua

The "*Unam Sanctam*" was declared at the 5th Ecumenical Council of the Lateran in 1516 and also supported by many including Bernard of Saisset, John of Salisbury, Nicholas II, and Leo IX. But Marsilius of Padua disagreed in 1325 and wrote *Defensor Pacis* in defense of civil power as against papal power.²⁰ Perhaps the hermit monk, Luther, read the bull, but this writer believes he did not read Marsilius even though he reiterates many of his thoughts. It bears much the same relation to the activities of the conciliar period as that of Luther's Ninety-five Theses to the work of the Protestant Reformation.²¹ John of Paris in the 14th century set forth a complete and complex interpretation of the "indirect power" of the Pope in temporal affairs and it is worth examining on the basis of

¹⁹ Brian Tierney, *The Crisis of Church and State 1050-1300* (Englewood Cliffs: Prentice-Hall, 1964) 184.

²⁰ J. Marcellus Kik, *Church and State* (New York: Thomas Nelson & Sons, 1963) 68.

²¹ Ephraim Emerton, *The Defensor Pacis of Marsiglio of Padua*, Harvard Theological Studies 8, (New York: Peter Smith, 1951) 71.

his interpretation, and like Marsilianism it does have great relevance to contemporary issues. The contemporary doctrine and practice of the church is oriented in the sense of the concept of the indirect power represented in the medieval tradition of Marsilius of Padua.²²

Marsilius' solution was to give:

1). attention not to the relative superiority of two different ends, but on the specifically political means of carrying on the functions of state for the endurance of men's associated living.

2). separation of religion from the secular ends to the *universitas fidelium*, the whole people, who were more trustworthy than the priesthood alone.

3). a sharp distinction between spiritual and temporal power (II, ii, 4-7; 1 Cor. 12:21,²³ and Romans 13:1-7, 1 Tim. 2:1-2).²⁴

4). a definition of eternal salvation where it is necessary to observe only the content of the "evangelical law" (Discourse ii, chapter ix, para. 10 to the end).

5). the concept that no ruler can dispense with the commands or prohibitions of the divine law, and not any *partial* [emphasis mine] group but only the general council or the faithful human legislators can prohibit things which

²² This is maintained by J.C. Murray, S.J., "Contemporary Orientations of Catholic Thought on Church and State in the Light of History," *Theological Studies*; X, 1949, 212.

²³ Marsilius of Padua: *The Defensor Pacis*, trans. Alan Gewirth, (New York: Columbia University Press, 1956) 419.

²⁴ Marsilius of Padua 426.

are permitted by that law (Disc. 1, chapter XII, para. 9; Disc. II, chapter IX, para. 1 and chpt. XXI, para. 8).

6). the idea that only the whole body of citizens, the weightier part thereof, is the human legislator (Disc. 1, chpt. XII, XIII).²⁵

7). The decretals or decrees of the Roman and any other pontiff, collectively or otherwise, made without the grant of a human legislator, bind no one to temporal pain or punishment (Disc. 1, chpt. XII, Disc. II, chpt. XXVIII, para. 29).

Marsilius has a distinction of the internal and external aspects of religious values, between the conditions of the soul which essentially constitute these values as such. We see by the time of Luther the tortuous struggles of ecclesiastical and temporal rulers. Luther knew that this tradition, this internal-external concept would bind him in thinking of church-state issues with the princes. Luther stated that faith and baptism in the name of Christ brings eternal salvation. In particular, Luther's teaching of justification by faith (*sola fide, satisfactio vicaria*) sees all forces in the world beyond the church subject to God's universal governance. Now one must focus on Scripture

²⁵ Alan Gewirth presents a discussion of natural rights, self-legislation, and less-useful laws in his 1951 book, *Marsilius of Padua*, p. 225.

which teaches that the preservation and government of the world, as an *opus ad extra*, is a work of the Triune God.²⁶

LUTHER

Luther's stand against the bull, *Unam Sanctam*, began in 1520 and is summarized in Of Temporal Power and in his Address to the Christian Nobility of the German Nation. It is also noteworthy that Luther addressed secular rulers on more topics than 'the failings of the clergy'; he went on to prescribe remedies for the 'failings of the temporal estate....²⁷ He states:

No temporal matter shall be submitted to Rome. The pope should have no power over the emperor, except to crown him at the altar, as a bishop crowns a king; nor should that devilish pomp be allowed that the emperor should kiss the pope's feet, or sit at his feet...The chapter Solite in the Canon Law, in which the papal authority is exalted above the imperial, is not worth a farthing...

It is also absurd and puerile for the pope to boast for such blind, foolish reasons, in his decretal Pastoralis, that he is the rightful heir to the Empire, if the throne be vacant.

²⁶ Francis Pieper, Christian Dogmatics, 3 vols. (St. Louis: Concordia Publishing House, 1950) 1: 484.

²⁷ Kolb 3; LW, AE, 44:212-215.

Who gave it to him? Did Christ do so when He said, 'The kings of the Gentiles exercise lordship over them, but we shall not do so?' Did St. Peter bequeath it to him? It is disgusting to me to see that we have to read and teach such impudent, clumsy, foolish lies in the Canon Law, and moreover to take them for Christian doctrine.²⁸

Martin Luther had developed this as a reaction against what he had been taught. He did this before the Diet of Augsburg. Luther grew up with human ordinances, but distinguished between the general priesthood of all believers and the special ecclesiastical office.²⁹ According to Luther, ordination is not a sacrament, but a human rite that bishops, *episcopi seu pastores*, carry out under papal supervision. This critical stance of the Augsburg Confession, Article 28, offers this distinction as early as The Babylonian Captivity of the Church.³⁰

Luther knew of the responsibilities of the state to be directed to the general welfare of the people. His basic concern was always "what the marks of the church were in this rich worldly setting".³¹ He set the preaching of the Word, administering the sacraments above all; he also said that the "holy possession of the sacred cross" was the church's responsibility.³² Likewise, "we must not abolish or hide the commandment to stone false prophets...."³³

²⁸ LW, AE, 44:160ff.

²⁹ LW, AE, 44:15.

³⁰ LW, AE, 36:6, 111, 113.

³¹ LW, AE, 13:57.

³² LW, AE, 41:151-154, 164.

³³ LW, AE, 13:67.

Luther's position three years later in the main part of his treatise, Of Temporal Authority, In How Far One Should Obey It, is (1) an inquiry into exactly how far the arm of the temporal authority should reach, and (2) an inquiry into the church's serving office which has nothing in common with temporal ruling power.³⁴

This was written out of concern about the Catholic Church in secular affairs. Unquestionably, power often is permitted to go too far, or not far enough; here power punishes too much, there too little. It is argued that it is better to spare a criminal than to kill a pious person. Resistance by a prince against his overlord, the emperor, is not correct.³⁵ Resistance is only by confession of the truth; therefore, an outrage is not to be resisted and not to be beaten down with vigilantes. Luther again shows us passive resistance, in which he always sought reform in an "orderly fashion."³⁶

"So that the Gospel comes into light," Luther remarks that the spiritual tyrants have to "pull in their pipes."³⁷ Luther stresses the positive form of opposition, and the creative form of loyalty in the realm of the state. Cornerstones from Boniface VIII such as "self-will, seditious, and under pretense" are used by many law-givers.

³⁴ LW, AE, 45:88ff.

³⁵ LW, AE, 45:124-125.

³⁶ LW, AE, 40:49-59, 75-143.

³⁷ LW, AE, 13:42.

So the argument proceeds that there must be peace, for without it, no one can keep his life. Much less will there be room to teach God's Word.³⁸

Luther was concerned about open rebellion. The impression he received in Thuringia in 1521 confirmed his belief in a strong state. The writer notes again that the two kinds of human beings in the world need two kinds of righteousness. Civic authority is important, although not a faith saving righteousness. Jesus Christ has given us the grace of God in His Word. Luther always presented the Law first, then the Gospel. There must be a sound basis for civil law.³⁹

It is a misunderstanding of Luther's teaching on justification to assume that Christians are so removed from the reality of sin that they should not submit themselves to the restraining power of the sword. This correspondent "horizontal" and "vertical" parts to theology, which means this two-realm paradigm, did not separate out "natural reason" in theology. Luther was confident that human rationality would ascertain what is best for human life.⁴⁰

Melanchthon, in the Augsburg Confession, Article 28, does not deal with the saving and reproofing will of God nor with the faith and sin of people destined for salvation by grace. Instead he dealt with "social ethics" rather than

³⁸ LW, AE, 13:45.

³⁹ LW, AE, 45:85.

⁴⁰ Kolb, "An Historian's Reflections," 9.

theology in the strict sense. Luther's statements from 1523 in Concerning the Ministry states how bishops incur the wrath of God.⁴¹ Secularization tendencies are seen in An Exhortation to the Knights of the Teutonic Order.⁴² In the Instructions for the Visitors of Parish Pastors in Electoral Saxony of 1528, Luther did not condemn late medieval episcopacy, but urged that one ought to accept some things out of love.⁴³ In the On War Against the Turks in 1529, standards were set for the proper office of a pastor. Luther explained that man's nature is such that he cannot achieve perfection even if he should be a true Christian, and the goal of perfection does not belong to the political realm.⁴⁴ This explains the harsh attack in his Exhortation to All Clergy Assembled at Augsburg in 1530. The intent of Article 28 is a summary of Luther's thoughts on this over a ten year development.

Luther prayed for aid and hoped for peace. Luther did not mean that Article 28 was establishing a distinction between the temporal and the spiritual. He stressed God's saving will, both for the regenerate and the unregenerate, but Melanchthon did not see this; therefore in Article 28 there is very little positive comment on temporal authority. There is a certain unmistakable bias against the temporal in

⁴¹ LW, AE, 40:(4),7-44,13,25, 34, 37, 40.

⁴² LW, AE, 45:152, 155.

⁴³ LW, AE, 40:269-73, 281-86.

⁴⁴ J.H. Porter, ed., Luther: Selected Political Writings (Philadelphia: Fortress Press, 1974)

1530. Article 28 discloses this very complex origin of the doctrine of the two-fold righteousness as it relates to the function of temporal authority. Thus, Luther principally gives a doctrine of justification with a minimal treatment of the ethics of Aristotle. The tension is thus between the *iustitia civilis* and the *iustitia fidei*.⁴⁵

From May 1530 Melanchthon built Luther's early writings into an abbreviated form, but agreed with Luther.⁴⁶ Luther did suggest that "he had been very outspoken with impractical suggestions, but how else ought he do it?"⁴⁷ Individual statements of Luther discern how the three hierarchies (*ecclesia*, *politia*, and *oeconomia*) relate to the two-kingdom doctrine.⁴⁸ The complex four situations (household, economic sphere, societal sphere, and churchly sphere) in life are only a framework. Luther and his colleagues at Wittenburg saw that the church's attempt to exert political power had subverted its calling.

To paraphrase Temporal Authority in Luther's Works, 45:104ff. (111) I note:

The temporal power has a law that extends only to life, property and external things upon the earth, for God will not let anyone rule over the soul

⁴⁵ Wilhelm Maurer. Historical Commentary on the Augsburg Confession. Trans. H. George Anderson. (Philadelphia: Fortress Press, 1986) 97. See also footnote 225, p. 97.

⁴⁶ See Johannes Herchel (*Lex Charitatis*, 1953) versus Harald and Hermann Dien, 1938 and 1947 following Froelch and Wunsch from the series of Sermons on the Mount 1530-32.

⁴⁷ LW, AE, 44:216-217.

⁴⁸ LW, AE, 20:168-71. See also WA 31.2:634; LW, AE, 15:189-264. *Oeconomia* is only a vague reference to marriage law and basically no place in this essentially diplomatic document. See also John R. Stephenson, "The Two Governments and the Two Kingdoms in Luther's Thought," Scottish Journey of Theology 34 (1981):321-337.

except Him alone. We wish to make this very clear and, in order to that the bishops and princes see what fools they are in commanding that people shall believe this or that. When a law is passed telling people what their religious creed shall be, this is certainly not in accordance with God's Word. God wants our faith to be based entirely upon the Bible, as He says in Matthew 16:18: "Upon this rock I will build My church"; and in John 10:27: "My sheep hear My voice and know Me, but they know not the voice of a stranger, but flee from him." It is therefore a foolish thing to command the people that they shall believe the churches, the fathers, and the councils, as if there were not the Word of God. The devil's apostles command that, and not the Church, for the Church does not command anything of which it is not absolutely certain that it is in accordance with the Bible...

They will not be able to prove that the decisions of the councils are the Word of God. [Luther realized this in the Leipzig Debate of 1519 with Johann Eck]. Much more foolish is it to say that the kings and princes and the multitude believe this. We have not been baptized in the name of kings, princes, and the multitude, but in Christ and God Himself. We are also not named after kings, princes, or multitudes, but are called Christians. No one can command the soul what it shall believe, and say he knows what is the way to heaven. No human being can do that, but God only, and therefore in matters that concern the salvation of the soul, nothing but the Word of God shall be taught...

Moreover, the temporal power does not know anything about the condition of one's soul...

The temporal lords ought to rule material things, so that criminals be punished, taxes collected, etc. But now they want to rule over men's souls. And as for the texts quoted above from Paul [Rm. 13:1] and Peter [1 Peter 2:13], these are true and correct. One must indeed obey the temporal power, though only in temporal matters. Paul does not speak here of faith but of temporal power, for the temporal ruler has no authority over the beliefs of subjects. Peter does

the same, as he speaks of "Human ordinances". Certainly, religious beliefs are not governed by human ordinances! For had not Christ said plainly [Matt. 22:21] that one should give unto Caesar that which is Caesar's, and unto God that which is of God? If the imperial power extended into God's kingdom and authority, then Christ would not have made this distinction. The soul is not under the power of the emperor...

If he should take your property because of your disobedience, and punishes you for it, thank and bless God that you have been worthy to suffer for God's Word. Let him carry on as he likes, for he will find his judge eventually. For I say unto you that if you do not resist him and let him have his way, so that he takes away your faith or the books, you have truly denied God...

Heresy is a spiritual thing, and that cannot be cut off with iron, nor burned up with fire, nor drowned with water. As Paul says in 2 Cor. 10, 'For the weapons of our warfare are not of the flesh, but mighty before God to the casting down of strongholds, and bringing every thought into captivity to the obedience of Christ'.⁴⁹

Thus we also are shown in the "Preface to the Book of Concord that there was always a concern for repercussions:

Wherefore, by this writing of ours, we testify in the sight of Almighty God and before the entire Church that it has never been our purpose, by means of this godly formula for union to create trouble or danger to the godly who today are suffering persecution. For, as we have already entered into the fellowship of grief with them, moved by Christian love, so we are shocked at the persecution and most grievous tyranny which with such severity is exercised against these poor men, and sincerely detest it.⁵⁰

⁴⁹ LW, AE, 45:114.

⁵⁰ F. Bente and C.F.W. Dau, 21; also Tappert 83f.

The government is also further limited by human frailty to punish only evil in word and deed and not in thought and desire, for it cannot look into the hearts of men, "for the Lord sees not as man sees; man looks on the outward appearance, but the Lord looks on the heart."⁵¹

It is "our duty to strive against the word and works of the devil and to drive him out in whatever way we can, as both Christ and his apostles command us, how have we gotten into such a state that we have to do nothing and say nothing when the pope or his cohorts undertake devilish words and works?"⁵²

Luther was not a theoretician or a political philosopher, yet passionately political in his concerns, which with his usual direct concreteness caught the attention of historian Heinrich von Treitschke and theologian Albrecht Titchl. But Luther assures us it is God who sits in judgment.⁵³ Within these concerns, its natural limits, government is to protect the rights of individuals and to punish those who transgress against these rights. These rights naturally flow from the commands of God's Law.⁵⁴ One may include among these liberty of religious belief and practice, sanctity of marriage and the family, respect of proper authority (including recognition

⁵¹ Cf. Samuel 16:7.

⁵² LW, AE, 44:132.

⁵³ LW, AE, 13:150: "Not a single one...."

⁵⁴ LW, AE, 13:160.

of the divine institutions of Church, State, and Family), the right to an education, life, property, free enterprise, and a good name. Rulers, he exclaimed, "Would to God they were all Christians, or that no one could be a prince unless he were a Christian!"⁵⁵ It is of course to be understood that these rights are to be protected only insofar as in their exercise thereof that there be no invasion into the equal rights of other human beings. That government is thus to protect the rights of individuals has been established in the First Amendment to the Constitution of the United States. But the "sum and substance" of it all is still the premise that the Kingdom of Priests has no sword and is to be seen as a divine thing entirely.⁵⁶

Luther thought of church and state not in terms of passive associations of people, or externally structured institutions, but rather as *realms* in which the active and immanent God works through people for good in the world in two ways. He once said in characteristic manner that Peter and Paul had no ground or straw, much less called ruler, yet there were two kingdoms (*governments*) in Rome: Nero's against Christ, and Christ, ruling through Peter and Paul, against the devil.⁵⁷ The Church is the kingdom of God, and is so described, Luther remarks, because God alone

⁵⁵ LW, AE, 46:166.

⁵⁶ LW, AE, 46:99-100.

⁵⁷ Albert G. Huegli, ed., Church and State Under God (Saint Louis: Concordia Publishing House, 1964) 461.

reigns in her; God alone rules, speaks, works, and is glorified in her.⁵⁸ Luther declares that he could foment trouble, but that it would have been fool's play and so he let the Word do its work.⁵⁹

In his Lectures on Hebrews Luther asserts, there is no power which is not of God. Therefore, what Luther gives us is a theological, working definition of "believe." Though Luther related the 'Two Kingdoms' under the common rule of God, he emphatically asserted over the years how pernicious was any confusion of the two.⁶⁰ He said that the Enthusiasts derive laws for secular government from the Gospel, and that they confuse the two governments in the same way that the papacy does.⁶¹ Because one remains a righteous man and a sinner (*simul iustus et peccator*), it is said that man can "only in Christ's Kingdom have a straight scepter."⁶²

Luther did have a defense of the right to resist an inferior magistrate's rule; however, most of the basis of the argumentation is to be discovered in his German language letters not readily available and in his students' writings after 1546.⁶³ The Christian, Luther felt, should be politically active, serving, furthering the government and

⁵⁸ LW, AE, 44:379. Also WA 8, 656.

⁵⁹ LW, AE, 51:75.

⁶⁰ James Atkinson, Church and State Under God (Oxford: Latimer House, 1982) 38.

⁶¹ Paul Althaus, The Ethics of Martin Luther (Philadelphia: Fortress Press, 1972) 61.

⁶² LW, AE, 12:240-241.

⁶³ Robert Kolb, "Matthaeus Judex's Condemnation of Princely Censorship of Theologians' Publications," Church History 50 (1981), 401-414.

thus, doing the Lord's work.⁶⁴ As late as March 1530 Luther opposed resistance to the Emperor and did not have the right to change his mind.⁶⁵ But, again one does see a change in Luther's concepts after February. 27, 1531.⁶⁶ Luther believed that the Emperor was acting against his own law.⁶⁷ Thus, the prince could oppose the Emperor, but one should not begin a war or promote a cause. If one agitates and makes it "more complicated" that is a sufficient deed. If that Emperor had followed his baptism, then one could easily have followed him. Luther still harbored doubts about armed resistance, but "the polemical force of his treatise [Warning to His Dear German People] which found expression in Luther's characterization of his opponents and in the arguments he employed, including the 'dream' in which there was no God, favored resistance."⁶⁸ Luther did add his name to the list of signatures of later Wittenberg opinions. His Warning was later in 1546 republished by Melanchthon.

⁶⁴ LW, AE, 14:113.

⁶⁵ LW, AE, 49:272-280, 433-437.

⁶⁶ Hans Baron, "Religion and Politics in the German Imperial Cities During the Reformation," English Historical Review 12(1937): 422.

⁶⁷ LW, AE, 47:3-55.

⁶⁸ Mark U. Edwards, Luther's Last Battles: Politics and Polemics, 1531-1546 (Ithaca: Cornell University Press, 1983) 29.

The Lutheran Confessions

In the article on Civil Government" the Augsburg Confession teaches "that Christians may without sin occupy civil offices or serve as..." (A.C. XVI,2; cf.Ap. XVI,1). Edmund Schlunk's work interprets the Confessions and provides ten theses of civil and ecclesiastical government:⁶⁹

Civil government is the power of the sword providing for external righteousness and peace.

Spiritual government is the office of preaching the Gospel and administering the sacraments.

Civil and spiritual authority are divine ordinances and derive their dignity from the Word of God.

Civil government is God's good creature and ordinance.

The spiritual office was instituted by God in the calling of the apostles through Jesus Christ.

The function but not the concrete form of both authorities is revealed in God's Word. Only according to human law is the office of church government distinguished from the pastoral office.

God demands of every man obedience to both authorities.

The ecclesiastical and civil offices must not be intermingled, but differentiated.. [The confessions deal with government as *politia*, office, whereas modern concept of the "state" embraces the entire ordered community of government and subjects.]

The limit of obedience to each of the two offices is God's commandment.

In the mingling of civil authority and ecclesiastical authority, the tyranny of Satan's kingdom invades both of them.

The Augsburg Confession of 1530 clearly advocates separation when it says in the sixteenth article:

Of Civil Affairs they teach that lawful civil

⁶⁹ Edmund Schlunk, Theology of the Lutheran Confessions, trans. Paul F. Koehnke and Herbert J.A. Bouman. (Philadelphia: Muhlenburg Press, 1961) 226.

ordinances are good works of God, and that it is right for Christians to bear civil office, to sit as judges, to judge matters by the Imperial and other existing laws, to award just punishments, to engage in just wars, to serve as soldiers, to make legal contracts, to hold property, to make oath when required by the magistrates, to marry a wife, to be given in marriage.

They condemn the Anabaptists who forbid these civil offices to Christians.

They condemn also those who do not place evangelical perfection in the fear of God and in faith, but in forsaking civil offices; for the Gospel teaches an eternal righteousness of the heart. Meanwhile, it does not destroy the State or the Family, but very much requires that they be preserved as ordinances of God, and that charity be practiced in such ordinances. Therefore, Christians are necessarily bound to obey their own magistrates and laws, save only when commanded to sin; for then they ought to obey God rather than men. Acts 5, 29.⁷⁰

And again the normative doctrinal issue of the Augsburg Confession, twenty-eighth article:

Therefore, since the power of the Church grants eternal things, and is exercised only by the ministry of the Word, it does not interfere with civil government, no more than the art of singing interferes with civil government. For civil government deals with other things than does the Gospel. The civil rulers defend not minds, but bodies and bodily things against manifest injuries and restrain men with the sword and bodily punishments in order to preserve civil justice and peace. Therefore the power of the Church and the civil power must not be confounded. The power of the Church has its own commission, to teach the Gospel and administer the Sacraments. Let it not break into the office of another; let it not transfer the kingdoms of this

⁷⁰ F. Bente and W.H.F. Dau 51. For appropriate Formula of Concord references see Appendix A.

world; let it not abrogate the laws of civil rulers; let it not abolish lawful obedience; let it not interfere with judgments concerning civil ordinances or contracts; let it not prescribe laws to civil rulers concerning the form of the Commonwealth. As Christ says, John 18, My kingdom is not of this world, also Luke 12, 14: Who made me a judge or a divider over you? Paul also says, Phil. 3, 20: Our citizenship is in heaven; 2 Cor. 10, 4: The weapons of our warfare are not carnal, but mighty through God to the casting down of imaginations.⁷¹

The impression the writer gets of the form of the article is that the Confessions are bound to the form of the sixteenth century. But here the Augsburg Confession is suggesting something else as well: God the Creator is a living God and His creation, in a sense, continues. Not only the ordinances of the past but for the sake of unity quite specifically those of the present are deemed bona opera Dei.⁷² Therefore, the power of the office of the keys doctrine and its connection with justification is just as important as an uncrossable boundary, and one never to be cast aside. The Augsburg Confession speaks of justifying faith, the means of grace and then good works. One should do good works for God's sake and not to merit favor. These works should flow naturally from a justifying faith. It is not the church's proper task thus to create civil righteousness. These good works flow freely from Christians, however, not under the control of a pastor. The pastoral

⁷¹ F. Bente and W.H.T. Dau 85.

⁷² John F. Johnson, "Confessional Lutheranism and Civil Affairs: The Contemporary Significance of the Two Kingdoms Doctrine," Office of Government Information Opening, St. Louis, December 3, 1986.

approach is to educate the membership and not to mobilize the troops.⁷³

Likewise does the Apology, in recounting the many abuses against the proper spheres of Church and State, speak of:

The entire topic concerning the distinction between the kingdom of Christ and a political kingdom has been explained to advantage (to the remarkably great consolation of many consciences) in the literature of our writers (namely) that the kingdom of Christ is spiritual (inasmuch as Christ governs by the Word and by preaching), to wit, beginning in the heart the knowledge of God, the fear of God and faith, eternal righteousness, and eternal life; meanwhile it permits us outwardly to use legitimate political ordinances of every nation in which we live, just as it permits us to use medicine or the art of building, or food, drink, air.⁷⁴

The Treatise on the Power and Primacy of the Pope speak likewise:

The second article is still clearer, that Christ gave to the Apostles only spiritual power, i.e., the command to teach the Gospel, to announce the forgiveness of sins, to administer the Sacraments, to excommunicate the godless without bodily force (by the Word), and that He did not give the power of the sword, or the right to establish, occupy, or confer kingdoms of this world (to set up or dispose kings). For Christ says, Matt. 28, 20: Go ye, teaching them to observe all things whatsoever I have commanded you; also John 20, 21: As My Father hath sent Me, even so send I you. Now it is manifest that Christ was not sent to bear the sword or possess a worldly kingdom (rule in a worldly fashion), as He Himself says, John

⁷³ David R. Liefeld, "A Pastoral Approach to the Politics of Abortion," Symposium on Church and State, April 6-7, 1990, St. Louis, Concordia Theological Seminary.

⁷⁴ Theodore Tappert, ed., The Book of Concord (Philadelphia: Muhlenberg Press, 1959) 330f.

36: My kingdom is not of this world, and Paul says 2 Cor. 1, 24: Not for that we have dominion over your faith; and 2 Cor. 10, 4: The weapons of our warfare are not carnal, etc.⁷⁵

Dr. Mueller sums up the Lutheran doctrine on this point in his Christian Dogmatics with these words:

From this follows that the State (civil government is not a sort of maid (*ancilla ecclesiae*) that must assist the Church in its divine work of winning souls for Christ. While both the papists and the Calvinists intermingle Church and State in principle and practice, the Lutherans on the basis of Scripture, oppose every attempt to mingle the two. According to Lutheran doctrine the mingling of the two produces only harm, never good (cp. church conditions in all European state churches). The church loses nothing of its dignity or power by being independent of the Civil government. On the contrary, its freedom from the restrictions of the civil law enables it to attend to its sacred duty of proclaiming the Word the more efficiently.⁷⁶

Calvinistic theology also espouses separation of Church and State. Of this Calvin himself states, "that this spiritual power be entirely separated from the power of the sword,"⁷⁷ and again, "that the spiritual kingdom of Christ and civil government are things very different and remote from each other".⁷⁸ Although Calvin here clearly expresses the doctrine of separation of Church and State over against the Roman teaching and practice, yet he himself fell into

⁷⁵ F. Bente and W.H.T. Dau 513, also Tappert, 325.

⁷⁶ John T. Mueller, Christian Dogmatics, (St. Louis: Concordia Publishing House, 1934) 552.

⁷⁷ John Calvin, Institutes of the Christian Religion, Book IV, Chapter XI, Article V, translated John Allen, Vol. III, 231.

⁷⁸ Calvin, IV, XX, I, 516.

the same error and mixed Church and State. This historical fact one can find with the same situation rather consistently in later Calvinistic writings and applications.

John Knox, for instance, declared also for separation of Church and State, and yet it may be said of him that he went so far as to say that a woman should never be permitted to rule a country, and that the civil government should be placed above all. So, historical mores and traditions can be seen to play a part in determining the stance of doctrine.

Franz Pieper in his Christian Dogmatics does not cover all church and state questions, but he insisted that Lutherans must avoid both the Roman Catholic and the Calvinist approaches to questions of church and state, for both involved a confusion of the two realms which always undercut the proper working of each realm. Pieper rejected any attempt by the Church to impose the Word of God upon the State.⁷⁹

The Influence of Luther

Martin Luther's theology built on justification by faith which sees all forces in the world beyond the Church as belonging to the Kingdom of the Left and ultimately subject to God's universal governance through all worldly

⁷⁹ Kolb, "An Historian's Reflections," 14.

powers, is valid and efficacious today. As a framework, some of Luther's concepts of non-neutrality included:

Resistance to inferior persons who denied certain religious spheres of government.
 Resistance by magistrates.
 Resistance by individuals only in one case.
 Most importantly, the use of the Emperor's own laws in the constitution's provisions for making a change in one's concepts, i.e. the argument by Luther for resistance.⁸⁰

Yet Luther always repeated his concept that he still considered passivity to be the better course.⁸¹ What Luther anticipated led to a divergence of understanding of the two government framework. If a Christian cannot decide which cause is just, he should give his own government the benefit of the doubt. Yet, the basics are clear:

1. You don't make Christian believers by force of law.
2. You don't rule the civil realm by the Gospel.

Since heretics were punished more severely than counterfeiters in the Middle Ages because of unity of faith, now one can see why Luther was against this element of thought, that the law makes Christians for the common good.

⁸⁰ Luther's own political view in a letter (LW, AE, 50:9-12) to Lazarus Spengler, written in 1531, explained his Forgan Memorandum, saying that no attempt must be made to derive the true or alleged right to resistance from a natural or divine right of self defense. The whole problem solely should be from this constitutional point of view. See WA, 30:390ff. written while working on his *Warnung an seine lieben Deutschen*.

⁸¹ LW, AE, 50:13-17. Letter to Wenceslaus Link, 1-15-1531, (nr. 1796) stated that one should depend on their own thinking and then only in the end - the prophets. One must think like the prophets, especially in three things: what one does, their life, and their sufferings. These are all to be in a Christlike way.

Being part of the rule of reason and law, we are under that restraint. In our day we are sufficiently removed from that historical situation. Most will agree that in order to give due recognition to the very clear distinction, which Christ established between spiritual and temporal matters, and to recognize the powers belonging to the Church and those belonging to temporal societies, decisions are still very difficult.⁸²

The link between the ideas of sixteenth-century religious thinkers and the present is a tangled and meandering path, not a straight line. After Luther's own students died, "Orthodox" followers did not distinguish the two governments. Paul Althaus, Jr., Warner Ehlert, Hermann Sasse and Karl Barth are examples of divergence. There is no vacuum in Luther's image, yet distinct from any religious attachments or prejudices. Luther in a high school history class today is still portrayed as a liberator, rebel, foreign tongue, or revolutionary of some sort. Our challenge and our calling, then, is to live as citizens of the right hand in the kingdom of the left. Luther's image was that he was the one "that brought the Gospel back to light" in whatever realm he himself worked.⁸³

⁸² LW, AE, 40:83.

⁸³ Peter Brunner and Bernard J. Holm, Luther in the 20th Century (Decorah: Luther College Press, 1961) 93.

Heinrich Melchior Muhlenberg in Pennsylvania did not "meddle in politics."⁸⁴ However his son Peter became speaker of the House of Representatives in the first and third sessions of Congress. Statements by the Lutheran Church-Missouri Synod, theologians, and scholars will be more fully discussed in chapter two of the thesis. For to illustrate that there were limits is complex, even for Pieper.⁸⁵ Thus, Luther remarked that the individual could resist in defense of self, or those in his care, but not on behalf of one's faith.⁸⁶ But, his thinking does accentuate the personal religious freedom and the sanctity of the individual.

⁸⁴ Kolb , "An Historian's Reflections", 18 n34.

⁸⁵ Pieper, III, 183.

⁸⁶ Cynthia Grant Shoenberger, "Luther and the Justifiability of Resistance to Legitimate Authority," Journal of the History of Ideas Jan.-March 1979: 17, n51.

II. THE LUTHERAN POSITION IN THE SETTING OF THE UNITED STATES

At this point, it should be emphasized that links between political attitudes and religious orientations have been more often asserted than proven. Lawrence K. Kersten found that Luther's spiritual descendants accepted his counsel to take the world as it is.

Lutheran social philosophy suggests that true happiness for man and total release from the bondage of sin are not possible until after death. If earthly conditions are undesirable, man should patiently endure them, for they may actually be a test of his faith. Man must trust that God will change the social structure of social conditions when He sees fit.⁸⁷

Such religious beliefs may help to account for the pronounced economic, social, racial, and political conservatism exhibited by Lutherans.⁸⁸ This writer recognizes that attempts to assess direct connections between religious belief and political outlook, or in this case towards Supreme Court decisions, have yielded mixed results.

Since the rise and fall of the Third Reich, Lutheran theologians have labored hard at reinterpreting the Lutheran

⁸⁷ Lawrence K. Kersten, The Lutheran Ethic (Detroit: Wayne State University Press, 1970) 31.

⁸⁸ Mary Cabill Weber, "Religion and Conservative Social Attitudes," Views From the Pews: Christian Beliefs and Attitudes, ed. Roger A. Johnson (Philadelphia: Fortress Press, 1983) 103.

tradition. In The Valley of the Shadow, Bishop Hanns Lilje wrote: "It is not true that it is a Lutheran doctrine to submit at all costs to any authority, whatever it is, and whatever it may command; such a theory is a grotesque travesty of the truth."⁸⁹ In recognition of this, the apparent compatibility of religious with political thought must be treated with caution. Let us begin our study of the American attitude with this caution as we examine our developmental patterns and tradition in church-state relations.

WHAT THE AMERICAN FOUNDERS INTENDED

The strife of parties, the divisions and persecutions connected with the founding of the New England and the Quaker colonies, were an American parallel to the conflict which marked the constructive efforts of Protestantism in England and on the European continent.⁹⁰ By 1641 much of what would become the Biblical foundation, the legal documents, and structure for the United States government was established.⁹¹

Lutherans in colonial New York agitated for better conditions in the 1689 revolt. Among the Lutherans were

⁸⁹ Hanns Lilje, The Valley of the Shadow, trans. Olive Wyon (Philadelphia: Muhlenberg Press) 69.

⁹⁰ H. Richard Niebuhr, The Kingdom of God in America (Middletown: Wesleyan University Press, 1988) 57.

⁹¹ Edward M. Gaffney, Jr., "Biblical Foundations and Constitutional Order," Christian Legal Society Quarterly 10:3 (1989): 15, 16 n8.

Hans Hendrickson, Peter Van Waglum, and Jon Hendricks de Bruyn, the latter of which was an alderman of New York city and a major.⁹² Later in Muhlenberg's report of 1746 he reported: "The Lord grant us wisdom, not to do too much, nor yet too little." He knew the democratic way, so soon the anglicization of the Pennsylvania Ministerium in 1748 and the establishment of the first theological seminary was begun. His American way called for a wise guidance of the Church as opposed to insistence upon conformity.⁹³ Lutherans at the Culpeper Church did petition the Virginia Convention in October 1776 to be exempt from "Parochial Charges", other than sufficient to support their own church and the poor.⁹⁴ The constitution of the Lutherans as printed in 1781 made no mention of the federal government or of civic order, nor of the relations between church and state.⁹⁵ In 1788 the Pennsylvania Legislature aided the Lutherans in operating their charity school in Philadelphia by the grant of five thousand acres of land.

Of the fifty-five men who wrote and signed the U.S. Constitution of 1787, all but three were orthodox members of one of the established communions. Two were Lutheran. The legal minds, some with democratic ideas developed much later than in Luther's time, like Locke, Blackstone, and

⁹² Henry Julius Kreider, Lutherans in Colonial New York (Ann Arbor: Arno Press, 1972) 77.

⁹³ Kreider 136.

⁹⁴ Thomas J. Curry, The First Freedoms (New York: Oxford Press, 1986) 136.

⁹⁵ Huegli, Church and State Under God 209.

Rutherford, all confessed their debt to the Bible. By the documents and by the testimony of the signers themselves, the Constitution was created and influenced by Old Testament stories of God at work with His people, Israel, and the New Testament stories of the Christian church. Thousands of books have been written on the religious climate and traditions during the early days in America. None of these traditions were seen as a threat in society. These "traditional values" were family values.

The Declaration of Independence made it clear what most citizens believed: "the new government was to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." Roger Sherman, a delegate, said in August of 1787 that an amendment was unnecessary as Congress had no authority delegated to them by the Constitution to make a religious establishment. James Madison thought the word "national" might be inserted before religion, to clarify the intent of the amendment. Mr. Carroll and Mr. Huntington feared this would be extremely hurtful to the cause of religion.⁹⁶ The most important statement in the Declaration is that the people wanted to operate "under the laws of God...they [human beings] are endowed by their Creator with certain

⁹⁶ Annals of the Congress of the United States, The Debates and Proceedings in the Congress of the United States, Vol. 1, Compiled from Authentic Materials, by Joseph Gales, Senior (Washington: Gales and Seaton, 1834) 730.

unalienable rights...with a firm reliance on the protection of divine Providence...."

James Madison, probably to fulfill his and other federalist promises made during the ratification process, rose early in the first Congress to propose the first ten amendments to the Constitution, which became the Constitution's Bill of Rights. Some states had these rights already.⁹⁷ On June 19, 1787 Madison asked the convention to come up with a "Constitution for the Ages." James Madison's arguments in the "Memorial" of 1785 were abstract ideological arguments circulated to justify the political revolution in the late 1770's.⁹⁸ Madison's true meanings are seen in his objections to "incorporating churches".⁹⁹ Leo Pfeffer strains in his argumentations in 1953 to show that Madison has a strict sense of establishment.¹⁰⁰ Benjamin Franklin rose to make what has become a famous plea: that prayers be held in the assembly every morning before delegates proceeded with the agenda. At the end of the convention, George Washington declared, "We have raised a standard to which the good and wise can repair; the event is in the hands of God."¹⁰¹

⁹⁷ Philip B. Kurland and Ralph Lerner, eds., The Founder's Constitution (Chicago: The University of Chicago Press, 1987) 43-110. Here is a good listing of documents pertinent to the development of the First Amendment.

⁹⁸ Robert L. Cord, Separation of Church and State (Grand Rapids: Baker Book House, 1988) 22.

⁹⁹ Lowrie, Walter and Walter S. Franklin, eds., Documents, Legislative and Executive of the Congress of the United States Vol. II (May 22, 1809, and ending March 3, 1823) (Washington: Gales and Seaton, 1834) 152, 154.

¹⁰⁰ Leo Pfeffer, Church State and Freedom (Boston: Beacon Press, 1967) 128, 156-7, 162.

¹⁰¹ Daniel L. Marsh, Unto the Generations (Buena Park, CA: ARC, 1968), 51.

The first amendment of the United States Constitution is the most important, which is why it is listed first. The United States Supreme Court has ruled in several decisions in recent years that the Fourteenth Amendment (1868) through its "due process" clause, makes the First Amendment applicable to the states as well as the federal government.

The First Amendment reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹⁰²

The late Dean Manion, former head of the Notre Dame law school has urged:

Look closely at these self-evident truths, these perishable articles of American Faith upon which all our government is firmly based. First and foremost is the existence of God. Next comes the truth that all men are equal in the sight of God. Third is the fact of God's great gift of unalienable rights to every person on earth. Then follows the true and single purpose of all American government, namely, to preserve and protect these God made rights of God-made man.¹⁰³

It has become evident that a Christian consensus was a way of life, and the predominantly Christian population of 1787 was under a Puritan check and balance system. Tradition-wise, one can discover that state-approved and

¹⁰² Discussed on August 15 and 20, 1789 and passed as Article Three on Thursday, September 24, 1789 by a vote of 37 to 14.

¹⁰³ Verne Paul Kaub, Collectivism Challenges Christianity (Winina Lake, IN: Light and Life Press, 1946) 58.

tax-supported churches and election laws required legislators to be Christians. Some established churches were still functioning in the same way after the ratification of the First Amendment. If convention delegates from those states had been atheists, they would not have been there.¹⁰⁴

The Christian has a good understanding of civil law. As attorneys, many in the early days of the nation were taught the Roman-Biblical law, self-rule based on humanity's moral responsibility (as theologians call it, "civic righteousness," a good if it is willed by God).¹⁰⁵ Therefore, early American documents such as the Northwest Ordinance of 1787 and the state constitutions had an appeal to Almighty God.¹⁰⁶ Even though our national anthem didn't become official until 1916, Francis Scott Key, an attorney from Washington, D.C., and a dedicated Christian, wrote it in September of 1814 during a British attack on Fort McHenry. Also, the first Congress printed Bibles, in order to "unify our people."¹⁰⁷

In conclusion, it is impossible to exaggerate the influence of early American Christianity upon the document

¹⁰⁴ Disestablishment: Virginia, 1786; New York, Maryland, North Carolina, 1776-1780; Georgia, 1789; Connecticut, 1818; New Hampshire, 1819; Massachusetts 1833.

¹⁰⁵ See Edward Gaffney's article for example on the first year law school curriculum in the *Journal of Law and Religion*, Vol.4 (1989) 95.

¹⁰⁶ North Carolina, 1868; New Jersey, 1844; Rhode Island, 1842; New York, 1846. For more information on church-state accommodation see Chester J. Antieau, Arthur Y. Downey, and Edward C. Roberts, Freedom From Federal Establishment (Milwaukee: The Bruse Publishing Co., 1964) 62.

¹⁰⁷ Journals of the Continental Congress, 1774-1789, Vol. VIII (Washington: Government Printing Office, 1907) 731-35.

of the Constitution of the United States. The Bible, Christian tradition, and the Protestant churches of the eighteenth century should be recognized as only one group of the numerous forces operating in the development of the American political culture. Taken as a whole, the events between 1776 and 1789 clearly indicate that the people of the states and their leaders with few exceptions favored governmental encouragement of religion. It was favored as long as this action did not lead to an "establishment" of a religion by means of exclusions and discriminatory preferences which gave the state a coercive influence over the private lives of individuals.

THE THINKING OF AMERICAN SCHOLARS

Richard John Neuhaus in *First Things*, May 1990, points out, "By love Christians are sustained for the duration, and nobody knows how long the duration may be."¹⁰⁸ The motivation for Christian engagement in worldly tasks is the same today as it was in 1787. Neuhaus further states, "It [Christian engagement in worldly tasks] is obedience to the command to care for his creation, it is love for neighbor, it is the joy of participating in God's unknown purposes, it

¹⁰⁸ Richard John Neuhaus, "Why Wait for the Kingdom? The Theonomist Temptation," *First Things* May 1990:20.

is the pleasure of contest and collaboration with others in the sure knowledge that we are forgiven in our inevitable failures...it is the resurrection confidence of victory over the radical evil within ourselves and the world of which we are a part...."¹⁰⁹

In the year 2076, Richard Neuhaus states in the 1976 Bicentennial Series in the *Lutheran Witness*, Americans will still be debating the separation of church and state. His first point which consists of arguments that the First Amendment does not erect "a wall of separation" between church and state highlights what some Lutherans maintained in their parochial school statements. His last point actually stresses a non-neutrality stance as he documents the distaste of some scholars over any religious reference in the business of the state and its accountability to the beliefs of the people. "Some Lutheran statements have preferred to speak about 'institutional separation and functional interaction' between church and state. This is helpful in theory, but in practice 'institution' and 'function' are often hard to distinguish."¹¹⁰

H. Richard Niebuhr in *The Kingdom of God in America* focuses on Luther's Protestantism which continued to concentrate its energies upon maintaining the freedom of the

¹⁰⁹ Neuhaus, "Why Wait for the Kingdom," 20.

¹¹⁰ Richard John Neuhaus, "Church and State: What It Isn't," *Lutheran Witness* 95.9 (1976) 270. Common usage of this term in Lutheran circles seems to originate with William H. Lazereth. Cf. the section he drafted in *Church and State: A Lutheran Perspective* (New York: Lutheran Church in America, Board of Social Ministry, 1963).

Word and has been inclined to yield to political forces in what seem temporal matters.

Is ours then a Christian nation? Scholars have pointed out that the answer depends upon the definition of the word Christian.¹¹¹ Martin H. Scharlemann makes the distinction,

Persons who make proper choices engage in the pursuit of what our Lutheran Confessions call "civic righteousness." Both Peter and Paul called it "doing good" (Rom. 13:3; 1 Peter 2:15). This is a "good" quite different from the righteousness that men are freely offered by God's grace through faith in Jesus Christ.¹¹²

Dr. Scharlemann calls always for a recognition of this concept. In the 1976 Bicentennial Series in the *Lutheran Witness* he stresses the distinction between "good" in the Rom. 13:3 passage of God's grace through faith in Jesus Christ and the "good" of civic righteousness; the relationship between justification and sanctification.¹¹³ His writings over the years, including chapter one of Church and State Under God, stress the infusion of Christian virtue and insists on this quality of life in society at large. The church thus has the task of sharpening the conscience of its individual members. God is present in grace only by Word and Sacrament...as the Gospel is proclaimed, and so the church has a responsibility, that is, to proclaim the Good News.

¹¹¹ Lorenz F. Blankenbuehler, "Is Ours a Christian Nation?" editorial, Lutheran Witness 72.16 (1953) 268.

¹¹² Martin H. Scharlemann, "Citizens of Two Kingdoms," Lutheran Witness 95.9 (1976): 274.

¹¹³ Scharlemann, "Citizen's of Two Kingdoms," 275.

Dr. Scharlemann distinguishes the two ways in which God rules and invites man to serve also in the kingdom of God's left hand to do something that God Himself recognizes as good. The first is the task of preserving civic order, the civic righteousness, and the second is the heralding of God's Word of grace, that righteousness which man is freely offered by God's grace through faith in Jesus Christ. In The Church's Social Responsibilities he concludes that St. Paul's words in Romans 13:4 provide no encouragement for quietism. The voice of ancient prophets of God's criticism and judgment still belongs to the church's resources; and the exercise of this responsibility on the part of the church can and often must go beyond words.¹¹⁴

J.A.O. Preus has noted that the Lutheran Church - Missouri Synod Constitution, with its emphasis on congregational autonomy and on the rights and privileges of congregations and pastors, has been influenced by American tradition. Missouri Synod forefathers had barely landed when they volunteered to serve in German regiments for the Union Army in the Civil War. Lutherans have often been very much influenced by the American scene: in the programs of the church, the interest of auxiliary organizations, and in our parish educational system.¹¹⁵

¹¹⁴ Martin H. Scharlemann, The Church's Social Responsibilities (St. Louis: Concordia Publishing House, 1971) 71.

¹¹⁵ J.A.O. Preus, "Our Country and Our Church," Lutheran Witness 95.9 (1976) 280.

"Our vigilance and involvement are also needed," said LCMS President Ralph A. Bohlmann, "in order to maintain our constitutional right to the free exercise of our religious convictions, and the abortion debate illustrates the point that we should assess public-policy questions only when the church can do so on the basis of the Word of God."¹¹⁶ Some pro-life Lutherans will still differ from other pro-life Lutherans in terms of which legislation or which judicial strategy will do the most good.¹¹⁷

Rev. Bohlmann asked support for President Bush at a special prayer service at the International Center on January 17, 1991 as "it is our duty as Christian citizens to support the responsible actions of our government." The "act of aggression in Iraq's takeover of Kuwait must be corrected."¹¹⁸ He added that it is in the Lutheran tradition to consider whether a given war is a just war.

Many earlier articles in the *Lutheran Witness* had delineated the same Lutheran position: (1) "that the position was in agreement with actual facts in that it supports reverence and loyalty toward the state for the long term, and (2) that the position is realistic."¹¹⁹ Authors such as Theodore Graebner in a 1936 and a 1948 series have

¹¹⁶ Ralph A. Bohlmann, "The Church and Public Policy," *Lutheran Witness* 109.7 (1990) 24.

¹¹⁷ Bohlmann 24.

¹¹⁸ Paul Devantier, ed., "Bohlmann asks support for President Bush, continued peace efforts," *Reporter* 17.2 (1991) 1.

¹¹⁹ O.C. Rupprecht, "Church and State-the Lutheran Position," *Lutheran Witness*, 59.17 (1940) 289. This reviews *Church and State in Contemporary America*.

contributed important Lutheran scholarship on the church-state issue for the purpose of informing Lutherans about church-state issues.¹²⁰

Academically many Lutheran scholars have been wonderfully erudite and wonderfully living interpreters of the church and state issue. Dr. Albert G. Huegli in Church and State Under God thinks through in detail the subject of church and state. In his conclusion he points to "new dimensions" and a "thinking through again" of this concept. Social groups are adjusting their accustomed positions. An "open door" is developing and many more people are involved. A *studying again* is always necessary to formulate the paradigms propitious to this deliberation. "An essential ingredient of religious liberty is toleration," he maintains.¹²¹

In 1962 while meeting with Msgr. Frederick Hochwalt, department of education director of the National Catholic Welfare Conference in Cleveland, Dr. Huegli stated "that to secure direct subsidy for church schools goes contrary to the past tradition and the contemporary understanding of American principles."¹²² Dr. Huegli in 1966 pointed to an "attitude of readiness for cooperative interaction with the government in the pursuit of common goals. Probably the

¹²⁰ For these series see: Theodore Grabner, "Separation of Church and State," Lutheran Witness 55.1 (1936) 3-4, 55.2 (1936) 18-19, 55.3 (1936) 35-36, 55.4 (1936) 50; 67.12 (1948) 190-191, 67.13 (1948) 206-207, 67.14 (1948) 223-224.

¹²¹ Huegli, Church and State Under God 446.

¹²² "Church - State, Aid to Church Schools," Lutheran Witness 81.3 (1962) 69.

most significant part of the new policy [federal aid for nonpublic schools] is the encouragement of Synodical and district officials in the exploration with government officials of the availability, utilization, and administration of federal funds on an equitable basis for children attending nonpublic schools."¹²³ Why was this change perceived during this "1962-66 dynamic time" in church-state Court decisions? The issue that was ignored in 1952 came to debate in 1962. The first case to be discussed in chapter three under "School Prayers" is *Engle v. Vitale* which aroused many citizens to a sharper focus on an old problem and opened the flood gates during a time of fiscal trouble in nonpublic schools.

The Conference of Christians and Jews in their First National Institute in November 1962 provided four impressions of this new focus for Dr. Huegeli: (1) there was a development of an atmosphere for rational discussion, (2) there are changing mores of our communities, (3) that the Roman Catholic Church is growing in power and place, and (4) that all be more concerned about the elimination of the moral and spiritual foundations from the public life.¹²⁴

Jaroslav Pelikan finds Ivo of Chartres (c. 1040-1116) as both a lawyer and a theologian, focusing from two distinct points, yet perceiving them as one. He states that if we

¹²³ Albert G. Huegeli, "The New-Look in Church-State Relations," The Cresset 29.3 (1966) 13.

¹²⁴ Albert G. Huegeli, "New Light on an Old Problem," The Cresset 26.3 (1963) 7-8.

not deal with the question of the law that is behind, above, and beneath the laws, we end up with the dismal proposition that "the law is the law is the law."¹²⁵ Along with Lutheran theologians such as Dr. Herman A. Preus of Luther Theological Seminary, St. Paul, and Dr. George W. Forell of Gustavus Adolphus College, he spoke out against "absolute" separation of church and state in 1953.¹²⁶ They felt that life cannot be divided into two neatly separated spheres, one ruled by the church into which the state dare not enter, and one ruled by the state where the church may not trespass.¹²⁷

Martin E. Marty, the Fairfax M. Cone Distinguished Service Professor of History of Modern Christianity at the University of Chicago, likewise echoed the *studying again* concept when he quoted Reinhold Niebuhr that "no scientific investigations of past behavior can become the basis of predictions...."¹²⁸ In his many writings, Dr. Marty states that transposition allows for appraisal. When schism and disruption occur in history, scholars can gain insight on new premises. It is the pressure from churches in areas such as common defense of society, conscientious objections, domestic tranquility, and the general welfare that has

¹²⁵ For this quote see the forward to Harold J. Bernan, Law and the Ordering of Our Life Together (Grand Rapids: William Herdmanns Publishers, 1989) viii.

¹²⁶ Interestingly, this writer would like to research what these theologians said after the 1962-66 changes in the "new look" in opinions.

¹²⁷ David E. Boles, The Bible, Religion, and the Public Schools (Ames: Iowa: Iowa State University Press, 1965) 241.

¹²⁸ Martin E. Marty, Religion and Politics (Boston: Beacon Press, 1987) 104.

instituted many Supreme Court cases. Even today with more federal and local governmental control we must reassess our position. The state now gives limited funds to a high percentage of church budgets in areas in new fields in which churches are more efficient. Since the LCMS gets some social funding from the government, we do have a rare, delicate, balance to maintain.

Dr. Marty maintains that the quest for coherence and consensus always continues. Therefore, more vocal people are being involved in church-state discussions. There are reasons for a common spirit in the Lutheran Church because of this dynamic society in which the world keeps changing. One must always study dogma from a coherent standard from which Lutherans may define their position.

Dean Edward Gaffney, of the Valparaiso University Law School, has been a scholar for the Christian Legal Society. During his tenure, his views on church and state have affected Christian training for lawyer as well as briefs presented to the United States Supreme Court. In agreement with Harold J. Berman's The Interaction of Law and Religion:

The dualism of church and state, spiritual and secular, religion and law, makes sense as an answer to monistic claims of the total state or of the total church. In the United States today, however, and in most countries of Western Europe, the principal danger is not that of excessive spiritual claims by political parties or excessive political claims by religious or quasi-religious groups. We are threatened more by anarchy than by dictatorship, and more by decadence and apathy than by fanaticism. Under these circumstances, the old dualisms

need to be subordinated to a more complex unity, which seeks the interaction of secular and spiritual aspects of life rather than their compartmentalization.¹²⁹

Non-Lutheran scholarship in many instances also touches very deeply on this thesis. The works of Robert N. Bellah, Peter Berger, Harvey Cox, Edward J. Larson, Douglas Laycock, Walter Lippmann, John Courtney Murray, Leo Pfeffer, and Alexis de Tocqueville are examples of men who contribute various meanings and flavor to many church and state discussions.

Many church-state discussions and forums have been held in Lutheran settings. The Fifth Annual Institute on "Law and the Pastoral Ministry" was held at Valparaiso University in January 1990.¹³⁰ In April of 1990, Concordia Lutheran Theological Seminary at St. Louis held a Church-State Symposium. It was pointed out then that Saxon forebearers came to this country so that they might worship God without hindrance from the state and many presenters at both seminars pointed out that that issue is still with us today. The complexity of the problem was illustrated by the topics discussed. As an example, some of the issues discussed were

¹²⁹ Gaffney agrees with the statement by H. Berman, The Interaction of Law and Religion (1974) 138-39 as seen in the Journal of Law and Religion 4.1 (1986) [63] 95.

¹³⁰ For discussion, video tapes exist: Speakers included John Yoder, John Robinson, Nancy Sederberg, and Martin Marty. The Law School faculty responded to workshop problems.

abortion, the Christian in Government, and religion in American public life.¹³¹

CHURCH-STATE ISSUES IN THE LCMS

Some experiences of The Lutheran Church - Missouri Synod, amassed since 1847, may instruct us on the consistencies of past actions on church-state issues. Many LCMS church-state issues have remained fluid, bringing into the foreground new problems year to year, arousing vigorous debate, and requiring new lights on an old problem.

This thesis brings many pertinent LCMS traditions into recognition, but due to research time constraints this is just an overview of them. Whether these traditions play a part, if not a major part, in the influence of a church-state consensus is, of course, debatable. One study by Lawrence K. Kersten in his The Lutheran Ethic pointed out some slices of diversity which are discerned from experiences.¹³² In another study, A Study of Generations (1972), it was maintained that Lutherans under 30 years of age were quite positive about social justice. John S.

¹³¹ For discussion, audio cassette tapes exist. For abortion topics request: William L. Webster, Rev. David R. Liefeld; For Christian in government: Dr. Albert G. Huegli, Rev. John L. May, Honorable Christopher S. Bond; For Religion in American public life: Rev. Richard J. Neuhaus, Robert G. Morrison.

¹³² For studies see: Lawrence K. Kersten, The Lutheran Ethic (Detroit, Wayne State University Press, 1970) 75, and Merton P. Strommen, Milo L. Brekke, Ralph C. Underwage, and Arthur L. Johnson, A Study of Generations (Minneapolis: Augsburg Publishing House, 1972) 276-288.

Hendricks in 1977 did an empirical study which reported a relationship between commitment to the tenets of "Lutheranism" and (1) conservative beliefs about race and ethnic relations, (2) Republicanism, (3) resistance to liberal initiatives on environmental and social welfare policy, (4) support for traditional beliefs about sexual roles and behavior, and (5) a low level of toleration for "deviant" political ideas.¹³³ Now, what in LCMS experiences has shown any involvement in selected church-state issues, to what extent, and with what results?

Parochial School Education And Church And State Issues

There is a collectively strong sense of religious identity in the LCMS because of the confessional stand. The church fights the Lord's battles *non vi, sed verbo* not by violence but by the Word. Synodical and district reports, proceedings from regular LCMS conventions, and articles from the *Lutheran Witness* are sources of help in this determination.

The LCMS has long prided itself on its interest in education, as a matter of fact, that point was a primary statement of President George Bush in his 1989 videotape message to the Convention. The educational concerns of

¹³³ John S. Hendricks, "Religious and Political Fundamentalism: The Links Between Alienation and Ideology," Ph.D. thesis, Department of Political Science, University of Michigan, 1977.

late, however, have dealt with NLRB and the Internal Revenue Service involvement in relationship to parochial schools.

The history of LCMS parochial school education and government involvement goes back to the nineteenth century:

1890

As early as 1890 one can read about the political involvement of the Wisconsin District toward the Bennett Law and the Illinois District toward the Edwards Law. These laws would have placed all schools - including the Lutheran parochial schools - under state supervision, and would in some cases have required instruction in English. But the LCMS response was clear:

The premise existed that Christian parents best discharge their God given duty to educate their children was in Christian schools, not public schools. In accordance with our daily prayer, 'Thy Kingdom Come,' it is our duty to preserve and extend the orthodox - Evangelical - Lutheran Church in this our country and we are therefore *conscience bound* to combat each and every law which is directed or may be used to the detriment and damage of Lutheran parochial schools which are effective means of extending and perpetuating the Kingdom of God.¹³⁴

¹³⁴ Kolb, "An Historian's Reflections" 15 and n39, n40. For earlier discussions see Synodal Bericht des Mittleren Districts im Jahre 1870 zu Cleveland, Ohio, pub. St. Louis, 1870, Druckerei der Synode von Missouri, Ohio und anderen Staaten, 44-45; and Synodal Bericht des Westlichen Districts im Jahre 1871 zu Altenburg, Missouri; pub. St. Louis, 1871, Druckerei der Synode von Missouri, Ohio und anderen Staaten, 32-33.

Synod used this principle of separation of Church and State to justify their involvement. As faithful stewards they did not approve of any legislation which tended toward a confusion of spiritual and secular affairs and which endangered one's religious liberty. They did approve of combatting with legitimate means such laws as to the detriment and damage of parochial schools which had been enacted in the states of Wisconsin and Illinois. It was pointed out that "energetic opposition" in other states should be enacted wherever such or similar legislation may be attempted. The result was that a school committee was appointed to:

- (1). Receive reports
- (2). Offer advice to the district and local congregations
- (3). Consult prominent jurists
- (4). Publish articles in leading journals
- (5). Raise funds to help the district oppose compulsory school laws

Likewise the district was instructed to:

- (1). Gather information
- (2). Publish articles defending synod's point of view
- (3). Attend to lawsuits
- (4). Procure funds required in times of election
- (5). Find out candidate's positions¹³⁵

1920

New laws as the fateful Siman Act of 1919 and the Reed-Norval Act of 1921 in Nebraska proved quite a change for parents of parochial school children in general and for the

¹³⁵ Kolb, "An Historian's Reflections" 15.

teaching of foreign languages in particular. They declared that English to be the official language of Nebraska. This "about face" when compared with the 1913 Mockett Law demanded resolution. The Missouri Synod went all the way to the Supreme Court of the United States. The Court in *Meyer v. State of Nebraska*, however, said that "the salutary effects of the (Siman) statute (i.e., the education of every child in English) no doubt outweighed the restriction upon the citizens generally."¹³⁶ There was also an attempt to legislate all private and parochial schools out of existence and to compel parents to send their children to the public school in Michigan and Oregon.

1947

The Board for Parish Education presented to the 1947 convention an "Opinion" entitled "Religious Education in State-Supported Schools," similar to the convention's opinions in 1944. In Memorial 521 which was adopted in convention, a Lutheran Office in Washington, D.C. under Rev. E.T. Bernthal was established for the purpose of "furthering the interests of Church and making its influence properly felt."¹³⁷ The board then appointed a "Committee on Church-State Relations" to make the necessary studies for guidance.

¹³⁶ *Meyer v. State of Nebraska*, 262 U.S. 390, 402 (1923). See Paul I. Johnson, "Freedom of Speech Means Freedom to Teach," Concordia Historical Institute Quarterly 52.3 (1979) 118-124.

¹³⁷ H.F. Kretzmann, Sec. Proceedings of the Fortieth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House) 461-467, 579-580. The necessity of establishment, staffing, functions, and operations of the Washington Office in 1947 are described on

Resolution 2 of Committee 13 also recommended that the Synodical Press Committee, established in 1926, be terminated and that the Department of Public Relations be established. By 1955 the office directors included: Rev. Oswald C.J. Hoffmann in the New York Public Relations Office, Miss Olinda M. Roettiger in Washington, and Miss Janice Pries in the St. Louis Information Services. Thus, the Board for Parish Education's resolution 521 was expanded giving new dimensions and new light:

1966 - "Division of Communication and Public Relations" began under Dr. E.R. Bertermann. Offices were in Washington, New York, Chicago, and St. Louis.

1967 - Washington office eliminated. The Lutheran Council and LCUSA were there.

1968 - Rev. Kenneth M. Lindsay became chairman of new "Division of Communication and Public Relations."

1969 - Chicago office eliminated.

1970 - "Division of Communication" begun with the Board for Public Relations under it in St. Louis.

1982 - An appointed Support Service Board was established with the "Board for Communication Services" having an interim public relations committee.

1991 - Board for Communication Services is still operational along with the separate OGI Office.

1950

pages 463-464. Under "Plan of Operation" it must be noted that the personnel requirement would require a sound theologian, a well-indoctrinated practical educator, a man trained in research, a man trained in publicity methods, and necessary secretarial help".

In an editor's note in the *Lutheran Witness* in 1950 to a letter, the difference between social service to schools and the teaching program of schools was delineated.¹³⁸ A trend of consistent concerns was voiced and a statement was issued at the 1950 convention over the two then recent Supreme Court decisions of *Everson* and of *McCullum*.¹³⁹ *McCullum* is noteworthy, among other things, as the first decision of the Supreme Court to declare a legislative enactment, federal or state, to be violative of the "establishment Clause."¹⁴⁰

An article on church, state, and education in the June 1950 Convention Proceedings on pages 364-372 stated that the "state should cooperate with the Church whenever the welfare of the nation demands such cooperation." When Lutherans speak of separation, they use incorrect terminology. What is meant in separation is a *policy* or a *practice*, and one should not refer to the principle of separation of church and state. "It is our duty as Christian citizens to guard against a union of Church and State on the one hand, and the absolute separation of religion from the State and the schools on the other."¹⁴¹ The report continues, "It is the

¹³⁸ W.G. Polack, "Separation of Church and State," *Lutheran Witness* 69.5 (1950) 114. It is interesting to note that in the 1965 Convention of LCMS tried to change this 1944-1962 position. At first the resolution was tabled 411 to 200, then passed 291 to 252. Aid for construction to colleges was tabled 200-183. This "distinctive purpose clause" became new Synodical policy.

¹³⁹ *Everson v. Board of Education* (1947), and *McCullum v. Board of Education* (1948).

¹⁴⁰ Huegli, *Church and State Under God* 273-277.

¹⁴¹ H.F. Kretzmann, Sec., Proceedings of the Forty-First Regular Convention of the Lutheran Church - Missouri Synod (St. Louis:Concordia Publishing House, 1950) 368,369.

responsibility of the Church to reveal the will of God on moral issues also to rulers and magistrates."¹⁴² The Church also should take a stand when schools are threatened as the Forty-First Convention in 1950 agreed:

When attempts were being made in Oregon and Michigan in the early 1920's to legislate all private and parochial schools out of existence and compel all parents to send their children to the public school, our Church [emphasis mine] went into action... to defeat the unfair legislation.¹⁴³

1953

Thus, as a functional part of God's plan, the Church did stand up for its rights, especially after the United States Supreme Court decision in 1952 which Mr. Justice Douglas' purely historical notion said: "We are a religious people." Douglas had no legal ground for adding that our "institutions presuppose a Supreme Being."¹⁴⁴ The Church did however repudiate the reasoning that was taking God out of the schools. Informing the delegates at the Forty-Second Regular Convention in 1953 of the recent problems in education was perceived as the Church's responsibility. On pages 328-332 of the Proceedings are examples of what constitutes and follows the best of the Lutheran "traditions."

¹⁴² Kretznann, Forty-First 369.

¹⁴³ Kretznann, Forty-First 370.

¹⁴⁴ Martin E. Marty, Religion and Republic, The American Circumstance (Boston: Beacon Press, 1987) 71.

1956

The Synod's "Committee on Church and State" in the Parish Education department made a project report at the Forty-Third Convention of the LCMS in 1956 as to the Lutheran position on Church and State. A re-evaluation was begun to study church and state dealt with Scripture, the Confessions, contemporary problems and the emerging trends in political and social life.¹⁴⁵ Committee members included: Dr. Albert G. Merkens, Mr. Eugene Wengert, Dr. Gilbert A. Thiele, Mr. Paul Simon, Dr. A.C. Mueller and advisors Dr. Albert G. Huegli and Dr. Arthur L. Miller.¹⁴⁶ This committee undertook thorough studies of a broad range of church-state issues: public aid to private religious schools; Bible reading and prayer in public schools; public aid to church controlled hospitals and welfare agencies; use of public facilities for religious purposes; tax-exemption of church property and income; Sunday closing laws; and, of course, the role of religion in ascertaining the fitness of candidates for public office. This study resulted in the book, Church and State Under God, A.G. Huegli, ed., in 1964, to which reference has previously been made.

1961

¹⁴⁵ Refer to note 137.

¹⁴⁶ H.F. Kretzmann, Sec., Proceedings of the Forty-Third Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1956) 337.

The "Biblical concepts" involved in the separation of church and state and how these concepts related to parochial schools were published in the *Lutheran Witness* in another series of three articles in 1961.¹⁴⁷ James G. Manz wrote that "fringe benefits," accepted for social service help from the government, were acceptable as far back as 1944. "We need to study again what Holy Scripture and our Lutheran Confessions say about church and state", remarks Manz. The congregation, District and Synod must be alert to what is happening and to any possible action that should be taken.¹⁴⁸

Dr. Arnold C. Mueller stated that benefits that are intended primarily for school age children and channeled through the schools as a matter of convenience should be accepted. In the chapter, "Church, State, and Education," in Church and State Under God, Dr. Arthur L. Miller states, "one of the glories of the American Constitution is that it has never prevented the sovereign people from doing what in their considered judgment they wanted to do or needed to do."¹⁴⁹

1971

In the 1971 Convention Proceedings, the Parish Education Report now brought to light the contact with other

¹⁴⁷ James G. Manz, "The Separation of Church and State," *Lutheran Witness* 80.20 (1961) 470-471, 80.21 (1961) 493-495, 80.22 (1961) 516-518.

¹⁴⁸ Manz, 80.22 (1961) 518.

¹⁴⁹ Huegli, *Church and State Under God* 355.

groups likewise concerned about cases in the United States Supreme Court. This discussion with others dealt mainly with the contested *Lemon v. Kurtzman* decision which will be discussed later in this thesis. "The secretary of elementary and secondary schools was consulted by legal counsel in the preparation of an *amicus curiae* brief which was filed with the U.S. Supreme Court supporting the Pennsylvania legislation."¹⁵⁰

The "Committee on Church and State", Division of Communication, functioning as a "resource group" under [for] Parish Education discussed new church and state educational developments. It also took the church and state pulse of the synodical districts, assessed their activities, and developed materials which documented their common problems. Individuals began to dissent of wrongs and affirmed government attempts for justice. A statement on public school desegregation was sponsored by the Lutheran Human Relations Association of Greater Racine, Wisconsin.¹⁵¹

1977-1978

The LCMS has intervened many times for the free exercise of religion in cases like the *NLRB v. Catholic Teachers Association* case in 1977. In 1978 counsel for LCMS presented testimony at an IRS hearing in Washington which

¹⁵⁰ Herbert Mueller, Sec., Proceedings of the Forty-Ninth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1971) 361.

¹⁵¹ "Statement on Public School Desegregation," Racine Journal Times-Sunday, August 4, 1974.

hearings were a subtle attack on religious education, an invasion of the free exercise of religion.¹⁵²

Selected New Dimensions in Church-State Issues

1962

Times change and so do committees. In the 1962 LCMS Convention, Resolution 7-04 was adopted that placed Church and State leadership functions into the "Commission on Social Action." This commission would do the necessary studies and initiate position papers for the President of Synod which he would then give to the Public Relations Department. This would be an agency initiated process concerning subjects of critical interest. This Commission on Social Action was placed within the Division of Social Action and Welfare.¹⁵³

Civil rights issues were identified as having LCMS involvement, even though church officials attempted to distance themselves from such words and actions. What members of LCMS did has a long history of resolutions of

¹⁵² Linse 252.

¹⁵³ W.C. Birkner, Sec., Proceedings of the Forty-Fifth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1962) 138-139. It is interesting in Resolution 7-08 on page 139 that concern was given over the blurring of the purpose of the church by involvement too heavily in temporal affairs. One's function as a witness of the Gospel is emphasized.

LCMS conventions.¹⁵⁴ Beginning with the September 1962 article in *The Vanguard*, "That Church May Lead", telling of some LCMS clergy's participation in civil disobedience following demonstrations in Albany, Georgia, it was always stressed that a "redress of grievance" and "a peaceable assembly under the Constitution" was non-violent. But, it was civil disobedience and in most cases, refusing to "disperse" at the order of police. It was those police who swore to uphold the state and U.S. Constitution which provided for assembly.

To focus on dissent is a necessary dimension of any discussion on civil disobedience. What justified any participation in actions where 1100 demonstrators were arrested? Some felt that "it would be hypocritical for a Christian to see his fellowman in some kind of physical, social, or psychological need and to ignore that need by trying merely to 'save his neighbor's soul' through 'preaching the gospel' to him."¹⁵⁵ The command is given to love one another.

1963

The "spirit of Pontius Pilate" and not the "spirit of Christ" was said to prompt the responses of citizens who

¹⁵⁴ See Appendix C.

¹⁵⁵ "That the Church May Lead," *The Vanguard*, 9.8 (1962) 4.

wrote about and accused the church of meddling in a political situation in regards to civil rights.¹⁵⁶

1964

John Strietelmeier wrote in the March 1964 issue of *Vanguard* that time has not solved a single one of our racial problems - the rights are not things to be won, they belong to all. Addressing Luther's doctrine, the dean of Boston College Law School before the National Legal Conference in New York, said, "that civil disobedience to the law arises not from contempt for the law but rather from a profound respect for the majesty of the moral law which the violated statute contravenes."¹⁵⁷

1965

Although not Lutherans, it was LCMS people who brought others such as Herbert Reid and Barbara Jordon to institutes to address the issue of "the Christian as Citizen." LCMS people also showed their support and endorsement of Jimmie Lee Jackson, a slain civil rights demonstrator. In May, Rev. W. Harry Krieger, President of the Michigan District of LCMS spoke out on race.¹⁵⁸ Dr. Homrighausen, LCMS Southern District President said he supported Pastor Ellwanger's "goal of freedom for all under just legislation" but he

¹⁵⁶ "That the Church May Lead," *The Vanguard*, 10.3 (1963)2.

¹⁵⁷ "Demonstrations Analyzed", *The Vanguard*, May/June (1964)1.

¹⁵⁸ "Church Officials Speak Out on Race," *The Vanguard*, 12.3 May (1965) 4.

stated that demonstrations do not have the official sanction or endorsement of LCMS.¹⁵⁹ In June, a case for civil obedience was being addressed to eliminate injustice.¹⁶⁰

Statements are made in action as well as verbalization, for example, Christ's cross. Pastors in New York City were arrested for a "sit-in" to make the Board of Education commit to a city-wide school desegregation plan. Luther's Two-Kingdoms' Doctrine said change and resistance may be done within one's Constitution's laws; however, articles called for a reexamining and if necessary a restating of this doctrine. Again, the First Amendment's right of assembly and redress provisions were applied.

Delegates to the 46th Convention of the Lutheran Church-Missouri Synod approved three resolutions dealing with racial matters, and tabled a resolution which would have acknowledged that Christian love "occasionally leads some Christians to challenge and even violate federal, state, and local laws which are unconstitutional." The Commission on Social Action placed overtures 9-21, 9-22, 9-23, and 9-24. It is interesting to note the title of Resolution 9-23, on page 171: "To Point Out Dilemma That Confronts Christians When There are Conflicting Laws." One resolution urged the church's members to use the greatest care in judging one another in their "individual and

¹⁵⁹ "Clergymen Back Civil Rights Cause By Joining Alabama Protest Marches," The Vanguard, 12.2 (1965)1.

¹⁶⁰ "The Case for Civil Disobedience," The Vanguard, 12.4 June (1965)1.

different responses" to complex social problems. Another directed a policy statement which would "decline membership in the LCMS" to congregations which practice "a selectivity based on racial or ethnic origin."

1967

Rev. Donald Becker, LCMS, said that it is decidedly un-Lutheran not to draw the church out of its cloister of antiseptic worship into the muddy reality of political life. He stated, "a Christian at times is obligated to join with groups whose motives may be different from his own to work for a proper social good."¹⁶¹ In the 1967 Convention, a Commission on Theology and Church Relations (CTCR) document was approved, "Civil Obedience and Disobedience."¹⁶² This document, somewhat similar to Karl Lutze's 1965 draft, gives some of Luther's argumentation to non-neutrality, but strongly refers at least four times to the "due Process" clause:

1. Public demonstrations generally are not contrary to law in and of themselves, and a Christian may at times feel constrained by Christian love to join in a public demonstration.
2. Petitioning of the government for a redress of grievances can and should morally be done through the due process of law for the preserving of the peace and tranquility of

¹⁶¹ "Chicago Pastor Stresses Civil Responsibility Over Obedience," The Vanguard, April-May (1967)4.

¹⁶² Herbert Mueller, Sec., Convention Proceedings of the Forty-Seventh Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1967) 94.

the nation. However, the breaking of an unjust law, as a civil disobedience is at times defined, need not necessarily reflect a spirit of anarchy, criminal intent, or general contempt for laws. It may, in fact, reflect an earnest desire to respect the rule of law and to test the validity of a specific law and so to provide a larger measure of justice.

3. At the same time, Christians should be cautioned against:
 - a) an exaggerated individualism that breeds contempt for law and due process of law;
 - b) the anarchic spirit which pits one segment of the population against another;
 - c) the asserting of individual rights at the expense of others.

Andrew Schulze wrote a guest editorial in *The Vanguard* that:

If justice and equity do not prevail, it is the responsibility of the individual citizen, by every legal method, to invalidate unjust laws; to create new and just ones; to bring pressure to bear on our political representatives for the enforcement of just laws; and to work among our fellow citizens for their cooperation in causing justice and equity to prevail.¹⁶³

A year later another CTCR document was published, "Guidelines for Crucial Issues in Christian Citizenship."

1968

Rev. George Milner (LCMS) resigned from the pastorate after he went to Prichard, Alabama to march. Some members of his Holy Cross Lutheran Church were displeased with what

¹⁶³ "Reformation: Luther and Today," *The Vanguard*, November (1967)2.

he had done. In addressing the members, Southern District President Edgar Homrighausen made note of the difficulty of the Christian maintaining his position in the face of the patterns of Southern tradition.¹⁶⁴

At this time Rev. N.E. Kabelitz, pastor of Redeemer Lutheran Church, Oklahoma City, wrote a letter in response to criticism from Ed Hieronymous at The Clergy and Law Conference concerning the clergy taking an active role in the lawmaking process. He said, "to assume that 'morals and ethics' are the peculiar providence of the clergy, implying that somehow lawyers are exempt and therefore clergy have nothing to say to them, is also not new, for the Gospels document again and again confrontation by Him with lawyers who spoke of law which did not effect justice."¹⁶⁵

1969

From Manhattan's Lower East Side, to Chicago where a Lutheran pastor was acquitted, to St. Louis churchmen like Rev. Herman Scherer and Rev. Arnold Wessler responding to confrontations of churches by blacks, racism was condemned as morally reprehensible. At the LCMS Convention, a bit of "churchly disobedience" occurred when people disenchanted with churchmakers in their silence and passivity presented some demands. It is again interesting to note the lack of the Two-Kingdom Doctrine discussion in the past seven years.

¹⁶⁴ "Pastor Resigns," The Vanguard, 15.5 (1968)1.

¹⁶⁵ "Minister Responds to Lawyer's Attack," The Vanguard, 15.8(1968)1.

Dr. Oliver R. Harms, then retiring LCMS President addressed the convention assembled in Denver with his observations:

While there are no specific instructions to the President's office to represent the church to the public, some contacts have been maintained, especially with branches of government. The prudent management of the church's business in the best interests of the church and those whom we are called to serve requires contacts with a growing number and variety of institutions and interests... (and) have been increasingly helpful in doing our job better.¹⁶⁶

1971

The Social Ministry Affirmation of the 1971 Convention did recall the concerns of the 1967 New York convention, resolution 9-14, CW, page 151. Raising the question whether Christ would be concerned about the burning of a farm in Indo-China, or the starving child in Asia, the observation was made that those who are members of the Body of Christ dare not be less concerned.

Lutheran concerns over involvement in Southeast Asia and the Vietnam Conflict became apparent. It was resolved that all turn to God in genuine repentance and fervent prayer for peace. One should study foreign policy since "Christians must share responsibility for helping define the objectives of our foreign policy and subject its operations

¹⁶⁶ Herbert Mueller, Sec., Convention Proceedings of the Forty-Eighth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1969) 51.

to critical review."¹⁶⁷ It is interesting to note that the Report of Office of Government Information to the 1989 LCMS Convention features resistance to the trend of church-office pronouncements in this area of foreign policy.

The increasing recognition of human rights [Christian Care] offers many possibilities for responsible involvement by Lutheran citizens.¹⁶⁸ The Scriptural comment "If any man speak, let him speak as a mouthpiece of God," received focus in contrast to speaking for majority, expedience, or any other consideration.

Another new dimension in church-state issues was abortion which was not enumerated in the 1956 committee report. Thus, in 1971 the Commission on Theology and Church Relations issued its report, "Abortion: Theological, Legal, and Medical Aspects." Convention resolution 2-39 against abortion and the willful taking of human life was passed.

1973

The Commission on Theology and Church Relations of the LCMS was asked to prepare and disseminate another guideline designed to assist the membership of Synod in making judgments regarding capital punishment. The "Report on

¹⁶⁷ Herbert Mueller, Sec., Convention Proceedings of the Forty-Ninth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1971) 199. In 1983, a resolution 3-06A called for the basic study of church-state in this area.

¹⁶⁸ Rosin, Convention Workbook of the Fifty-Seventh Regular Convention of the Lutheran Church - Missouri Synod 147.

Capital Punishment" was prepared. It pointed up a confessional stance and the doctrines involved. This report reiterated the point that Christians obey even while seeking changes and should exercise a positive influence upon government.

1976

In this Bicentennial Year of the United States, many articles and books were written on church and state. Lutheran Witness articles about church and state issues were written to inform the public.¹⁶⁹ Henry J. Eggold proclaimed freedom in church and state in his articles in 1977 at Fort Wayne. Using the "institutional separation and functional interaction" argumentation, he was against "mingling" for it produces tyranny.¹⁷⁰

1981

The Lutheran Church - Missouri Synod has consistently taken a strong position regarding willful abortion and in support of human life.¹⁷¹ Even to the extent that one should witness to the world to implement Pro-Life Programs, the 1981 LCMS Convention Proceedings in resolution 3-02 stated

¹⁶⁹ For Lutheran Witness Articles in 1976, see selected footnotes in this chapter's section titled, "The Thinking of American Scholars." These articles were written by Richard John Neuhaus, Paul Simon, J.A.O. Preus, and Martin H. Scharlemann.

¹⁷⁰ Henry J. Eggold, "Proclaiming Freedom in Church and State," Concordia Theological Quarterly 41.4 (Oct. 1977) 57.

¹⁷¹ Res. 2-39, 1971, Milwaukee; Res. 3-08C, 1977, Dallas; Res. 3-02A, 1979, St. Louis; Res. 3-02, 1981, St. Louis; Res. 3-04B, 1983, St. Louis.

that the Lutheran Church-Canada give testimony to the Canadian government. This was adopted as amended with ten resolves.¹⁷²

1982

Now eleven years since the Parish Education Report,¹⁷³ the President of Synod has asked the CTCR committee and the Social Concerns committee to review new synod documents, position papers, and other materials for church and state positions.¹⁷⁴ The complex issues of racial attitudes, the Vietnam war, and the *Roe v. Wade* decision has suffused the parochial school "Committee on Church and State" which was now under the new Board for Communication Services. Many new issues and changes have occurred since this committee was formed in 1947.

The Board of Directors of Synod now requested that the Social Concerns committee explore:

- (1) tuition tax credits
- (2) prayer in public schools
- (3) increased support in the voluntary sector
- (4) the peace question

¹⁷² Herbert Mueller, Sec., Convention Proceedings of the Fifty-Fourth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1981) 155. The amendment was: "and to support a pro-life amendment to the United States Constitution."

¹⁷³ See the Proceedings of the Forty-Ninth Regular Convention where the contested Lemon Case was discussed on page 361. *Lee v. Weisman*, No. 90-1014 will take a fresh look at this precedent under fire when the Court meets in 1991. This precedent for twenty years has provided the framework for analyzing church-state questions like aid to parochial schools and Christmas displays on public property.

¹⁷⁴ Walter Rosin, Sec., Convention Workbook of the Fifty-Sixth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1986) 98-99. As one can discern from the above heritage, there have been numerous statements made by numerous persons on this issue.

- (5) etc. [refer to 1968 CTCR report on "Guidelines for Crucial Issues in Christian Citizenship"].

1983

In the convention of the Synod, Resolution 3-06A was adopted "To Encourage Peacemaking and the Study of Problems Concerning the Church and Nuclear Arms". Citizens were asked to become familiar with issues, and CTCR with its Social Concerns Committee¹⁷⁵ were given the task for a basic study of the various aspects of church and state with particular emphasis on:

- (1) Who speaks for the church?
- (2) When?
- (3) On what basis?

1984

The Social Concerns Committee prepared a report on euthanasia with guiding principles in 1979 and in 1984 CTCR wrote the pamphlet, "Abortion in Perspective," as an aid to informed participation in the changed political situation.

1986

A resolution, "To Promote Christian Attitudes in Government and Country," in which we encourage the members of our Synod to express their scripturally-informed beliefs on the moral and political issues of our day was presented

¹⁷⁵ When the CTCR Commission reorganized in 1986 and thereupon dissolved the Social Concerns Committee, the preliminary responsibility of this assignment was given to the appropriate standing committee of the commission.

in Convention. No action was taken.¹⁷⁶ However, concerns such as divestment in South Africa, peace, pro-life, sanctity of human life, the primary mission of the church, and the disavowing of political crusading as part of mission of the church opened new dimensions to church-state issues.

1987

Following a Washington conference on Church and State on December 7, 1986 the Synod's Board of Directors authorized the establishment of an Office of Government Information (OGI).¹⁷⁷ There had been a twenty year period since an official LCMS office was located there. The OGI's three major areas of concern for reporting purposes included:

- (1) Life concerns
- (2) Family issues
- (3) Education.¹⁷⁸

These were chosen because convention resolutions have traditionally affirmed the scriptural basis for them. The OGI distributes information to clergy and laity through the *The Lutheran Witness, Reporter*, and regular reports to the Board for Parish Services.

¹⁷⁶ Walter Rosin, Sec., Proceedings of the Fifty-Sixth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1986) 214.

¹⁷⁷ For more information on the attitudes and activities of the religious lobbyists in Washington, D.C. see Robert Zwier, "Church and State: The Views of Religious Lobbyists," Church and State Report 18.2 (1988) 136-147.

¹⁷⁸ Walter L. Rosin, Sec., Convention Workbook of the Fifty-Seventh Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1989) 147. It is interesting to note the change from the 1947 directive. See note 132.

1989

In the Board for Parish Services, close relationships were maintained with the new Office of Government Information. The traditional concerns of LCMS for First Amendment rights have been communicated by OGI. OGI was working with LECNA, LIRS, LWR, NAE, and the U.S. Catholic Conference on many new dimensions of issues in church and state. OGI represents LCMS on the RAAP and the NPRC.¹⁷⁹

Led by the Missouri Synod, three church groups filed a brief urging the United States Supreme Court to overturn its 1973 *Roe v. Wade* decision legalizing abortion.¹⁸⁰ The LCMS *Webster* brief was submitted with the Southern Conference Baptists. Although non-theological, some other court cases deal with that issue. The answer to the question: When does human life begin? can be argued from the record in the *Davis* case. It concluded that human life begins at the moment of conception.¹⁸¹ If this testimony does nothing else in the *Davis* case, it will make one praise God as our incredible Creator.

¹⁷⁹ Religious Alliance Against Pornography (RAAP), and the National Pro-Life Religious Council (NPRC).

¹⁸⁰ "Missouri Synod files brief urging reversal of *Roe vs. Wade* decision," Reporter (March 13, 1989) 2.

¹⁸¹ *Junior L. and Mary Sue Davis v. Ray King, M.D.*, Circuit Court for Blount County, Tennessee at Maryville, Equity Division (Div. I) Opinion of the Court was reinforced by testimony given by world-renowned geneticist Professor Jerome Lejeune of Paris, France on August 10, 1989. He found the chromosomal cause of Down's syndrome thirty years ago.

1990

One basic problem, as Mark Noll has recently pointed out, is that minimal if aggressive participation in politics by the LCMS is deemed to be qualitatively different from all the others. To all others looking on, it may be qualitatively more controversial and demanding or urgent, but it belongs on the continuum with other political issues....¹⁸²

CONCLUSION

The relationship between church and state becomes very practical when seen from our Lutheran church tradition. The tradition of convention resolutions, of caring Christians, and of legal settings, all seems to substantiate in this thesis that "policy and practice" which Lutherans have relied on is based on Luther's Two-Kingdom Doctrine.

Again, what was critical to this thesis from the beginning is that the principles were maintained by *sola Scriptura*. Luther's doctrine of the Two-Kingdoms has helped define and re-position issues for Lutherans in these numerous church-state issues by reflecting and reinforcing

¹⁸² Mark A. Noll, ed., Religion and American Politics From the Colonial Period to the 1980's (New York: Oxford University Press, 1990) 327.

decisions around the harmony that is to be in the world for the sake of conscience. Luther's advocacy of "prophetic" preaching insists on high moral standards for any age. Linked with this is that primary importance of getting back to the fundamental evangelistic truths of the Bible.

The words of George Forell stress this in his book:

Against [the] despair, which characterizes so much of the political thinking of contemporary intellectuals, the Christian depends again on the resources of the Gospel. In the means of grace God offers him the forgiveness of sins which alone can enable him to act courageously and confidently in the midst of the ambiguities of public life...the Gospel frees the Christian from despair and for responsible and intelligent action in the realm of politics.¹⁸³

The state must give the Church appropriate consideration in this historical setting. Lutherans have attempted in the aforementioned moral problems, especially in parochial education, to illustrate that there is not a conflict of rights between separate individuals, but only a conflict in man's responsibility. Much has been said on the concept of vocation as Rev. David G. Schmiel remarked when he addressed the 1983 LCMS Convention: "All useful roles that Christians can play in human society and government are a service to God the Creator and man."¹⁸⁴

¹⁸³ George W. Forell, The Proclamation of the Gospel in a Pluralistic World (Philadelphia: Fortress Press, 1973) 112.

¹⁸⁴ Walter Rosin, Sec., Convention Proceedings of the Fifty-Fifth Regular Convention of the Lutheran Church - Missouri Synod (St. Louis: Concordia Publishing House, 1983) 109.

Therefore, several observations are helpful today in evaluating the new dimensions of church and state relationships:

- (1) Governments have aided churches.
- (2) A religious climate and tradition existed during the early days in America.
- (3) The document of the Constitution of the U.S. was influenced by early American Christianity.
- (4) Lutheran concepts voiced included the Two-Kingdom Doctrine, toleration, and resistance.
- (5) Lutheran position in future behavior does not need in all cases to echo past behavior in the Two-Kingdom Doctrine.
- (6) The most numerous activity in Lutheran church-state issue was education.
- (7) New dimensions include: life concerns, family concerns and education. Specific topics may include: civil rights, civil disobedience, abortion, and capital punishment.
- (8) A re-application of the doctrine has been necessary to define practical concerns to the church and officials of the body.

III. SUPREME COURT CASES OF SPECIAL INTEREST TO LUTHERANS

So what's a Christian to do? As judges grapple with thorny issues of church-state separation, one cannot truly see where the Court now stands. If you positively teach children that they are evolved from apes, then they will start acting like apes. If you teach them possibly they were created by an Almighty God, then they will...start acting like God's children. So goes the main argument for creation science. Forty years after the Scopes trial, the U.S. Supreme Court described state statutes as "discomforting to the modern mind."¹⁸⁵ How then has the legal system coped with conflicting demands for such rights and restrictions as they are applied to the teaching of evolution and creation? Edward Larson has chronicled this from Scopes until 1985.¹⁸⁶ In June 1987, however, the Supreme Court struck down a Louisiana law by a 7-to-2 vote. Justice Brennan said, "Creationism law improperly promotes [the] idea "that a supernatural being created mankind."¹⁸⁷

¹⁸⁵ Epperson v. Arkansas, 393 U.S. 97, 102 (1968).

¹⁸⁶ Edward J. Larson, Trial and Error, The American Controversy Over Creation and Evolution (New York: Oxford University Press, 1985) 39-70.

¹⁸⁷ Ted Gest, "High Court: The day God and Darwin collided," U.S. News and World Report 102:25 (1987) 12.

Unwittingly, perhaps, the Fifth Circuit held that evolution is not religion and creation-science is not science.¹⁸⁸

So what's a Christian to do? Having an attitude toward Supreme Court decisions has depended upon many factors in the past studies. Based on independent variables, some factors which create attitudes toward the U.S. Supreme Court decisions are: (1) some manner of a liberal/conservative attitude, (2) agreement or disagreement with what the Court has done, and (3) favorability or unfavorability of the communications received about the Court.¹⁸⁹ Some studies state that people born after 1960, for instance, support decisions and that those born before 1940 are critical. But, do contemporary studies reflect these same attitudes of Christians, especially those with a confessional heritage?

Having an attitude or perception toward the Supreme Court decisions depends also on being involved in the political (temporal) culture. Many times the direction of an attitude or perception depends on the nature of the political (temporal) environment to which one is exposed. Far more inspiring than the content of the usual decisions in Court are the variety of dissensions themselves. Each

¹⁸⁸ David S. Caudill, "Law and Worldview: Problems in the Creation-Science Controversy," 3 J. Law & Religion 1 (1985) 22.

¹⁸⁹ For example in the editorial by R.R. Caemmerer, "The Supreme Court and Released Time," 67.7 Lutheran Witness (1948):107-108, points up the "array of premises" the Court had taken. Also "Religion and the Public Schools"; 67.7 Lutheran Witness (1948): 111, points to a decision which "was too general and lacking in clear definition"; the article, "How Can I Be a Better Citizen?" 67.7 Lutheran Witness 1948: 112, gives good advise to the tedious process of discussion of problems of church and state; "Synod, LFL execs..." 17.3 Reporter (1991) shows how to keep the issue alive in the Courts.

script we read echoes the beliefs and opinions regarding a perspective on traditions and ideals. Whether rejecting or offering affirmation to U.S. Supreme Court decisions involving specific issues as the use of the symbol, for example, no opinion is ever censored and all may express their own beliefs.

Some other issues seem far from the liberties protected by the Bill of Rights and any 1991 bicentennial celebration of its ratification.¹⁹⁰ Still many feel accommodation of religion is essential to democracy. Numerous books recently have appeared in bookstores based on government and religion.¹⁹¹ Freedom of speech is the ultimate gift our country shares. If judges take this away, then something is wrong. As Luther stressed, then the Constitution's own laws from its constitutional provisions must be used for change.¹⁹² Few other cultures have had the choices politically, religiously or secularly that are afforded citizens in the United States.

The ordering of the world we live in, this fallen creation in which no person or institution can infallibly speak for God, is a democracy. In a recent *Lutheran Witness*

¹⁹⁰ See Appendix B for U.S. Supreme Court cases 1980-1990.

¹⁹¹ Garry Wills, *Under God* (New York: Simon and Schuster, 1990) 334-339, and James M. Burns, *The Crosswinds of Freedom* (New York: Alfred A. Knopf, 1989) 264-288 .

¹⁹² Dan Herbeck, "Ruling Curbing Sermons on Abortion Is Protested," *Buffalo Evening News*, September 29, 1990, A-1, Col. 1. To fine pastors \$10,000. if they are found to be "attempting, inducing or encouraging" parishioners to take part in blockades of abortion clinics. See also Robert Kolb, "Matthaeus Judex's Condemnation of Princely Censorship of Theologians' Publications", *50.4 Church History* (1981): 412-413.

article, "From the President," twelve guiding principles were developed in 1979 to be used for discussion concerning euthanasia and quoted as "a way to grapple with these issues [U.S. Supreme Court cases], and similar questions."¹⁹³ Five pertinent questions were raised in this article -- all very helpful in future discussions of coping with issues concerning God's gift of life.

The OGI of LCMS had on July 28, 1990 prepared summaries of important U.S. Supreme Court cases and distributed them. The media coverage given these cases since *Webster* had increased. In summary, OGI stated that the "Points of Interest to Members of LCMS" included that: (1) "the Court's decision was a choice for life over death,"¹⁹⁴ (2) "...professional church workers may not routinely participate in a Bible study group held at a local public high school,"¹⁹⁵ (3) "it would deny all dignity to the family to say that the State cannot take this reasonable step in regulating its health professions,"¹⁹⁶ and (4) "...members of the LCMS are encouraged to work for and

¹⁹³ Ralph A. Bohlmann, "A Time To Die," *Lutheran Witness* 109.8 (1990): 192.

¹⁹⁴ *Cruzan v. Director, Missouri Department of Health*, 58 U.S.L.W. 4916 (1990). Report OGI, 27 July 1990: 5. The Missouri Supreme Court and the state court of appeals has reinterpreted this case. Judge Edward Robertson's two-sentence order was given Dec. 21, 1990 against Terry Randall of Operation Rescue and Lawyers for Life. Thus, the feeding tube supplying food and water was left out.

¹⁹⁵ *Board of Education of the Westside Community Schools v. Mergens*, Report OGI, 27 July 1990: 2.

¹⁹⁶ *Ohio v. Akron Center for Reproductive Health*, Report OGI, 27 July 1990: 3.

support protective state laws regarding parental notification that will pass judicial muster."¹⁹⁷

How do these summaries create attitudes? These determinations highlight what was stated above in point three concerning favorable and unfavorable communications about the Court. Believing that Supreme Court decisions are subject to review, yet must be obeyed, then what is good in society often comes out of this critical thinking process. Informed Lutherans are able to distinguish and articulate what is theologically labeled as "good works" and fruits of one's faith.

SCHOOL PRAYERS

The *Engel v. Vitale*¹⁹⁸ case in 1962 raised a challenge to the prayer which New York State teachers read at the beginning of the day to foster "moral and spiritual values":

Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country.

Because the New York State Board of Regents composed the prayer in 1951 and insisted that it be read as a part of

¹⁹⁷ *Hodgson v. Minnesota*, Report OGI, 27 July 1990: 4. Prior to the Supreme Court's ruling, the LCMS filed an *amicus curiae* brief written by attorney Leonard Pranschke in defense of the constitutionality of Minnesota's provision that mandates parental notification without a bypass procedure in abortion.

¹⁹⁸ *Engel v. Vitale*, 370 U.S. 421, 430, 82 S.Ct. 1261, 1266, 8 L.Ed.2d 601 (1962). The critical issue seemed to be the role of governmental authorities - specifically, teachers and other school personnel - in leading religious ceremonies. Inflamed rhetoric about "banning God from schools" notwithstanding, the rulings do not prohibit prayer by individual students.

the daily routine, six U.S. Supreme Court justices declared that the New York practice illustrated precisely the type of action that the First Amendment forbids as an establishment of religion. Officers of a Lutheran congregation in New York called the prayer an abomination because "the name of Jesus Christ" had been omitted!¹⁹⁹ A year later, to make matters worse, in *Abington Township School District v. Schempp*,²⁰⁰ the Court ruled (8 to 1) and extended *Engel* beyond state-mandated religious ceremonies to prohibit a Pennsylvania law requiring Bible reading and the recitation of the Lord's Prayer over the loudspeaker at the beginning of the day. Justice Brennan said on barring prayer in public schools that:

Awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems...A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.²⁰¹

By these two decisions of the Court, it seemed to say that "establishment" includes any celebration of religion conducted by an agency of the government. The Establishment Clause requires a secular purpose which neither advances nor

¹⁹⁹ Martin Mueller, "The Supreme Court Ruling on Prayer," editorial, 81.16 Lutheran Witness (1962), 384.

²⁰⁰ *Abington School District v. Schempp*, 374 U.S. 203 (1963).

²⁰¹ Robin Toner, "Two Sides Prepare For Hard Battle On Court Nominee," New York Times 22 July 1990, National Edition: A-1, Col. 5.

prohibits religion and need not be so intended. The dissent by Justice Stewart stated that non-believers may be excused and forbidding school prayer is not neutrality and not determinative.²⁰²

In *Engel v. Vitale*, reactions such as these were heard:

- (1) Sen. Hermann Talmadge
(D.Ga.)... "unconscionable... an outrageous edict."²⁰³
- (2) Congressman John B. Williams
(D.Miss.)... "a deliberately and carefully planned conspiracy to substitute materialism for spiritual values and thus to communize America."²⁰⁴
- (3) Sen. John J. Sparkman
(D. Ala.)... "a tragic mistake."²⁰⁵
- (4) Congressman Frank J. Becker
(R. N.Y.)... "the most tragic decision in the history of United States."²⁰⁶
- (5) Sen. A. Willis Robertson
(D. Va.)... "most outrageous ruling that the Supreme Court has ever made in favor of atheists and agnostics."²⁰⁷

The reaction therefore to this disintegration of one of the most sacred of American heritages was evident in Congress. Twenty-two Senators and fifty-three Representatives of the United States Congress took issue.

²⁰² Other examples of violations of the Establishment Clause have been direct tax credits to parents sending their children to religious schools and paying the salaries of secular teachers at religious schools. Permissible activities include secular text books, hot lunch programs, and busing to parochial schools.

²⁰³ 108 Cong. Rec. 11675 (1962).

²⁰⁴ 108 Cong. Rec. 11734 (1962).

²⁰⁵ 108 Cong. Rec. 11775, 11844 (1962).

²⁰⁶ 108 Cong. Rec. 11704 (1962).

²⁰⁷ 108 Cong. Rec. 11708 (1962).

In the *Abington v. Schempp* case in which the Supreme Court extended the ban on state-mandated religious ceremonies, Congress introduced 140 amendments as of March 24, 1964. In March 1964 an ad hoc meeting was called in New York City to oppose the Becker Amendment. This Constitutional amendment was designed to overrule the U.S. Supreme Court's decision banning prayer and Bible reading in the public schools.²⁰⁸ Why all the fuss over a few verses of the Bible? Questions raised to muddle the issues have been: (1) Which Bible version do we use? (2) What about the Koran? and (3) What about the Ave Maria? Today's student can study the Becker hearings logically and learn that in statutory protections:

- (1) There are expert plans by opponents.
- (2) One must gain support of "heavier guns."
- (3) Those opposing legislation have an advantage if they cooperate.

No court ruling and no legislative enactments are self-enforcing. Caring Christian citizens will find a greater need in the future for information on more and more sensitive questions of public policy. Religious values from caring Christian citizens can supply a basis for rejecting many claims of the state (U.S. Supreme Court) to eliminate any sacred obligations the church has in preaching moral authority amongst the people. As an illustration, slavery, supported by the Supreme Court, has been condemned. Some church leaders and citizens urged its incompatibility.

²⁰⁸ See the provisions in "Shadows," Lutheran Witness 82.20 (1963): 460-461.

Religious institutions stand between individuals and the state. They expose congregants to standards of right and wrong and teach about how best to apply values to concrete situations. And when the individual is deeply attached to a religion, he or she may prove more resistant to recruitment by political causes that threaten human rights. C.E. Huber wrote in 1963 that "if we desire *spiritual* power and profit from our religious devotions, they will be best secured by doing two things: cultivating a sensitive response to God's own voice in Word and Sacrament, and doing more listening to Him at home."²⁰⁹ Dr. Oliver R. Harms, Past-President of the Missouri Synod said, "The decision of the United States Supreme Court makes it all the more incumbent on all Christians to utilize the channels which the home, the church, and its educational agencies offer for the study of God's Word."²¹⁰ Among the primary religious themes must be included forgiveness, penitence and salvation. In reality, the high Court's decisions on programs which may provide a crucial symbolic link between church and state are all but impossible to enforce in the nation's hundreds of thousands of classrooms; there are surely prayers being said in many of them and lessons being taught that might horrify Justice Brennan. Because one is a

²⁰⁹ C.E. Huber, "Information and Revelation," Lutheran Witness 83.7 (1963): 162.

²¹⁰ "Experts Reflecting Various Views Cite Implications of Supreme Court Ruling," editorial, Lutheran Witness 82.15 (1963): 364, also Robert K. Menzel, "The Court's Ruling and the Church's Work," Lutheran Witness 82.16 (1963): 381.

Christian in the Kingdom of the Left Hand, this never permits him to be anything other than a Christian.²¹¹

It should surprise no one that law is viewed by many people as a source of moral authority. People clearly look to laws both as expressions of ethical principles and as a set of fair rules which, Luther maintained, persons have a moral duty to obey. Many people regard certain laws however as having more ethical authority than others. The apparent public support for restoration of school prayer has made it politically appealing to challenge the *Engel* and the *Schempp* ruling. So what about the moral authority of a certain Supreme Court decision? Do Christians have ethics?

Two-Kingdoms' doctrine maintains the premise that laws are to be obeyed. In *Engel v. Vitale* the first strategy which the courts were besieged with were state laws amending prayer policy. Perhaps this for the citizen was seen as a better way and certainly a way to creatively dodge the issue. Neither the OGI nor the Church and State Committee were functioning at this time. The Court subsequently in 1985 struck down Alabama's one-minute of silence for meditation or voluntary prayer statute in *Wallace v.*

²¹¹ Perhaps this is the concern of Brennan, the dissenter in *Lynch*, that the teachers in *Grand Rapids School Dist. v. Ball*, 473 U.S. 402, 105 S.Ct. 3216, 87L.Ed.2d 267 (1985) were likely to carry their religious beliefs with them in teaching the secular classes. This, he stated, presents a probability of entanglement and renders the programs unconstitutional. The Court decided a companion case simultaneously with *Grand Rapids*. *Aguilar v. Felton*, 473 U.S. 402, 105 S.Ct. 3232 (1985), involved a state-run remedial program which was invalidated due to the religious supervision involved. Religious content of the program established entanglement which required invalidation. In *Lemon* the holding in 1971 stated that the teacher could color his teaching with religious overtones. See footnotes 132, 135.

Jaffree. In that case a provision of Alabama Code Sec. 16-1-20.2 (Supp. 1984) was struck down as an unconstitutional law respecting the establishment of religion:

From henceforth, any teacher or professor in any public educational institution within the state of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:

'Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.'²¹²

Some school officials attempted to evade the rule, thus many attempts at noncompliance occurred. Previously in 1984, President Ronald Reagan supported an amendment to permit vocal prayer by individuals or groups in public institutions. It fell eleven votes short of the required sixty-seven needed for further action in the Senate. The diversity of both the support for and the opposition against the proposal underlines how such church-state issues split normal citizens in American politics. Legislators do value public sentiment and everybody's view is heard. Evidently only a constitutional amendment could have removed this issue from the jurisdiction of the courts.

²¹² *Wallace v. Jaffree*, 472 U.S.38 (1985) 40-41 n3.

Some United States Supreme Court decisions, for example the Champaign Case, are felt to be legislative and not based on history. Philosophical debate, represented by Justices Brennan and Scalia between the two sides of the Court, illustrate many moral authorities to us. One is that freedom, judicially defined and protected like a law itself, has a moral structure that democracy requires. The most likely path for a return to the prewar interpretation of the First Amendment's religious clauses is through a change of mind by the majority of the United States Supreme Court. Should this ever happen, the grounds for reversion will have been prepared by a steady and heavy barrage of legal criticism against the court's rulings. Scholars sympathetic to a more accommodating government position regarding religion have mounted a searching intellectual challenge to the postwar doctrines of separation and free exercise. To them, the decisions were simply bad law.²¹³

STATE AND THE "LEMON TEST"

While the 1960's released time and school prayer in the cases have proven to be recurring Establishment Clause issues for the Court, there have been many other problem cases. In 1971 the U.S. Supreme Court decided four

²¹³ For facts here see: Cord 1982; Goldberg 1984; Howe 1965; Morgan 1984.

companion Establishment Clause cases, three of which (*Lemon v. Kurtzman*, *Early v. DiCenso*, and *Robinson v. DiCenso*) were handled in one opinion of the Court and the fourth (*Tilton v. Richardson*) decided by a plurality opinion because at least five justices could not reach agreement on one opinion. The *Lemon v. Kurtzman*²¹⁴ case struck down state salary supplements to teachers of secular subjects at private schools. This gave us the Lemon Three-Prong Test in which the state statute:

- (1) must have a secular purpose, and,
- (2) its principal or primary effect must be one that neither advances nor prohibits religion, and,
- (3) the cumulative impact does not foster an excessive entanglement with religion.

The decision stated that while total separation between Church and State is impossible (i.e., zoning, building codes, compulsory school attendance), the Court must still examine the relationship between government and the institution benefitted. In subsequent cases, the Court continued to invalidate various State and local creative schemes to funnel money to non-public schools.²¹⁵ New York's plan, for instance, included reimbursements to low income families, maintenance and repair reimbursements, and income tax relief to middle-income families. Pennsylvania's

²¹⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed. 2d 745 (1971). Justice David H. Souter said he is reluctant to scrap the test "without knowing what comes next."

²¹⁵ Richard R. Hanner, *Pastor, Church and Law* (Springfield: Gospel Publishing House, 1983) 412. Also Hanner, *Supplement* (1986)186.

tuition reimbursement plan was also invalidated. The only plan to survive was a South Carolina financing arrangement that allowed a Baptist college to borrow money by selling bonds through a state agency. In all of these cases, the opinions were "effect" derived from *Lemon*, rather than the "entanglement" portion upon which the principal case rested in 1971.

The debate over services still rages today. The *Meek v. Pittinger*²¹⁶ case which allowed public funds to be used to acquire and to loan non-public schools children textbooks was upheld as a "Child-Benefit." Yet, auxiliary services such as counseling, testing, psychological services, speech and hearing therapy, teaching and related services for exceptional children, for remedial students, and for the emotionally disadvantaged are held in violation of the Establishment Clause.²¹⁷ The Supreme Court is opening the door to a fresh look at the constitutional boundary between church and state by agreeing to decide whether public school graduation ceremonies can include prayers that mention God. Next fall, this case will directly attack the Lemon Test.²¹⁸

Making matters even more difficult, Justice Brennan in his dissenting statement in *Meek* introduced a new "fourth

²¹⁶ *Meek v. Pittinger*, 421 U.S. 349 (1975).

²¹⁷ The "threatening" atmosphere of a parochial is an interesting way of stating it. Perhaps most schools have dealt with this in their own way anyway.

²¹⁸ Two education groups, the National School Boards Association and the National Association of State Boards of Education, also filed briefs asking the Court to take the Providence case, *Lee v. Weisman*, No. 90-1014.

factor or prong" by which public aid to religion challenged under the Establishment Clause ought to be judged, entanglement. After the "three-prong" test, Brennan added:

...four years ago, the Court, albeit without express recognition of the fact, added a significant *fourth factor* to the test: 'A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs.' *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).²¹⁹

"Excessive entanglement" is found when the Court is against the interest of the church. Most of the cases not covered in this thesis illustrate some "unfairness" when the government hands out financial benefits and invokes this doctrine, but then forgets all about separation when the government imposes some financial burden.

Henry J. Eggold wrote in the *Lutheran Witness* in 1977 that *Meek* is impossible to understand for it does not at all make sense to believe that a public school teacher providing speech therapy on church property will be promoting religion. He "perceives" this case as important to his own decision when he prefers paying the way in education because in school finances the little received from the state is not worth state domination.²²⁰

²¹⁹ *Meek*, at 349. Emphasis added.

²²⁰ Henry J. Eggold, "Proclaiming Freedom in Church and State," Concordia Theological Quarterly 41:4 (1977) 60.

STATE'S COMPELLING GOVERNMENTAL INTEREST

In *Sherbert v. Verner*²²¹ the U.S. Supreme Court, per Justice Brennan, struck down the denial of state unemployment benefits to a Seventh Day Adventist for refusing to work on Saturday, the Sabbath day of her faith. While the burden was indirect on her faith, the coercive effect of the law imposed a significant burden, a penalty on her religious liberty. The requirement was that government actions substantially binding on sincerely held religious belief be justified by showing a "compelling governmental interest" and "that no alternative form of regulation" would suffice. This is about the only example of the doctrine that the free exercise clause of the First Amendment sometimes requires government accommodation of its general regulations and intentionally advances religion.²²²

Cases with direct attacks on religion started coming before the Court with dizzying rapidity. In 1962, *Engel* struck down ecumenical school prayer in New York. In 1963, *Schempp* outlawed Bible reading and the Lord's prayer in public schools. In 1966, *Epperson* overthrew Arkansas' quiet ban on teaching evolution. In 1968, *Epperson* was

²²¹ *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963).

²²² For example, *Sherbert* was deemed controlling in *Thomas v. Review Board of Indiana, Unemployment Div.*, 450 U.S. 707 (1981); *Hobbie v. Unemployment Compensations Appeals Comm. of Florida*, 480 U.S. 136 (1987); *Prezee v. Ill. Department of Employment Security*, 109 S. Ct. 1574 (1989).

upheld and in 1973, abortion was legalized nationwide in *Roe v. Wade*.

Both high profile and incidental cases provided clues to a growing debate over "choices, obligations and expectations" of a free society. In the *Witters* case,²²³ the state offered to pay tuition to certain disabled individuals for any course of study in leading to a job. Larry Witters was blind. He wanted to be a minister. The Supreme Court affirmed the decision using the rationale that the "program is made available generally without regard to the sectarian-nonsectarian, or public-non-public nature of the institution benefitted. Why that principle was not explained in *Aguilar* and *Grand Rapids* went unexplained.

Arguments for "good citizenship" have been presented, but we have two different concerns and different consequences. Firstly, in obeying the "letter and the spirit" of a new decision in day to day working, must one distinguish whether what is being affirmed is the citizen's obligation to comply with the specific provisions of the new law despite its inconvenience? Secondly, whether the citizen is being directed to go beyond just technical compliance with the terms of the statute? Thirdly, should citizens accept the policy and ethical position embodied in the decision as something that must expressed in their day to day actions? The Confessions would answer affirmatively

²²³ *Witters v. Department of Services for the Blind*, 474 U.S. 481 (1986).

to all these questions by the contention that the citizen has a moral obligation to obey laws generally.²²⁴

The shift in focus, from the law as a source of ethical rules to Luther's contention, then leads to a second major source of authority mentioned above -- the personal ethical beliefs of the individuals who are participating in the Supreme Court decision. It is almost thought by the laity that those who judge would be theologian-legalists in some regard and that they would recognize that the Court is not exercising a primary judgment. It sits in judgment upon those who have also taken the oath to observe the Constitution and who have the responsibility for civil order in the temporal realm.

STATE AND ACCOMMODATION

In *Wisconsin v. Yoder*²²⁵ the state of Wisconsin exempted Amish children from attending secular school after the age of fourteen, instead of the required school attendance to age sixteen. The Amish believed that sending their children to high school would endanger their own salvation and that of their children. The issue was that when the interests of

²²⁴ Francis Pieper, The Christian Church, 4 vols., trans. Walter W.F. Albrecht, vol.2 of Christian Dogmatics (St. Louis: Concordia Publishing House, 1953) 428.

²²⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972).

parenthood are combined with a free exercise of religion claim, must the state show more than a mere reasonable relation to some purpose within its competency? Here again the court required accommodation. Courts have rejected cases that require mandatory accommodation.²²⁶ The doctrine of mandatory accommodation therefore becomes highly complex.

When one belongs to a sect and is exempted and the other doesn't belong because of beliefs - what occurs? What then becomes of the permissible accommodation doctrine for the LCMS?²²⁷ The state doctrine of permissible accommodation is too problematic for state and religion. While the Court warns of this "unlawful fostering of religion," it does not give a point of separation. Even the Court in *Edwards v. Aguillard* stated, "We have not suggested precisely (or even roughly) where that point might be."²²⁸

Again, the state interest in including the Amish under the law was not sufficiently overriding to justify the significant burden on religious liberty. As recently as 1981, the Court demanded that Indiana pay unemployment compensation (another compensation case like *Smith*) to a member of Jehovah's Witnesses who quit a job rather than

²²⁶ *U.S. v. Lee*, 455 U.S. 252 (1982). The government can tax Amish farmers as an employer for Social Security, which they are religiously forbidden to pay or receive, because "myriad" claims for exemption of other sorts might swamp the system.

²²⁷ Permissible accommodation is when government responds to religious beliefs in any way so long as its action does not coerce non-believers. As Luther stated it is not in the realm of the state to make believers, thus we perceive of the Court as not coercive as appertaining to religious conversion.

²²⁸ *Edwards v. Aguillard*, 107 S.Ct. 2596 (1987).

take an assignment to work on gun turrets for tanks.²²⁹ By decisions such as these, free exercise has been extended to support mandatory accommodation from a variety of obligations imposed on American citizens. This chapter started out by saying that accommodation is essential to democracy. This short excursus on the relationships between church, society and state is aimed at illuminating what is meant by accommodation. Theologically speaking, the understanding of accommodation is based upon the distinction--but not separation!--between the church and society. We acknowledge the right ordering of this world.

In the holding which brought this case to the Court, Wisconsin law, under threat of criminal punishment, forced the Amish to do that which the State thought was the right ordering of the world. The Court said the State compelled individuals "to perform acts undeniably at odds with the fundamental tenets of their religion." The dissent by Douglas stressed the invasion of the children's rights to impose upon them their parent's views without considering their own view. However, the caring citizen can easily see the many other problems with the determination of "fundamental tenets" of religion than the constitutionally protected interests in children about religion.

²²⁹ *Thomas v. Review Bd., Indiana Employment Security Div.*, 450 U.S. 707, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981), see also n204.

STATE AND MANDATED ACCOMMODATION

The symbol problem for the Christian begins before *Lynch v. Donnelly*,²³⁰ but in 1984 Donnelly contended it was a violation of the Establishment Clause for the City of Pawtucket, Rhode Island, to include a nativity scene with a Santa Claus, a clown, and a Christmas tree in its Christmas display in a public park.²³¹ Chief Justice Burger held that a city's display of a nativity did not violate the Establishment Clause and that the "religious effects" were no more egregious here than in many public aid programs approved by the Court.

Justice O'Connor in her concurrence stated that the display did not constitute governmental endorsement of a particular religion. Therefore, it was permissible. Justice Brennan's dissent stated that the primary effect of the scene, a re-creation of an event that lies at the heart of Christianity, was perceived as non-secular and therefore unconstitutional. In this case, the Court places a municipal nativity scene in a category with other permissible accommodation governmental uses of religious symbols.

²³⁰ *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

²³¹ This writer finds it very intriguing that *Lee v. Weisman*, 1991, is also from Rhode Island.

The Constitution was said to affirmatively mandate accommodation, not merely tolerance, of all religions and to forbid hostility toward any. The second problem stems from the distinctions among religions found by the Court that may well seem invidious. Accommodation seems to be too difficult with the resultant Court decisions. The last problem with mandatory accommodation is that most liberals state that sometimes Christians win, but non-Christians never do. In *Goldman v. Weinberger*,²³² claims by non-Christians to exemptions have been rejected when they sought exemption from Air Force dress codes regarding all military officers to wear only prescribed uniforms. A "far more deferential standard" of review was held in military cases. So, the state can escape the mandatory religious accommodation doctrine when it demonstrates that allowing exemptions would, in one way or another, severely impair important state interests. Justice Brennan, the writer of the dissent, did approve accommodation in two situations: (1) where they did not impose burdens on those not exempted, and (2) when government regulation itself makes religious exercise more costly.

In the *Waltz* case,²³³ the Court emphasizing historic practices, ruled (8 to 1) that religious institutions need not be taxed. This exemption or mandated accommodation does

²³² *Goldman v. Weinberger*, 475 U.S. 503 (1986).

²³³ *Waltz v. Fax Commission*, 397 U.S. 664 (1970).

not violate the three criteria listed in *Lemon v. Kurtzman*. Two hundred years of tax exemption tradition has shown that this does not lead to a gradual establishment of religion in this country. Justice Holmes' earlier observation about this "common consent" illustrates the need for a strong case for the Constitution to offset traditions.²³⁴ Note however, that in the *Bob Jones University* case, tax exemption was withdrawn when the university claimed that its religion forbade interracial dating.²³⁵ This case could become one of the most important tax cases in the future. The problems of faith, moral authority, and IRS tax antecedence in what is meant by nonadvocacy or commemoration is clearly seen.

Sometimes we "perceive" governmental regulations as stiffening Lutheran opposition to Court decisions mainly because it makes it more difficult for the laity to follow their beliefs. Perhaps, if government didn't act in some cases things would smooth out; since the Confessions admit an overlapping of realms, the consequence is that it is to be expected that some leveling out occurs.

Relieving burdens has been seen as subsidizing religion directly when employers are required to take the employee's beliefs into account. Mandated accommodation, as the Court is thinking, does not make a strict separation as to religion versus non-religion. No one has ever said that

²³⁴ *Waltz* 678.

²³⁵ *Bob Jones University v. U.S.*, 461 U.S. 474 (1983).

was the bottom line.²³⁶ The Court has advanced in some areas since *Everson v. Board of Education*²³⁷ when there were strict prohibitions against laws which aid one religion, and all religions, or prefer one religion over another. If the law then doesn't encourage, but just allows what is reasonable, the problem for the citizen is an understanding of "what is reasonable".

Reasonable accommodation fits into the permissible accommodation category that was previously described, with some aberrations. A good example of this is *Wallace v. Jaffree* when the Supreme Court struck down Alabama's law in allowing a moment of silence in their schools. What was "reasonable" in the sense of the eighteenth century is now "perceived" differently. The mores of the community have changed. It is far beyond any citizen's ability to stand apart, with empathy to understand what message of endorsement or not, the court's opinions send. All the citizen can hope is that the judge who endorses any "test" is fair and can preserve peace. All the caring Christian citizen can pray for is forgiveness, perseverance, and salvation.

This writer does not feel that *Allegheny* dealt with the real issue. The Court has not ignored the sentiments of the nation, but it has acted like a lumbering elephant, and

²³⁶ *Brown v. Board of Education*, 349 U.S. 294 (1955), and *Shelby v. Kramer*, 344 U.S. (1949).

²³⁷ *Everson v. Board of Education*, 330 U.S. 15 (1947).

not a racing gazelle. People have the capacity to respect each other's religious symbols. The view that the judges went off on a wrong track can be substantiated. Justice O'Conner's concurrence in *Lynch* was pretty good as it was a decent way to tell an establishment clause violation, but when deeply into it, a majority think she asked the right question, but gave the wrong answer.²³⁸ She stated, "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."²³⁹

STATE AND RELIGIOUS SYMBOLS

What's a Christian to do? In 1989, *County of Allegheny v. A.C.L.U.*²⁴⁰ reiterated, at least three things: (1) 1971 Lemon Laws, (2) the 1984 *Lynch v. Donnelly* case concerning issues "which make adherence to a religion relevant in any

²³⁸ *Lynch* and *County of Allegheny* are the Supreme Court cases concerning whether a municipality may sponsor display of a nativity scene or a menorah. Justice O'Conner's right question is: Do nativity scenes make any reasonable person feel excluded from the polity? Answer: No. See also Glenn Tinder, "Can We Be Good Without God?" *The Atlantic Monthly* December (1989) 69, and Harvey Cox, *Many Mansions*, (1988) Chapter 5, and Anne Roiphe, "Taking Down the Christmas Tree," *Tikkun* 4:6 (1989) 58-60.

²³⁹ Edward M. Gaffney, Jr., "O'Conner Fumbles the 'Christian Nation' Case," *Christian Century* 106.12 (1989): 373-374.

²⁴⁰ *County of Allegheny v. A.C.L.U.*, 57 U.S.L.W. 5045 (1989).

way to a person's standing in the political community", and (3) that pluralism is a secular symbol, while the creche is not. But what kind of pluralism is she [Justice O'Conner] talking about? Are these symbols in the category of "In God We Trust" on currency, and the language "One Nation Under God" in the Pledge of Allegiance, and Thanksgiving, and artwork? Perhaps the Court's definition is not of religious people, but people with plural religions. It is not clear in this case which things go in that shoe box. As perplexed as one becomes when saturated with Supreme Court decisions, the present day opinion on symbol seems to outrage many Christians in that the symbol of Christ in 1989 was being eliminated from the country's most benevolent holiday, Christmas.

Since the removal of prayer from public schools, the pledge of Allegiance is the one place in almost every school's daily regimen where God can still be mentioned in connection with national loyalty. Being overwhelmed by the passionate words, Christians however see beyond the silhouette of a child in a manger. They see that Christ was, is, and will be held dear in the Christmas tradition.

The two limiting principles in the County of *Allegheny v. A.C.L.U.*²⁴¹ are:

²⁴¹ Justice Kennedy wrote the dissent with Justices Rehnquist, White and Scalia joining. Reference to religions have to be held to a minimum and the non-coercive element has to be existant.

- (1) Government may not coerce anyone or participate in any religion.
- (2) Government may not in the guise of avoiding hostility or callous indifference give direct benefit to religion in such a degree that it in fact "establishes" a [state] religion or religious faith, or tends to do so.

What was to become the most important of religious symbol cases in the 1988 presidential campaign was one in which the Supreme Court ruled in 1943 that students may not be forced to say the pledge of allegiance to the flag if it is against their religious beliefs.²⁴² Acting on that understanding, Governor Michael Dukakis had vetoed a proposed law requiring the pledge in Massachusetts schools.

STATE AND THE DEFERENTIALIST

Does the state have the right to control the moral content of a person's thoughts? In terms of the radiating "moral authority", Justice Marshall's footnote is critical:

Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no decent place in society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated...

²⁴² *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

Obscenity...is not crime. Obscenity is sin.²⁴³

It is interesting that in 1957, under the principle enunciated in *Roth*,²⁴⁴ that the government had a certain kind of state interest to demonstrate, and that now a special right of privacy exists, so the next civil suit to enjoin the showing of two allegedly obscene films at two "adult" theatres, *Paris v. Slaton* was dismissed. This occurred because of the constitutional protection which provided that there was "requisite notice to the public" and "reasonable protection against exposure to minors."²⁴⁵ The Georgia Supreme Court reversed and the Supreme Court granted certiorari because:

...the issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a *morally neutral judgment* [emphasis is mine] that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's word's, the States' "right...to maintain a decent society."

Can the difference in outcomes in *Stanley* and *Paris* be explained in terms of the state's interest in curbing the commercialization of sex? For example, can the Court's opinion in *Paris* be perceived simply as acknowledging the rights of states, if they wish, to pass laws regulating

243 *Stanley v. Georgia*, 394 U.S. 557 (1969).

244 *Roth v. United States*, 354 U.S. 476, 489 (1957).

245 *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973).

commerce so as to preserve the positive value of sexual intimacy, gentleness, and respect from the dehumanizing and demeaning effects of commercialized sex? Until recently, the Court ranked expression for commercial purposes far below non-commercial expression in the hierarchy of activities meriting First Amendment protection. The view of the Two-Kingdoms' Doctrine gives us a starting point in answering some basic questions.

Is it appropriate for legislatures to express their revulsion through laws against the commercialization of sex, or should legislatures be denied constitutional authority to regulate what people do with their bodies or minds, absent proof of harm to others? The answer is again influenced if one assents to Luther's basic and primary function of the law, which is to protect and to punish.²⁴⁶

If one were to adopt the position that law is to maximize the freedom of individuals, and public interest is defined as no more than what Marsilius said "the sum total of individual interests", would any community then possess the constitutional power to engage in esthetic zoning, which curbs individual freedom by acknowledging the right of the majority to legislate matters of taste?²⁴⁷

²⁴⁶ The Missouri Synod is a founding member of the inter-demoninational Religious Alliance Against Pornography (RAAP). The third national conference was held October 25-26, 1989 in Washington, D.C. as reported in Reporter, September 25, 1989:3.

²⁴⁷ See generally, "Roe and Paris: Does Privacy Have a Principle?," 26 Stan. L. Rev. 1161-89 (1974).

The Supreme Court's religious liberty decision was good news in *Board of Education v. Mergens*, the bad news was in *Employment Division v. Smith*.²⁴⁸ While *Mergens* adopted a sensible, moderate view of the establishment clause in upholding the Equal Access Act, *Smith* adopted an incredibly narrow reading of the free exercise clause. Justice Scalia's opinion lurches forward without the supporting historical data. So instead of having an accommodationist type or even a neutralist type of opinion, one has a deferentialist opinion. He defers and "passes back the hot potato" to legislatures and executives and largely ignores the rights of individuals and the church.

Some politicians also prefer not to stand up and be counted and may therefore toss "hot potatoes" to the Court. When we perceive this as happening, it does not necessarily constitute a failure of democratic governance, but it should encourage more caring citizens to run for office. The good news is that most governors and legislatures often are more amenable to the arguments for religious freedom.

Minnesota Governor Al Quie, a Norwegian Lutheran said, "An election year is when we (citizens) need to be informed. We need information in order to make just decisions. Many say you can't legislate morality. Others say you shouldn't. But I say, not true."²⁴⁹ Although not expressly stating

²⁴⁸ *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. ___, 58 U.S.L.W. 4433 (April 17, 1990).

²⁴⁹ Al Quie, "Christians as Concerned Citizens," *Lutheran Witness* 99.7 (1980) 196.

Luther's Two-Kingdoms' doctrine, Pieper, or the Confessions, Governor Quie does speak to stewardship: "just as a stone created by God can be used to hit someone in the head or to the glory of God as part of a cathedral, so government can be used for either evil or good (the glory of God)."²⁵⁰

This leads citizens towards Luther's Doctrine of the Two-Kingdoms in applying justice to a social order. Citizens should obey all laws, give good advice, and help recognize what is for good for conscience sake.

Eugene Linse said it so plainly in 1980:

Supreme Court decisions still remain subject to inquiry, contest, review, and perhaps change. The problem is that to equate court decisions with definite public policy may well obscure the need to determine what public really should be, inhibit the inquiry into what is the good, substitute legal reasoning for critical thinking, and miss entirely the possibility that what is right and good in a society might well derive its functions from sources outside of the judicial or the political realm.²⁵¹

The Religious Freedom Restoration Act (101st Congress, 2d session, H.R. 5377) was one step closer to passage in 1990. In September, the U.S. House of Representatives' Subcommittee on Civil and Constitutional Rights held hearings on the measure, which was intended to restore religious freedom rights placed in jeopardy by the Supreme

²⁵⁰ It is best to see 'good' as Martin E. Scharlemann defined it in terms of "civic righteousness" which is good in the sight of God as He wills, but it does not save.

²⁵¹ Eugene Linse, "Church and State: Some Problems of Philosophy and Practice," Concordia Journal 6.6 (Nov. 1980) 242.

Court's *Employment Division v. Smith* ruling. To perceive of Supreme Court cases as "always" subject to some Congressional review seems a statutory style "double jeopardy."

In the *Smith* decision in April 1990, the Court reversed nearly fifty years of church-state jurisprudence and said that the government may not only prohibit the religious use of peyote but can also deny unemployment compensation to individuals dismissed from their jobs for using the drug. Philip Draheim, LCMS legal counsel, said that the way the Court phrased its opinion in *Oregon v. Smith* and its refusal to rehear the case is "of serious concern to churches."²⁵² H.R. 5377 would restore the standard that existed before *Smith*, which holds that the state must show a "compelling interest" before restricting religious freedom rights.²⁵³

Justice O'Connor, in a separate opinion in *Smith* concurring only in the judgment, took strong exception to the court's rejection of a *Sherbert* analysis. She insisted, the compelling state interest requirement "reflects the first amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society."²⁵⁴

²⁵² "Supreme Court refuses to reconsider ruling in peyote case," *Reporter*, 19 June 1990: 2.

²⁵³ The LCMS was among those churches bodies that asked the court to rehear the case. It was denied. They are monitoring the legislative efforts. Legal Counselor for LCMS Len Pranschke went to Washington, D.C. in 1990 to effect and work for passage of this bill. It should be reintroduced in the 1991 session. Except for the military and the prison system, the bill has full support which reinstates the "compelling governmental interest" clause.

²⁵⁴ Analysis found in *Religious Freedom Reporter* (Church and State Resource Center, Norman Adrian Wiggins School of Law, Campbell University, April 1990): 100.

Alarmist nonsense, Justice Antonin Scalia's majority opinion might respond. His argument is that legislatures can make religious exemptions from such general laws. And if a group can't muster a majority in the legislature of their state? It's the price we pay for democracy.²⁵⁵ This again has been perceived by many as the subordination of religion to the political order.

At the end of the year in 1989-1990 term, the concerned citizen found that the Court: (1) did confound conservatives by upholding the right to burn the U.S. flag; (2) declared a brand new, if limited, constitutional right - to refuse medical treatment when one's wishes are made clearly and competently; (3) upheld two federal programs aimed at increasing minority ownership; (4) reaffirmed the right of women to have abortions without undue interference from the state; and (5) endorsed, with limits, the power of federal judges to fashion tough remedies for racial discrimination. How one "perceives" these decisions can possibly be cause for yet another year of mixed messages. In the 1990-1991 docket, sex discrimination, school busing, graduation prayers, and abortion will be at the forefront.

²⁵⁵ John Richard Neuhaus, "Church, State, and Peyote," National Review 11 June 1990:42.

CONCLUSION

This paper has discussed some relevant U.S. Supreme Court cases concerning religion and how Luther's Two-Kingdoms' Doctrine applies to them. Three problems that have been threaded throughout the many cases are:

Point One:

Can and how may the religious person, in this case LCMS, accommodate their sincere convictions and beliefs to some human-type broad consensus when they do "perceive" U.S. Supreme Court case meaning?

St. Paul cautioned Christians against going to court "before unbelievers" because it cast shame upon the church. It is evident in the increasing litigiousness in which people go to court to have the state rule on their affairs that it surely would be to our blessing if one could reach a working concurrence without having to ask the courts to denote every detail.²⁵⁶

Separation of Church and State is an issue that should not be, that cannot be resolved short of the coming of the

²⁵⁶ Dean M. Kelley, ed. Government Intervention in Religious Affairs (New York: Pilgrim Press, 1982), and Why Conservative Churches Are Growing, Second Edition (San Francisco, CA: Harper & Row, 1977). In *U.S. v. Seeger*, (1965) the Court ruled that conscientious objector status is given to one whose belief occupies a place parallel to that filled by orthodox beliefs in God. In *Gillette v. U.S.*, (1971) the Court remarked that if one just objects to war, then the conscientious objector status would not be given.

Kingdom of God, but churches are getting involved in more and more kinds of enterprises. If you do engage, to what extent then will future U.S. Supreme Court decisions accommodate you? As with *Yoder v. Wisconsin*, one is not allowed to convert his own personal standards on matters of conduct into a religious belief requiring constitutional protection. There is a standard and in the case of LCMS it is dogmatically grounded in systematic confessionalism.

Point Two:

Has the Court taken an unjustified hostility to religion cases on establishment clause issues since 1985 which the courts shied away from since 1947?
 Can the Court now control a church?
 Then what is the church's function?

Organized religion has not affected Supreme Court decisions to any majority degree and the Court would not consider the truth or falsity of any belief or doctrine of a church or choose between doctrinal viewpoints within a religion.²⁵⁷ Luther stated many times that religious beliefs are not to be governed by human ordinances. Ordinances are not the Word of God, and only Scripture is inerrant. But citizens have had their voices heard in other areas such as the abolition of slavery, education, euthanasia, birth control, and Sunday closing laws, but with mixed signals in

²⁵⁷ *U.S. v. Ballard* (1944), and *Thomas v. Review Board of the Indiana Enpl. Sec. Div.* (1981).

areas as gambling, prohibition, obscenity and the ambassadorship to the Vatican.²⁵⁸ Citizens, Luther remarks, are to obey temporal authorities. So, if one maintains that there is an institutional stake in the decisions being made, and that we are in this for the duration, then perhaps we as a church should think more about public affairs in the light of Scripture, the Symbols and Luther.

Government is grounded in consent: one may shape and persuade the general public in a variety of issues. One may appeal to the clearest implications of sincerity in religious beliefs. If one affirms a certain moral position, it does not mean that that religious consensus should be denied corporate expression, nor does it mean that that religious consensus must be included in all matters of social order. In Wisconsin, for example, the controversial voucher plan where 400 inner-city Milwaukee students will enter private schools with \$2,500 grants from the state, was not considered by many as a matter of separation of church and state.²⁵⁹

Free society does not work unless there are in it caring citizens who use those freedoms and rights which it affords to them. Our concern is not which of the candidates for this role should win, whether Roman Catholic, Lutheran,

²⁵⁸ Leo Pfeffer, Church, State, and Freedom (Boston: The Beacon Press, 1953) 66. "Statement by Dr. J.W. Behnken, President of Synod, On the Appointment of an Ambassador to the Vatican," Editorial, 70.23 Lutheran Witness (1951); 1; 376; L.W. Spitz, "A U.S. Ambassador to the Vatican?" 71.1 Lutheran Witness (1952); 7 remarks that "Lutheran were united in their protest against it".

²⁵⁹ Janice M. Horowitz, "Pick a School, Any School," Time September 3, 1990:70.

or some other tradition, but that there be one distinctive religious tradition playing a role of generator of values and coordinator of policies, lest the society lose its center altogether.²⁶⁰

No consensus can be found in the LCMS even with the guarantees of the First Amendment of the United States Constitution. Robert K. Menzel said very clearly in 1963 that "the latest decision of the U.S. Supreme Court serves to remind the churches that, while they may look to the state for the preservation of religious liberty, they should not expect institutions of the state to do the church's work."²⁶¹

One of the chief shapes of the moral structure that democracy requires, as indicated in chapter two, has been the church, both in the narrow and broad sense. Another fundamental problem, however, which runs throughout the field of freedom of religion is:

Point Three:
What is a religion?

The church defines and gives context to faith and religion, but the Court has never directly answered this

²⁶⁰ John F. Wilson, "Common Religion in American Society," Civil Religion and Political Theology, ed. Leroy S. Rouner (Notre Dame: University of Notre Dame Press, 1986) 120.

²⁶¹ Menzel 381.

question as clearly as Luther.²⁶² Has "religious" in this civil realm been incorrectly described and labeled by the justices who make up the Court? Or, is their perception of "having faith" as that which Paul Tillich describes as humanist faith which is called "secular," in contrast to his two types which are called "religious":

Man's faith is inadequate if his whole existence is determined by something that is less than ultimate. Therefore, he must always try to break through the limits of his finitude and reach what never can be reached, the ultimate itself.

However, if faith is understood as the state of being ultimately concerned about the ultimate, humanism implies faith. Humanism is the attitude which makes man the measure of his own spiritual life, in art and philosophy, in science and politics, in social relations and personal ethics. For humanism the divine is manifest in the human; the ultimate concern of man is man. All this, of course, refers to man in his essence: the true man, the man of the idea, not the actual man, nor the man in estrangement from his true nature.²⁶³

Unduly one gets caught up with this "religious language" in our practices. The church of the Augsburg Confession takes a back seat to no one in professing gratitude to God for good rulers. Moreover, the *Large Catechism* calls it "the greatest need of all" to pray for civil authorities. However, in Luther's discussion of the

²⁶² Some observations are found in Hammer 427 and Supplement 191.

²⁶³ Paul Pittich, *Dynamics of Faith* (New York, Harper Bros. Publishers, 1957)57-63.

First Commandment, F. Bente and W.H.T. Dau explain in the *Large Catechism* what it all means:

For no people has ever been so reprobate as not to institute and observe some divine worship; every one has set up as his special god whatever he looked to for his blessings, help, and comfort...*their trust is false and wrong...*

...even though otherwise we experience much good from men, still whatever we receive by His command or arrangement is received from God.²⁶⁴

²⁶⁴ F. Bente and W.H.T. Dau 581-593.

IV. Summary Statements and Conclusions: Lutheran's Viewing Supreme Court Decisions

To Lutherans this "sideline" paradigm in chapter one became very comforting and acquiescing. In it God is seen as speaking to and caring for the world in two ways. What has happened to the Two-Kingdoms' Doctrine? Are the themes, principles, or axioms emphasized in it relevant for God's people today? Of course they are, and some proven principles can be cited in the development of the argument.

I. The demand for justice and truth

Both church and state speak throughout this thesis to a quality of justice.²⁶⁵ From the perspective of our culture toward Court decisions, a society in which people are not free to speak, worship, form alliances, strive for achievement, and guard against governmental intrusion is not a just society. Likewise, a society of plenty - where people lack the food of life, the bread for the soul, where fellow humans do not respond to unjustifiable harm, is not a just society.

Both the approach of the state and the approach of the church aim at a just society, and each checks the faults of

²⁶⁵ Cf. Rom. 2:15.

excess in the other. Both have something vital to offer, and individual good is not complete without the contribution of both. Yet the issue is not so much who controls whom, but the broader matter of how religious belief, practices, and values relate qualitatively to our judgments dealing with U.S. Supreme Court decisions.

II. The Gospel and the World

Inevitably, there are and will remain clashes between civil society and the Gospel as the many examples in chapter three demonstrate. Absent the alternative of a division of spheres, the 'two realms' can and have existed together cooperatively. The Church holds that good works are done for God's sake, and not to merit favor. We must serve our neighbor in need, whether it be in court decisions or whatever. Christians have been shown in our analysis to influence the democratic process; however, a reluctance exists thereby to speak of potential Christianizing or transforming of society.

It is vital that we set the right terms for any public debate because church and state issues are not going to go away. We stumble on no remnants of *cuius regio eius religio* (each region its own religion) obliging us to "change speaking identities" in moving from one realm to another. The Two Kingdoms' theory does not mean that neither has anything to do with the other, but rather God speaks in a different way to each.

III. The higher civic righteousness

Americans of all faiths have increasingly come to realize that church-state type issues in the U.S. Supreme Court are not unique to themselves. There is a perception and recognition that, while Jesus' disciples are called to a "higher civic righteousness" in the Kingdom, those of the "Office of the Universal Priesthood" do care for society. The church is ethically related to all the world. One tries to serve others in these useful roles in caring for neighbors. Witnessing to the Kingdom that Christ has already inaugurated in the "here" of history, and which He has promised to complete in the "hereafter" of eternity is a function of that office.

IV. Ministry must teach, educate, and sharpen the conscience of its membership

Information about church-state issues, and especially those in Supreme Court decisions, has been shown to be important to the caring Christian. Our Church's primary focus is its mission of forgiveness, life and salvation through God's grace. Through the faithful, as the leaven leavening the loaf and the light shining in the darkness, the Gospel of Christ will exert an indirect but important influence upon the political life of the community.

The believer, as previously defined from the priesthood of all believers, is not in an impersonal communion. Concerned citizens have looked to the church community for instruction, prayer, confirmation, and correction over the years. This is a case of Christians fulfilling their vocation. All this encourages the citizen with responsibility, lonely at times, to seek the complex and compromised in that sphere.

Lutherans should take all opportunities to share with others those important facts that Supreme Court issues evoke, for one day soon public opinion will awaken to the constitutional dangers of the strict separation of Church and State. "But until that day, the responsibility falls to the Christian to keep a lonely vigil and involvement, defending the church and state accommodation wherever and whenever it may be attacked...holding the torch of religious liberty high."²⁶⁶ While one avenue to teach or express an idea may be blocked, another avenue is always open and may ultimately be the better path.

But, with our inconsistent history of traditions described in chapter two, that should engender us Lutherans to be somewhat moderate about making judgments about Supreme Court decisions, especially where our knowledge is incomplete. In today's world most Supreme Court decisions

²⁶⁶ Bohlmann, "The Church and Public Policy," 168.

become in accommodation what the referee determines from a complex order.

V. Citizens are to obey the government

This answer derived from our analysis of the Two Kingdom' Doctrine. Some Supreme Court cases in chapter three lie in the transcending, even overwhelming moral and intellectual commitment that colonialists first made to independence from Great Britain, then to a new constitutional order, and finally to the Bill of Rights, all within twenty years between the early 1770's and the early 1790's. "Freedom of religion" was given to us.

The passive "just stay away" concept is often perceived as following in Lutheran past experiences because citizens are to obey the government. However, this passivity is not a true tradition as the many examples in the "Church and State Issues in the LCMS" section demonstrated. "Symbol", meaning those signs of religion, school prayer, state accommodation of religion, and abortion are but a few of the important new public issues now being articulated by concerned citizens. They raise enduring questions. Luther did not articulate specific solutions to our current plights; therefore, we must still think our way through to any new problems by applying the Two-Kingdoms' Doctrine. This means that one is applying a theologically correct position based on the conclusions we have addressed in chapter one.

If we too pause to reexamine our Lutheran heritage, this Two-Kingdoms' Doctrine can be applied to the Supreme Court's adjudication of moral conflicts and church-state conundrums. It is not any demonstrated intent to use Scriptures nor the Lutheran Confessions to provide specific answers to the multitude of political and social problems that come every day to the Court. It is neither the nature nor the purpose of theology to provide us with a handbook of legal casuistry.²⁶⁷

While the two realms (church and state) coexist in society, it is the conclusion of this thesis that law does not lend itself to the complete separation of the two into public and private spheres. U.S. Supreme Court decisions are part of *what goes on* in the public square. If one is loyal to God, and loyal to government for its' protection, then within that realm is it not right to do moral things for "right purposes"?

Joseph Fletcher said, "moral ethics is a social responsibility."²⁶⁸ But in this church-state issue conflict we have to be completely truthful with ourselves and use the resources of the Gospel. In the United States today, when we celebrate the bicentennial of the First Amendment to the U.S. Constitution: (1) we can elect God-fearing men; (2) we can pray for all in power; (3) we can be good citizens;

²⁶⁷ Linse 244.

²⁶⁸ Katherine Bouton, "Painful Decisions, The role of the Medical Ethicist," The New York Times Magazine, 5 August 1990: 22-25.

(4) we can honor all men; and (5) we can love the brotherhood. Faith recognizes that God is present in this world. The world, however, being the creation of God, should glorify Him.²⁶⁹ This is especially true of man, the crown of God's creation.²⁷⁰

As Robert Kolb stated, "Faith in Christ and love in the context of the callings of daily life mark the piety of the Lutheran Christian."²⁷¹ Thus, one can discern the proper station for a Christian caring society based on these perceptions, even with the challenge of a totally pluralistic society. Finally the settlers, who made their way across the Atlantic Ocean, penetrated the Appalachian slopes or navigated the Mississippi River, and then worshipped freely under men like Walther, Muhlenberg and Grabau developed substantial convictions about God and country. They celebrated with words that express the Christian's attitude in poetry that endures:

*Thou holy Church, God's city, shine
High on His mountain founded!
Sing praise to Christ, thy King divine,
Who thee with walls surrounded;
Thy children He doth bless and sends
His peace to thee, thy strife He ends:*

269 Cf. Proverbs 16:4, 104:1ff; Psalm 148; Romans 11:16.

270 Cf. Genesis 1:8, 2:7; Psalm 68:7, 115:16.

271 Kolb, "God Calling, 'Take Care of My People': Luther's Concept of Vocation in the Augsburg Confession and Its Apology", 11.

Now praise thy God, O Zion!

[M. B. Landstad]

*God bless our native land!
Firm may she ever stand,
Through storm and night,
When the wild tempests rave,
Ruler of wind and wave,
Do Thou our country save
By Thy great might.*

[C. T. Brooks, J. S. Dwight]

Appendix A

IMPORTANT CHURCH/STATE SECTIONS IN THE CONFESSIONS

Augsburg Confession

- Article 15: 1
- Article 16: 1, 2, 5, 6
- Article 28: 3-5, 8, 10, 11, 13, 14, 15-19, 21-23,
28, 5, 71, 72, 76, 77, 78

Apology of the Augsburg Confession

- Article 7: 1, 2, 3, 5, 6, 7, 8, 12, 13, 16,
50, 19, 23, 28, 47, 48, 50
- Article 13: 11, 12, 15
- Article 16: 1, 2, 3, 5, 6, 7, 8, 13, 50
- Article 21: 44
- Article 27: 3, 5, 8, 12, 13

Large Catechism

- Article 1: 21, 22, 23, 24, 25, 26,
141, 142, 150, 168, 169, 180,
181, 182, 207, 274

Article III: 74, 75, 77, 80

Article IV: 20, 62

Article V: 1, 2

Article VII: 1

Epitome

Article 10: 6; Article 12: 22

The Smalcald Articles

Part II, Article 2: 1, 3, 4, 10, 11, 12, 14, 16

Part III, Article 4: 20, 37ff; Article 7: 1;

Article 10: 1

Repetition and Declaration of Some Articles of the

Augsburg Confession (Formula of Concord)

Article 10: 1, 9, 10, 15, 30

Article 12: 18, 20

APPENDIX B

THE PAST DECADE OF FORTY CASES 1980 – 1990 IN RELIGIOUS
LIBERTY AND THE UNITED STATES SUPREME COURT

(Compiled by the Christian Legal Society)

Thirteen cases where the Supreme Court conflict with ACLU.
The Court answered YES.

***May federal restrictions on abortion funding coincide with tenets of religious groups? (*Harris v. McRae*, 448 U.S. 297 (1980)).

***May states reimburse church-run schools for costs incurred in complying with state-mandated student testing? (*Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980)).

***Must public universities grant equal access to student-led Bible studies? (*Widmar v. Vincent*, 454 U.S. 263 (1981)).

***May states pay legislative chaplains? (*Marsh v. Chambers*, 463 U.S. 783 (1983)).

***May states grant tax deductions to parents for church school tuition, textbooks and transportation costs? (*Mueller v. Allen*, 463 U.S. 388)).

***May privately financed nativity scenes be displayed in public parks? (*Board of Trustees v. McCreary*, 417 U.S. 83 (1985)).

***May a city include a nativity scene in a display composed of secular Christmas holiday symbols such as plastic reindeer, a Santa Clause house, a Christmas tree, and a "Season's Greetings" banner? (*Lynch v. Donnelly*, 465 U.S. 668 (1984)).

***May religious organizations impose religious standards on those employees performing "secular" jobs, such as janitor? (*Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987)).

***May federal funds be used for church-run social welfare programs? (*Bowen v. Kendrick*, 108 S.Ct. 2562 (1988)).

***May states use rehabilitation funds for a blind person's seminary training? (*Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986)).

***May states pass laws stating a preference for childbirth over abortion, limiting state funding for abortions and imposing regulations on abortions? (*Webster v. Reproductive Health Services*, 109 S.Ct. 3040 (1989)).

***Must public high schools grant equal access to student-led Bible studies? (*Board of Education v. Mergens*, 58 U.S.L.W. 4720 (U.S. June 4, 1990), and *Bender v. Williamsport*, 475 U.S. 534 (1986)).

Three Cases where the Supreme Court decisions are somewhat ambiguous, but where the Supreme Court allows objectives sought by the Christian Legal Society (CLS). The Court answered YES.

***May a moment of silence include voluntary prayer? (*Wallace v. Jaffree*, 472 U.S. 38 (1985)).

***May schools teach alternative theories of origin, other than evolution? (*Edwards v. Aguillard*, 482 U.S. 578 (1987)).

***May schools post the Ten Commandments in a classroom for educational, but not religious, purposes? (*Stone v. Graham*, 449 U.S. 39 (1980)).

Six cases where the ACLU took the CLS position and the Supreme Court concurred. The Court answered YES.

***May religious tracts be distributed at public airports? (*Board of Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987)).

***Must unemployment benefits go to a pacifist who would not work on weapons for religious reasons? (*Thomas v. Review Board*, 450 U.S. 707 (1981)).

***Must Unemployment benefits go to new converts to Sabbatarian beliefs? (*Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1986)).

***May a Quaker be exempt from photo requirements on a driver's license? (*Jenson v. Quaring*, 472 U.S. 478 (1985)).

***May a state fair restrict the sale of religious merchandise and books to licensed booths? (*Heffron v. International Society for Krishna Consciousness, Inc.*, (452 U.S. 640 (1981)).

***May an employee whose personal religious convictions forbids working on Sunday be eligible for unemployment compensation when the church he attends does not firmly embrace the same convictions concerning Sunday work? (*Frazer v. Unemployment Compensation Commission*, 57 U.S.L.W. 4397 (1989)).

Six cases where the ACLU took the position of CLS and the Supreme Court concurred. The Court said NO.

***May states grant churches a "veto" power over local liquor licenses? (*Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982)).

***May state charitable solicitation laws be imposed only on select religious groups? (*Larson v. Valente*, 456 U.S. 288 (1982)).

***May local tax funds be used for paying teachers at church-run schools to teach remedial secular subjects in church-run schools? (*Grand Rapids School District v. Ball*, 473 U.S. 373 (1985)).

***May a county display a stand-alone nativity scene on the staircase inside the courthouse under a banner declaring a religious message, "Gloria in excelsis deo?" (*ACLU Greater Pittsburgh Chapter v. County of Allegheny*, 109 S.Ct. 3086 (1989)).

***May the courts impose secular, state-defined professional standards on clergy and church counselors? (*Hally v. Grace Community Church*, 47 Cal.3d 278 (1988), cert. denied 57 U.S.L.W. 3654 (1989)).

***May Church of Scientology members deduct as "gifts" from their federal taxes *quid pro quo* payments for "auditing" services rendered in exchange for the payment/"gifts"? (*Hernandez v. Commissioner of Internal Revenue*, 109 S.Ct. 2136 (1989)).

Seven cases where the ACLU took the CLS position on the free exercise rights of minority religious groups, but the Supreme Court ruled for the government's interests. The Court said YES and NO.

***May an Amish employer be exempt from withholding Social Security? (*U.S. v. Lee*, 455 U.S. 252 (1982)). Court said NO.

***May a Jewish rabbi wear his religious cap while on military duty? (*Goldman v. Weinberger*, 475 U.S. 503 (1986)). Court said NO.

***Must a prison permit Muslim inmates to worship on a holy day other than Sunday? (*O'Lone v. Shabazz*, 482 U.S. 693 (1986)). Court said NO.

***May an American Indian tribe bar the federal government from building a road over burial grounds? (*Lyng v. Northwest Indian Cemetery Protective Association*, 108 S.Ct. 1319 (1988)). Court said NO.

***Must a non-profit religious group, engaged in commercial activities, comply with minimum wage, overtime and record-keeping provisions of the federal Fair Labor Standards Act? (*Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985)). Court said YES.

***May a state require that an American Indian obtain Social Security numbers for his children as a prerequisite to receiving child welfare benefits? (*Bowen v. Roy*, 476 U.S. 693 (1986)). Court said YES.

***May a state deny unemployment benefits to American Indians discharged for using a hallucinogen herb (peyote) as part of a religious ceremony? (*Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. , 58 U.S.L.W. 4433 (April 17, 1990)). Court said YES.

.....

Five cases where the ACLU position prevailed over the CLS position in the Supreme Court.

***May the IRS revoke tax exemption for religiously based racial discrimination at a religious university? (*Bob Jones University v. U.S.*, 461 U.S. 474 (1983)). The real danger in this case is that institutions may be required to conform to "federal public policies" on issues other than race. Court said YES, CLS said no.

***May federal funds be used for paying public school teachers to visit church-run schools in order to teach remedial secular subjects? (*Aguilar v. Felton*, 473 U.S. 373 (1985)). Here we are discussing learning disabilities. Court said NO, CLS said yes.

***May states mandate Sabbatarian rights for employees with no recognition of employee's rights? (*Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985)). Court said NO, CLS said yes.

***May a state exempt religious publications published by a religious organization from sales taxes? (*Texas Monthly, Inc. v. Bullock*, 109 S.Ct. 890 (1989)). Court said NO, CLS said yes.

***May a state impose sales and use tax liability on in-state sales of religious materials at "evangelistic crusades" and on mail-order sales of such materials to state residents shipped from out-of-state? (*Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. ___, 58 U.S.L.W. 4135 (U.S. Jan. 17, 1990)). Court said YES, CLS said no.

Appendix C

Resolutions of the Lutheran Church - Missouri Synod in
Human Relations

1. Resolution.....June, 1956, St. Paul, MN

2. Resolution 12-a....June, 1959, San Francisco, CA
3. Resolution 12-b....June, 1959, San Francisco, CA
4. Resolution 12-c....June, 1959, San Francisco, CA

5. Resolution 7-07.....June, 1962, Cleveland, OH
6. Resolution 2-10.....June, 1962, Cleveland, OH

7. Resolution 13.....June, 1959, San Francisco, CA

8. Resolution 2-20.....June, 1962, Cleveland, OH
9. Resolution 2-08.....June, 1962, Cleveland, OH
10. Resolution 4-04.....June, 1962, Cleveland, OH

11. Resolution 9-24.....June, 1965, Detroit, MI
12. Resolution 9-22.....June, 1965, Detroit, MI
13. Resolution 9-21.....June, 1965, Detroit, MI
14. Resolution 7-05.....June, 1965, Detroit, MI
15. Resolution 1-01A.....June, 1965, Detroit, MI
16. Resolution 1-01B.....June, 1965, Detroit, MI
17. Resolution 1-01C.....June, 1965, Detroit, MI
18. Resolution 1-01D.....June, 1965, Detroit, MI
19. Resolution 1-01E.....June, 1965, Detroit, MI
20. Resolution 1-01F.....June, 1965, Detroit, MI

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