Is this Good Government?
Paper #1: Foundational Principles

Some Observations on Church Polity in the Lutheran Church—Missouri Synod,
Prepared at the Request of the Program Committee for the South Idaho Pastors Conference
October 4, 2005[1]

Introduction

The past four years have witnessed some critical events within the Lutheran Church—Missouri Synod, and times of crises will always put polity and structure to the test. The following observations are offered upon the current political structure of the LCMS. The reader will note along the way that this paper does not treat theological questions or doctrinal controversies; this is not to say that there are no doctrinal matters to be discussed or dogmatic differences within the Synod, but that those lie outside of the scope of this exploration.

The following examination of current LCMS polity is built upon several foundational principles. The reader is asked to analyze each one and determine if they are, indeed, correct before continuing to "Paper #2: Applications to LCMS Polity Today."

A. The Lutheran Church has always maintained that Scripture and the Lutheran Confessions require no specific church polity or governmental structure. This is unlike many Christian denominations in the world today.[2] Since the Reformation, for instance, Lutheran church bodies have operated under the leadership of princes and the leadership of bishops. Until the formation of the Missouri Synod and its decentralized democratic structure, American Lutheran church bodies were all ministeriums, with very little governmental power in the hands of the laity. Scripture and the Lutheran Confessions do not mandate a certain polity or government for the Church.

B. Although used for organization of the Church and the distribution of the right-hand kingdom means of grace, church government is a device of the left-hand kingdom of God. Church polity and governmental structure do not impart the forgiveness of sins, and may not be confused with, or seen as replacement or superior to, the means of grace.

C. Because governmental offices are filled by sinful human beings, all forms of polity are susceptible to abuse. By definition, government has power; and in the words of Lord Acton, "Power corrupts, and absolute power corrupts absolutely." A democracy or representative republic is prone to make decisions based upon the will of the people and the tyranny of the majority, not upon virtue and truth. An oligarchy confines most of the power to the few, easily leading to a privileged Politburo at the expense of the citizenry. A monarchy places all power and responsibility into the hands of one individual, and Lord Acton's dictum holds true; in that case, the government is only as good as the one individual who wears the crown.

As a device of the left-hand kingdom, church governance is equally vulnerable to misuse. A congregational form of polity will be tempted to determine doctrine by majority vote or the will of the people, not Scripture. A ministerium may be tempted to magisterial opinions, to demean the piety and participation of the laity in the life of the church, while an oligarchic college of cardinals may add the rest of the clergy to the list of subordinates. When the privileged few is reduced to

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[2] Examples would include Congregational, Episcopal, Presbyterian and Roman Catholic church bodies, all of whose names denote a specific form of polity.

one, then polity has reached papacy and the pontiff will be tempted to claim authority over the clear Word of God.

D. Because of sin, law is necessary to curb coarse outbursts and abuses. In good governmental polity, this law often takes the form of a separation of powers, a system of checks and balances, and due process. Two examples will suffice as illustrations, one secular and one ecclesiastical.

1. The United States Government

a. The Federal Government of the United States features a variety of safeguards for accountability, including:

i. The separation of federal powers into three branches (executive, legislative and judicial), all three of which must examine and approve law for the law to be effective or to remain in effect.

ii. A bicameral legislature (House of Representatives and Senate) to ensure that citizens are represented by both population and geography, in order to prevent the will of highly-populated states being unduly imposed upon lesser-populated areas.

iii. The electoral college, a sort of bicameral compromise for purposes of elections, to represent more fairly the entire citizenry of the nation.

iv. Enfranchisement of the citizenry, whose right to vote is to be zealously protected at local, state and federal levels.

v. The right of due process, allowing any citizen to pursue a grievance in an impartial judicial system which requires jurists to operate according to the law, not personal ideology.

vi. The tension between the authority of federal government and the rights of individual states.

b. These checks and balances, as well as separations of power, have proven relatively effective; they must also be safeguarded from abuse. For example, one might recall President Franklin Roosevelt's attempts at "court-packing," increasing the number of justices on the Supreme Court so that he might add judges who were sympathetic to his agenda. The nation today often witnesses the judicial branch making law rather than interpreting it, such as the recent decision of the Massachusetts State Supreme Court requiring the state's legislature to pass a law recognizing gay marriage. Citizens have, at times, called for the United States Constitution to be set aside in favor of the immediate will of the people.[3] Politicians have been known to gerrymander, manipulating the boundaries of legislative districts in order to garner more votes for one political party over another. One therefore appreciates the need to zealously protect these safeguards in order to preserve democracy. It would be disastrous, for instance, if:

i. The United States President were able to place Congress under the authority of his personally-appointed cabinet.

[3] Anecdotally, this was witnessed during the impeachment of President William Jefferson Clinton. Different voices called upon the proceedings to be dropped based upon public opinion polls, rather than continue according to the rule of law.

ii. Politicians were permitted to gerrymander, thus creating more votes to preserve their tenure.

iii. Judges were able to dismiss cases based upon personal opinion, not the rule of law.

iv. The clear meaning of the Constitution could be set aside for individual agenda or momentary, popular desire.

v. Governmental agencies were able to disenfranchise voters and set aside the legitimate ballots of the citizenry in order to increase power.

vi. The federal government were able to override any decision of state government, or state governments were able to reject any federal law they desired.

c. Arguments for setting aside the checks and balances are usually made on the basis of immediate necessity or short-term benefit. However, once governments accrue power, they are usually reluctant to give it back; while the short-term gains may be attractive, the long-term potential for abuse should usually discourage such practices.[4] In other words, a lack of checks and balances and separations of power is bad government, no matter who currently holds the office.

2. The Roman Catholic Papacy

a. A governmental structure notably without such safeguards is the Papacy.

i. Although assumed for a long time before, the primacy and infallibility of the Pope was codified into canon law at the First Vatican Council on July 18, 1870. The majority of bishops approved the "First Dogmatic Constitution concerning the Church of Christ" (a.k.a. Pastor Aeternus), though a sizeable minority dissented. With that vote, any sort of democratic process among the college of cardinals ended in favor of an ecclesiastical monarchy.

ii. Once the power was voted to the Pope, it could not be recovered. Once the vote was taken and the Pontiff was declared infallible, the Papacy and its doctrine became irreformable: how can the infallible Pope declare that the declaration making him infallible is wrong? Such an admission would not simply reverse one document, but deconstruct the ecclesiastical structure of the Roman Catholic Church. This example gives ample warning that a governmental structure may accrue enough power so as to reach a point beyond reformation.

b. Given its doctrinal mix of the two kingdoms, the Roman Catholic Church has also considered itself to be a political kingdom not accountable to civil authorities of nations. For example:

i. The Roman Catholic Church has its own nation-state, Vatican City, sends ambassadors to other nations and in history has even fielded its own army.

[4] There are, of course, legitimate exceptions. This paper does not wish to imply, for instance, that a president may not, or ought not, suspend the writ of habeas corpus during time of war. However, any such decision always has the potential to become a permanent practice and an infringement upon the citizens; it must be made only with strong justification and continually scrutinized with due diligence.

ii. In recent times, the Roman Catholic Church in America has been plagued with scandal regarding the sexual abuse of minors by priests. While defending itself against lawsuits, the Boston Archdiocese retained attorney L. Martin Nussbaum, who argued via the First Amendment of the U.S. Constitution that lawsuits against the Archdiocese for negligent ecclesiastical supervision of pedophile priests could not go forward "because examining that relationship - between priests and their supervisors - in civil court violates the constitutional freedom of religion."[5] Nussbaum lost the case, and the archdiocese was held accountable by the state for its negligence.

3. It goes without saying that the fewer the checks and balances, the greater the potential for abuse.[6] Furthermore, the greater the level of abuse, the more difficult the reform.

E. Christians are commanded to honor rulers and obey authorities, ecclesiastical and secular, unless those authorities command them to violate the Word of God. This is clear, among other places, in Romans 13:1-7.

F. The Holy Spirit speaks through the Word of God, not human decision or majority vote. Therefore, while a government may claim God's permission by way of its existence, it may not claim God's approval or support for its decisions when those decisions contradict God's Word.

G. Individual accountability is a necessary safeguard for good government. This obvious tenet has repeatedly received endorsement by secular government in such well-known instances as the Nuremberg trials of Nazi war criminals and the My Lai Massacre of Vietnam; one cannot defend violating the law with the defense that one was only following orders. Scripture correspondingly declares, "The soul who sins shall die. The son shall not bear the guilt of the father, nor the father bear the guilt of the son. The righteousness of the righteous shall be upon himself, and the wickedness of the wicked shall be upon himself" (Ezek. 18:20); and "So then each of us shall give account of himself to God" (Rom. 14:12).

H. Because of Stephanism, The Lutheran Church—Missouri Synod formed with a decentralized form of church government, featuring equal voting rights among clergy and laity in matters of the kingdom of the left-hand. During emigration from Germany to the United States, the clergy of the Saxon Lutherans who would form the Missouri Synod declared Martin Stephan to be their bishop and authority in all matters spiritual and temporal. Within a short time of their arrival and settlement in Missouri, Stephan was deposed for scandalous activities. His removal led to a political crisis. For one thing, the Saxon Lutherans had essentially established a papacy; and, in the days leading up the deposition of Stephan, it was unclear whether or not he held title to all of the land. Had this been the case, the attempt to remove Stephan would have resulted in the departure of all but Stephan. Furthermore, the move to create a supreme bishopric was led by the pastors without meaningful participation by the laity; the aftermath of Stephan's removal led to deep suspicion of the clergy by the laity. Both of these factors led to the decentralized form of governance in Missouri Synod polity: congregations were

[5] "Judge Rules Church Suits Can Proceed," Boston Globe, 2/20/2003, page A1. Nussbaum exhibits an excruciating misunderstanding of the Two Kingdoms not unknown in Roman Catholicism: "In making the religious liberty argument, lawyers for the Archdiocese of Boston argue that a plaintiff victory would require the court to 'modify the church's understanding of forgiveness and grace.' During a court hearing in the case, attorney L. Martin Nussbaum, the First Amendment specialist hired by the archdiocese, said the church sincerely believes that people can change. 'Some of the greatest leaders in church history are, as the church would say, redeemed sinners, but as our civil justice might say, former criminals,' Nussbaum argued." http://www.boston.com/globe/spotlight/abuse/stories4/032403_defense.htm

[6] And admittedly, the greater the checks and balances, the more likely a government will suffer gridlock. This may be good or bad.

to remain autonomous, and synodical conventions would feature equal representation between clergy and laity. This is to be the political structure of the LCMS today.

⬢ STOP! ⬢

Once again, before continuing to part two of this paper, readers are asked to decide if each of the principles listed in boldface above are correct. (One need not form an opinion on the accompanying examples and commentary. They are simply included to demonstrate the logic of each principle.) If the above principles are correct, they may now be used to evaluate the polity of The Lutheran Church—Missouri Synod today.

Are these correct? Before continuing, please check "Y" for yes, or "N" for no.

Y	N	Principle of Governance
		A. The Lutheran Church has always maintained that Scripture and the Lutheran Confessions require no specific church polity or governmental structure.
		B. Although used for organization of the Church and the distribution of the right-hand kingdom means of grace, church government is a device of the left-hand kingdom of God.
		C. Because governmental offices are filled by sinful human beings, all forms of polity are susceptible to abuse.
		D. Because of sin, law is necessary to curb coarse outbursts and abuses. In good governmental polity, this law often takes the form of a separation of powers, a system of checks and balances, and due process.
		E. Christians are commanded to honor rulers and obey authorities, ecclesiastical and secular, unless those authorities command them to violate the Word of God.
		F. The Holy Spirit speaks through the Word of God, not human decision or majority vote.
		G. Individual accountability is a necessary safeguard for good government. (The individual must be held responsible for his actions.)
		H. Because of Stephanism, The Lutheran Church—Missouri Synod formed with a decentralized form of church government, featuring equal voting rights among clergy and laity in matters of the kingdom of the left-hand.

Is this Good Government?
Paper #2: Applications to LCMS Polity Today
Some Observations on Church Polity in the Lutheran Church—Missouri Synod,
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"Paper #1: Foundational Principles" listed the following principles of governance:

A. The Lutheran Church has always maintained that Scripture and the Lutheran Confessions require no specific church polity or governmental structure.

B. Although used for organization of the Church and the distribution of the right-hand kingdom means of grace, church government is a device of the left-hand kingdom of God.

C. Because governmental offices are filled by sinful human beings, all forms of polity are susceptible to abuse.

D. Because of sin, law is necessary to curb coarse outbursts and abuses. In good governmental polity, this law often takes the form of a separation of powers, a system of checks and balances, and due process.

E. Christians are commanded to honor rulers and obey authorities, ecclesiastical and secular, unless those authorities command them to violate the Word of God.

F. The Holy Spirit speaks through the Word of God, not human decision or majority vote.

G. Individual accountability is a necessary safeguard for good government. (The individual must be held responsible for his actions.)

H. Because of Stephanism, The Lutheran Church—Missouri Synod formed with a decentralized form of church government, featuring equal voting rights among clergy and laity in matters of the kingdom of the left-hand.

Polity in the LCMS has evidenced several alarming revisions over the past several years, revisions which appear to be happening at a faster pace presently. If the principles elucidated above are correct, then these revisions and trends—no matter who holds office and authority—are not good government.

A. 2004 Amendment A: the LCMS faces serious challenge to its separation of powers, where the President of Synod and the Board of Directors serve as a check and balance of one another. Amendment A, sent to congregations following the 2004 convention, sought to place the Board of Directors under the control of the Commission on Constitutional Matters, a commission appointed by the President of Synod.[8]

1. At issue was the wording of Article XI.F.2 of the LCMS Constitution.

[7] This paper in original form was first prepared at the request of the pastors of the Treasure Valley Circuit (#10) of the Northwest District, and presented at a winkel in Emmett, Idaho, on January 11, 2005. It has since been edited and updated in preparation for the South Idaho Pastors Conference.

[8] Bylaw 3.9.2.1(1) (formerly 3.75a) stipulates that the President of Synod appoints the five voting members of the CCM. The Secretary of the Synod, elected by the synod in convention, also serves on the CCM, but only as a non-voting member (bylaw 3.9.2.1(2), formerly 3.903b).

a. This article currently reads: "The Board of Directors is the legal representative of the Synod. It is the custodian of all the property of the Synod, directly or by its delegation of such authority to an agency of the Synod. It shall exercise supervision over all the property and business affairs of the Synod except in those areas where **it** has delegated such authority to an agency of the Synod or where the voting members of the Synod through the adoption of Bylaws or by other convention action have assigned specific areas of responsibility to separate corporate or trust entities, and as to those the Board of Directors shall have general oversight responsibility as set forth in the Bylaws."[9]

i. As written, it has been understood that Board of Directors, as the legal representative of the Synod, has supervision over all other boards and committees of the Synod. Thus the beginning of the third sentence reads, "It shall exercise supervision over all the property and business affairs of the Synod except in those areas where it has delegated such authority…."

ii. This is a standard authority of boards of directors in incorporated organizations.

b. Amendment A introduced the following proposed change: "The Board of Directors is the legal representative of the Synod. It is the custodian of all the property of the Synod, directly or by its delegation of such authority to an agency of the Synod. It shall exercise supervision over all the property and business affairs of the Synod except ~~in those areas where it has delegated such authority to an agency of the Synod~~ to the extent management authority and duties have been delegated by the Constitution, Bylaws, or resolutions of the Synod to other officers and agencies of the Synod or where the voting members of the Synod through the adoption of Bylaws or by other convention action have assigned specific areas of responsibility to separate corporate or trust entities, and as to those the Board of Directors shall have general oversight responsibility as set forth in the Bylaws."

i. The reason for the change was that proponents of Amendment A asserted that the historic understanding of this sentence was in error, and the boldfaced "**it**" above (see A.1.a) referred not to the Board of Directors, but to the Synod itself.

aa. Grammatically, this is possible, but unlikely. Follow the paragraph with its use of the word "it."

aaa. "The Board of Directors is the legal representative of the Synod. **It** is the custodian of all the property of the Synod, directly or by its delegation of such authority to an agency of the Synod." To what does "It" refer at the start of the second sentence? Clearly, "it" refers to the Board of Directors, not the Synod.

bbb. "…**It** shall exercise supervision over all the property and business affairs of the Synod…" Once again, clearly the "It" refers to the Board of Directors.

ccc. "…except in those areas where **it** has delegated such authority to an agency of the Synod or where the voting members of the Synod through the adoption of Bylaws or by other convention action have assigned specific areas of responsibility to separate corporate or trust entities, and as to those the Board of Directors shall have general oversight responsibility as set forth in the Bylaws." To be consistent with the rest of the paragraph, "it" would

[9] Constitution, Article XI.F.2, 2001 Handbook, boldface mine. This wording was adopted at the 1998 synodical convention as Resolution 8-03B.

refer to the Board of Directors once again. However, proponents of Amendment A assert that the referent of this "it" switches to the Synod, not the Board of Directors.

bb. The effect of Amendment A was to retain the Board of Directors as a custodian of property, but weaken its authority over other agencies of the Synod. In particular, Amendment A bolstered the claim of the Commission on Constitutional Matters that it has the final say on the interpretation of the LCMS Constitution.

aaa. This is clear from the proposed wording revision: "It shall exercise supervision over all the property and business affairs of the Synod except ~~in those areas where it has delegated such authority to an agency of the Synod~~ to the extent management authority and duties have been delegated by the Constitution, Bylaws, or resolutions of the Synod to other officers and agencies of the Synod…" If "it" now refers to the Synod and the new verbiage is accepted, then who will decide what management authority and duties have been delegated by the Constitution, Bylaws, or resolutions of the Synod to the Board of Directors? This will legally fall to the Commission on Constitutional Matters, appointed by the President of the Synod.

bbb. If that CCM opinion holds true, then the "legal representative of the Synod," the Board of Directors, does not have ultimate legal authority. The CCM receives that authority, while the Board of Directors is left with the legal responsibility (and liability!).[10]

ii. The Board of Directors is elected by the Synod in convention. The CCM is selected by the President of Synod. **If the presidentially-selected committee has ultimate legal authority, then there is no longer a separation of powers within the corporate structure of the LCMS. This violates Foundational Principles D and F, and infringes upon H; no matter who holds office, is this good government?**

2. Along with the grammatical argument above, proponents of Amendment A also argued that a church body is free to do this because of its First Amendment rights under the United States Constitution.

a. The BOD has maintained that corporate law in the state of Missouri requires that certain authority be delegated to a corporation's BOD, and that the CCM's opinion violates state law.

b. As this conflict between the BOD and CCM escalated, three lawyers submitted briefs in defense of the CCM's position.

i. One of these was well-known First Amendment attorney L. Martin Nussbaum, who wrote: "Based upon our review of the cases articulating the First Amendment Doctrine of Church Autonomy nationally, in Missouri, and in cases involving The Lutheran Church—Missouri Synod itself, we think it almost inconceivable that any

[10] "If the Board fails to reverse or correct such exercise within a reasonable time after discovery, it might thereby be said to have adopted the same as its own, through acquiescence…. The Board will be held legally responsible for all actions of Corporate Synod taken or acquiesced by it." Letter from the Bryan Cave Law Firm on behalf of the Board of Directors, April 5, 2004. (www.lcms.org/graphics/assets/media/Board_Of_Directors/BryanCaveLetter.pdf)

court would attempt to refashion the Synod's faith-based polity where it conflicted with provisions of the Missouri Non-Profit Corporation Act."[11]

ii. Nussbaum's argument was essentially the same one that he used in a losing cause on behalf of the archdiocese of Boston,[12] that the state should not interfere in the affairs of a church. In considering the Nussbaum argument, please remember the origin of the conflict between the BOD and CCM was the BOD's setting aside of CCM opinions, including Opinions 02-2296 and 02-2320 which stated that a member of synod may not be disciplined if he received prior permission from his ecclesiastical supervisor.

iii. Reading Nussbaum's opinion above, note that Nussbaum does not say that a church may legally ignore state law. He writes that it is "almost inconceivable" that the government would interfere, even as he admits that the changes conflict with state law![13]

c. Congregations received a letter regarding Amendment A signed by the chairman of Floor Committee 7 of the 2004 convention.[14] The letter was dated October 12, 2004, nearly three months after the floor committee was excused at the end of the convention.

i. The letter, featuring a series of questions and answers to explain the need for passage of Amendment A, included:

> **Question:**
> Is it legal to withhold "ultimate authority" from the Synod Board of Directors?
> **Answer:**
> Yes. The First Amendment to the United States Constitution requires that the government involve itself in the operation of a church only to the extent necessary to protect the interests of the government. The church is free to organize and govern itself as it deems consistent with its religious beliefs. These issues were studied in detail by Floor Committee 7 and the convention itself. The Synod's legal counsel provided detailed information concerning the requirements of Missouri law both to Floor Committee 7 and to the convention itself. (Italics mine)

[11] http://www.lcms.org/pages/internal.asp?NavID=4714, italics mine

[12] See page 4 and footnote 5 in "Paper #1: Foundational Principles." Nussbaum previously argued that lawsuits against the Archdiocese for negligent ecclesiastical supervision of pedophile priests could not go forward "because examining that relationship - between priests and their supervisors - in civil court violates the constitutional freedom of religion." ("Judge Rules Church Suits Can Proceed," Boston Globe, 2/20/2003, page A1)

[13] The other two lawyers who wrote letters at Nussbaum's request, Esbeck and Whitehead, support these conclusions.

[14] This letter notes that Resolution 7-21 received a two-thirds majority vote of the convention (see also Convention Proceedings, p. 159); indeed, because it proposes an amendment to the Constitution of the LCMS, it would have to receive a two-thirds vote in convention for the amendment to be forwarded to congregations. However, the two-thirds approval of 7-21 has been used by others as proof that Amendment A is a good thing: if two-thirds of the convention voted in favor, how can so many be in error? However, the bylaw changes requiring the amendment were contained in resolution 7-02A, which passed by only 55% (654) to 45% (541)—after a similar ratio voted against allowing the chairman of the Board of Directors address the convention (Proceedings, p. 153). Nearly half of the delegates voted against the content of Amendment A; two-thirds of those who voted (93 fewer delegates voted at all) for 7-21 voted to send the amendment to the congregations of the LCMS. This is not the same as an endorsement of the content therein.

aa. **According to Lutheran doctrine and practice, there is no set form of governance required by its religious beliefs. Therefore, the LCMS is perfectly free to adapt its polity to meet state requirements. To claim otherwise would be in violation of foundational principle A** (above). **Is this good government?**

bb. Why, then, would a First Amendment argument be invoked to promote passage of Amendment A? Because, citing an opinion from the Brian Cave Law Firm (see the firm's April 5, 2004 letter[15]), the Board of Directors maintained that Amendment A violates Missouri State Law. The Bryan Cave legal opinion includes the following pertinent statements:

aaa. "Perhaps the most fundamental of our Federally protected guaranteed civil rights are proclaimed in the First Amendment. One of those is freedom of religion. Under it, states are prohibited from interfering with peoples' right to worship as they wish. **It does not, however, make church organizations above the law with respect to secular matters, such as** property, finance, contracts, civil rights, **corporate governance** and intercorporate relations. When the LCMS elected to organize itself as a corporation under the laws of a state, it voluntarily accepted the structural rules and accepted norms of that state as they apply to secular matters. For instance, Missouri's nonprofit corporate law delineates the authorities and responsibilities of a board of directors, the extent to which normative corporate structure can be varied, and the exclusive means by which that may be accomplished" (page 2).[16]

bbb. "**It would be contrary to Missouri corporate law**, and well outside the established norms of most states, for a nonprofit membership corporation, including a religious corporation like the LCMS, to give final decision-making authority with respect to any important secular matter to any person or group other than the board of directors. **This is particularly true in the case of a group not elected by the Members,** not charged with the fiduciary duties of good faith and loyalty and not specifically identified in the Articles of Incorporation as possessed of such authority…" (page 2).[17]

cc. The counter-argument of Nussbaum and others was essentially that the LCMS need not worry about violating Missouri State Law, since, in Nussbaum's opinion, the government should have no jurisdiction in church polity.

ii. Please note the two arguments regarding Amendment A.

aa. The Board of Directors maintains that the structure of governance established by Amendment A violates Missouri State law.

bb. Neither the Nussbaum opinion, nor the October 12 floor committee letter refute this. Rather, both argue that the LCMS is free to establish whatever structure it desires, even in violation of state law, based upon the First Amendment of the United States Constitution.

[15]Available at www.lcms.org/graphics/assets/media/Board_Of_Directors/BryanCaveLetter.pdf.
[16] Ibid, page 2, emphasis mine.
[17] Ibid, page 2, emphasis mine.

iii. No one is arguing that Missouri State makes requirements which, if followed, would force one to disobey God's Word. **Therefore, should not the LCMS submit to the governing authorities of the State of Missouri, and ensure that its polity is consistent with that law? To do otherwise is to violate foundational principle E** (above), **not to mention Romans 13:1-7. No matter who holds office, is this good government?**

3. Despite all of the discussion regarding Amendment A, the outcome was pre-determined well before the February 16, 2005, voting deadline. The CCM opined that Amendment A changed nothing in the LCMS Constitution,[18] because the CCM believes that the "**it**" refers—and always has referred—to Synod, not the Board of Directors. Therefore the CCM ruled that the intent of Amendment A would take effect whether it was approved by congregations or not.[19] A presidentially-appointed commission made this determination regardless of the votes of congregations or the opinions of the Board of Directors, who were duly elected by those congregations in convention. If this opinion stands, then congregations have no way of overturning it because the CCM has ruled itself the final authority. If this opinion stands, then are the congregations of Synod in convention really the final authority in matters of polity? **This is an alarming example of disenfranchisement and loss of separation of powers, in violation of foundational principles D and H**. **No matter who holds office, is this good government?**

B. Dispute Resolution

1. Amendment A and its controversy emerged from an action of the Board of Directors in which the Board set aside several CCM opinions, including Opinions 02-2296 and 02-2320.

a. With these opinions, the CCM established that an individual member of Synod may not be held accountable for false doctrine and practice if he had prior approval from his "ecclesiastical supervisor," defined by the CCM as a district president or the President of Synod.

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[18] One might note that the original ballot sent to congregations was entitled:

"- Constitutional Amendment A –

(Places limitations on the authority of the Board of Directors, Art. XI F 2)"

This indicates that Amendment A would certainly change Article XI of the Constitution. In the Floor Committee's letter, Amendment A was retitled "To Amend Constitution Regarding Officer and Board Responsibilities."

[19] The amendment failed to be ratified by the necessary 2/3 vote of congregations. However, the CCM had already determined:

"Question: If proposed Constitutional Amendment A entitled "To Amend Constitution Regarding Officer and Board Responsibilities" as set forth in Resolution 7-21 of the 2004 convention of the Synod is not passed by a 2/3 majority vote, will the implementation or validity of any other resolutions or changes to the bylaws passed at the 2004 convention be affected?

"Opinion: It is the opinion of the Commission on Constitutional Matters that the proposed amendment to Article XI F 2 states more clearly what the existing language already means. Any amendment to the Bylaws which is consistent with the former Article XI F 2 would similarly be consistent with proposed Article XI F 2. As such, the answer to the question presented is that if the proposed Constitutional Amendment A entitled "To Amend Constitution Regarding Officer and Board Responsibilities" as set forth in Resolution 7-21 of the 2004 convention of the Synod is not passed by a two-thirds majority vote, it would not effect the implementation or validity of any other resolutions or changes to the bylaws passed at the 2004 convention." (CCM Minutes, October 6-8, 2004. http://www.lcms.org/graphics/assets/media/CCM/CCMOct.6-8-04.pdf, italics mine)

b. These opinions in turn emerged from the charges brought against Rev. Dr. David Benke for participating in a syncretistic service at Yankee Stadium on September 23, 2001. In fact, along with an interesting interpretation of 2001 Resolution 3-07A, Dr. Benke was exonerated on the basis that he had prior approval from Dr. Kieschnick for his participation.[20]

c. These opinions were not overturned by the 2004 convention, and thus remain in effect today.

2. Additionally, Resolution 8-01a was narrowly passed by the 2004 convention, rewriting the bylaws regarding dispute resolution. The new bylaws prevent laymen from bringing charges against members of Synod, and only permit a member of Synod to be charged if his ecclesiastical supervisor permits. Additional bylaw changes in the same resolution make discipline of a sitting synodical president nearly impossible**. This disenfranchises the layman, tips the balance of power to [selected] clergy, and runs a great risk of prohibiting due process, all in violation of foundational principles D and H. No matter who holds office, is this good government?**

3. These CCM opinions and Resolution 8-01a both maintain that an individual member of Synod is no longer accountable for his actions; he may do what he pleases if he has permission from his ecclesiastical supervisor. **This is in violation of foundational principles G and H (above). No matter who holds office, is this good government?**

C. Delegate Representation at Convention

1. In keeping with the historical practice of the LCMS, bylaw 3.1.2(a) [formerly bylaw 3.03 in the 2001 Handbook] reads, "Voting delegates shall consist of one pastor and one layman from each electoral Circuit. An electoral Circuit shall consist either of one or two adjacent visitation Circuits, as shall be determined by each District, on the basis of the following requirements: each pair of delegates shall represent from 7 to 20 member congregations, involving an aggregate communicant membership ranging from 1,500 to 10,000."

a. This bylaw preserves the equal representation between clerical and lay representation in synodical conventions.

b. This bylaw also attempts representation based upon the number of churches in a district, by determining the permissible size of a circuit which may send voting delegates.

2. However, bylaw 3.1.2(b) continues by saying, "Exceptions to these requirements and limitations can be made only by the President of the Synod upon request of a District Board of Directors."

a. 3.1.2(b) enables the President of Synod to add delegates to a synodical convention without any sort of guidelines or restrictions upon him, other than the request of a district board of directors.

[20] The final sentence to the conclusion of the dispute resolution panel's final decision concludes, "the Synod is precluded from taking any action to terminate the membership of a member who, when performing his/her official duties, follows the advice and counsel of the ecclesiastical supervisor designated by the Synod." ("Decision of Dispute Resolution Panel, The Lutheran Church-Missouri Synod, April 10, 2003," p. 13.)

i. For the 2001 convention, district boards of directors made 69 requests for exceptions to delegate representation. 56 were granted, resulting in 112 extra delegates to the convention. 13 requests were denied.[21]

ii. For the 2004 convention, district boards of directors made 94 requests for exceptions. All 94 were granted, creating an additional 188 delegates.[22]

b. The exception provided by the final sentence of bylaw 3.1.2(b) creates the possibility of a synodical president creating additional delegates from districts which he judges to be sympathetic to his agenda. **If abused, this is akin to gerrymandering and violates foundational principle D. No matter who holds office, is this good government?**

Conclusion

At present, with no reference to or criticism of specific persons in office, LCMS polity currently:

- Is moving toward a rebuff of Missouri State law on the justification that it doesn't have to obey state law.
- Is seeking to remove power from the Board of Directors, elected by Synod, and place it in the hands of the Commission on Constitutional Matters, appointed by the President of Synod.
- Allows an individual member of Synod to avoid accountability if he has the permission of his ecclesiastical supervisor.
- Authorizes the President of Synod to add extra delegates to the synodical convention.
- Permits a commission appointed by the President of Synod to set aside the votes of congregations.
- Prohibits a layman from filing charges against a member of Synod for false doctrine or practice.
- Gives final legal authority in the LCMS to the CCM, a commission appointed by the President of Synod.

These indicate a centralization of power, an unnecessary conflict with secular authority, a disruption of separation of powers, the possibility of gerrymandering, protection of wrongdoing and disenfranchisement of individual laymen and congregations. Some of these trends have been growing for years; others are quite recent. In any event, none of these are indicative of good governance; all are symptoms of bad government. It is imperative that the LCMS correct these concerns as soon as possible, or else the polity will only grow worse from here.

Addendum

Following the original presentation of this paper to the Treasure Valley Circuit (#10) of the Northwest District, events have continued in the LCMS which affect the polity and governance of this church body.

[21] Information provided by Rev. Dr. Raymond Hartwig, secretary of The Lutheran Church-Missouri Synod.

[22] Ibid. Those districts which increased their requests for exceptions were Atlantic (+2 over 2001), Eastern (+5), Florida-Georgia (+6), Indiana (+1), Iowa West (+1), Kansas (+2), Minnesota South (+2), Nebraska (+1), New England (+1), New Jersey (+1), Northern Illinois (+5), Northwest (+4), Oklahoma (+3), SELC (+1), South Dakota (+2), Southeastern (+1), Southern (+1), and Texas (+13).

Exercise of Executive Power

One of these events especially demonstrates the further centralization of power to the office of synodical president.

Bylaw 3.3.1.3 of the LCMS 2004 Handbook states that the President of the Synod may exercise executive power under the following circumstances:

> (j) He shall exercise executive power when the affairs of the Synod demand it and when he has been expressly invested with such power by the Synod in convention.
>
> (k) He shall be authorized, in the event that the affairs of the Synod require the exercise of executive power for a purpose for which there is no specific directive of the Synod, to exercise such power after consultation with the vice-presidents, the Board of Directors of the Synod, or the Council of Presidents, whichever in his judgment is most appropriate. Any member of the Synod shall have the right to appeal such action to the Commission on Constitutional Matters and/or the Synod in convention, whichever is appropriate. The Lutheran Church Extension Fund—Missouri Synod is exempt from this bylaw.[23]

Such executive power is rarely used, and obviously is to be used in rare circumstances. However, in a July 25, 2005 memo, the President of Synod exercised executive power, citing especially bylaw 3.3.1.3(k) with no reference to 3.3.1.3(j). His purpose was to direct the Board for Communication Services and the Executive Director of Human Resources "to hold in abeyance the filling of any staff position under the BCS until related Constitutional and Bylaw questions of consequence regarding such positions can be answered by the Commission on Constitutional Matters of the Synod."[24] In fact, the BCS had already extended the call in question, and this executive order prevented Human Resources from sending the documents.

In the memo, the President notes that "this exercise of executive power is not taken unadvisedly or lightly," so it is rather surprising that such a heavy sword would be wielded against the filling of a staff position—especially when the position in question was to be filled by an LCMS pastor in good standing.

The President's memo continues: "An intended result of this exercise of executive power is assistance to the BCS in fulfilling Bylaw 1.5.6(a):

> Members of boards and commissions and officers and executive staff of the Synod and its agencies shall be sensitive in their activities to taking or giving offense, causing confusion in the Synod, or creating potential liability."

Bylaw 1.5.6(a) is about regulations for agencies of the Synod, and in its plain sense indicates that such agencies are to police themselves. In this case, however, the President of Synod has stepped in.

Does this matter? Consider: the Board for Communication Services is made up of members who have been duly elected by the Synod in Convention and appointed by the Board of Directors, according to the Constitution. In filling a staff position with an LCMS member in good standing, they are going about their constitutional duties. In this case, the President of Synod has issued an executive order to prevent a call they have already issued. If members of the BCS disagree

[23] 2004 Handbook, p. 105 (italics mine).

[24] July 15, 2005 memo "Exercise of Executive Power" from Dr. Gerald B. Kieschnick to LCMS Board for Communication Services, c/o Mr. Ernie Garbe, Chairman; and Mrs. Barbara Ryan, Executive Director, LCMS Board for Human Resources.

with the President's executive order, they may appeal his action…to the CCM, which, you will recall, is appointed by the President of the Synod.

This action sets the precedent that the President of Synod has the power to control the hiring/calling of all staff positions of LCMS boards and commissions. Such agencies may not unilaterally hire members although the bylaws empower them to do so, because the President has already demonstrated that he may and will use executive power to block the agency's action, even though a September, 1972, CCM "Opinion on Presidential Authority" says that such action should be limited to "situations which, in his estimate, are so important that the exercise of his ultimate constitutional responsibility is required."[25] The President of Synod has the privilege of deciding when to exercise this authority; but if staff positions now merit the use of "ultimate constitutional responsibility," one wonders what is next.

Is this good government?

The CCM and Congregational Constitutions

Minutes from the June 30, 2005, conference call meeting of the CCM reveal the following item of business.

In Opinion 05-2424, the CCM ruled that a constitution submitted by a congregation may be declined by a district if it includes a statement that prohibits women from teaching an adult Bible class attended by men. Quoting a 1983 CCM opinion, the CCM notes that such a statement "goes beyond [the Synod's] present confessional stance, and is therefore unacceptable."[26] The next question in 05-2424 indicates that the constitution in question was modeled after a similar constitution that received approval 80 years ago. (One can only conclude, therefore, that in the CCM's view the confessional stance of the Synod is shifting.) This congregation has also submitted revisions to its constitution. The CCM has ruled that a district may not only evaluate the revisions for acceptability, but should review the entire document. Please consider two quotes from 05-2424:

- "In its January 9-10, 1987 Opinion Ag. 1796A, the Commission also stated, 'when error is discovered, it is contrary to all logic and Christian expectation to suggest that it not be corrected.'"

- "Given these prior statements of the Commission, not only should the complete documents of a congregation come under review when amendments are made, but any provision previously approved that is not in agreement with the doctrine and practice of the Synod today should be given attention by a constitution committee."[27]

The CCM, which "exists to interpret the Constitution, Bylaws, and resolutions of the Synod"[28] (not determine doctrine and practice), has opined that a church which prohibits women from having authority over men in Bible class is in doctrinal error, because it is not in agreement with the current, apparently-changing, confessional stance of the Synod today. Congregations are expected to conform their constitutions to the current doctrine and practice of the Synod, which is apparently determined by…the presidentially-appointed CCM.

Is this good government?

In Conclusion

[25] Quoted by Dr. Kieschnick in his July 25 memo, "Exercise of Executive Power." Italics mine.
[26] CCM Minutes, June 30, 2005. Italics mine.
[27] CCM Minutes, June 30, 2005. Italics mine.
[28] Bylaw 3.9.2.

The crisis within the LCMS continues to escalate as the polity continues to centralize—not just from congregation to Synod, but specifically to the President of Synod. This power shift has long been a matter of concern in the LCMS, and the movement of power to the office of President was apparent during the administration of Dr. A. L. Barry. Although Barry made little use of the enhanced power given to his office, it was commonly repeated that the Synod is advisory and thus should have no control over local practice. In 2000, the Northwest District alone featured no less than nine overtures referring to the advisory nature of the Synod, and passed three resolutions about the same.[29] Another example of such concern, written in a letter of praise for the efforts of Daystar, is this:

> "Under synod's constitution, the synod is advisory to congregations. But under Dr. Barry's administration, the national synod has already given the president of the national church the authority to remove presidents of districts from office. These presidents were elected by the local district in convention, but now they hold office as long as they honor the party line of the national administration. So much for congregational authority."[30]

The author wrote in reference to a theoretical situation, because Dr. Barry never removed a district president from office. One would think his concern would be echoed by similar voices today, when a synodical board (in reality, not just theory) may only act as long as it honors the direction of the synodical president—so much for convention authority! However, the website of Jesus First, a close ally of the Daystar group which was formed to oppose Dr. Barry, currently features an article exhorting us to obey our church leaders, even if we "have issues" with them.[31] Such an exhortation was curiously missing from the website during Dr. Barry's tenure. The attitude is at odds with the fifth affirmation of Jesus First:

> "We affirm the power of the Holy Spirit as the means of establishing and preserving true unity in the church – Eph 2:14-22; 4:3-6. We reject attempts to use Synodical resolutions, dramatic statements, or institutional mandates to coerce uniformity and exercise control."[32]

Should one's polity change with the person holding the office?

Is this good government?

Pastor Tim Pauls
Trinity, 2005

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[29] Indeed, the Northwest District convention in 2000 adopted Resolution 4-01A, "To Memorialize Synod to Revise Bylaw 4.17b;" 4-02, "To Affirm the Present Role and Structure of Districts;" 4-03A, "To Memorialize the Synod to Overrule CCM Ruling of 9-14-9." The fifth whereas of 4-01A warned that the current bylaws, especially bylaw 4.17b "can lead to an unwanted centralization of power and the danger of coercive control." In addition, the convention also passed Resolution 4-07A, "To Memorialize the Synod to Revise Bylaws 2.27 and Bylaw 3.105 (Procedure for Handling Written Complaints against Synod President)," calling for greater accountability for the President of Synod because "the Synod President is also capable of persistent offensive conduct or of a persistent condition that could lead to his expulsion from the Synod." The provisions of 4-07A were not adopted by the Synod in convention for the 2001 Handbook, although the intent (that the Synodical President be accountable to the Missouri District President and other individuals), was struck down by the CCM early in the Kieschnick administration.

[30] Pastor Arne P. Kristo, quoted at http://www.crossings.org/thursday/Thur0420.htm. It is worth noting that Dr. Barry never exercised this power.

[31] Jonathan Coyne, http://www.jesusfirst.net/2005August01.htm

[32] http://www.jesusfirst.net/affirm.htm

This paper is submitted with loving concern for The Lutheran Church—Missouri Synod and her continuing proclamation of the Gospel. Any factual corrections will be gladly received and made known. Any attempts to reduce this to a matter of personal opinion will be met with a request to prove factual error.