St. Martin's Evangelical Lutheran Church and Northwestern Lutheran Academy versus the State of South Dakota

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THE GRACE OF GOD IS DISPLAYED IN AMERICA'S COURTROOMS

by

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ST. MARTIN'S EVANGELICAL LUTHERAN CHURCH AND NORTHWESTERN LUTHERAN ACADEMY VERSUS THE STATE OF SOUTH DAKOTA:

THE GRACE OF GOD IS DISPLAYED IN AMERICA'S COURTROOMS

Someone once said that the only sure thing in life, besides death, is taxes. Whoever said that must have been a very wise person indeed, because it seems to be true that every law-abiding individual or group of individuals must pay taxes in some form or another. Except churches in America, that is! Since 1791, when the Bill of Rights was ratified by the United States and attached to the Constitution, churches in this country have not had to pay property taxes, income taxes, sales taxes, or any other kinds of taxes. Their tax-exempt status has been their almost-exclusive privilege for a long time.

That may be changing, however, because in the last twenty years the freedom from taxation that American churches enjoy has received severe testing. Up until 1960 there was no specific discussion of religious tax exemption. But secular influences, unpopular religious campaigns, instances of tax fraud under religious guises, and the bureaucratic tendencies of government have combined to make tax exemption an explosive issue today. The simple need of governments for more revenues has also contributed. The result is that a large number of church-state controversies over tax matters have gone to court. "Basic federal and state nonprofit exemptions of most religious organizations are not presently at issue,"[1] today's experts assure us. Yet in gray area situations there lately has been an unprecendented number of court cases and hot debates on the matter of religion and taxation.

This paper is concerned with one of those recent court cases that

dealt with a supposedly gray area of the tax law. The case eventually assumed the name St. Martin Evangelical Lutheran Church and Northwestern Lutheran Academy v. the State of South Dakota, and it is highly deserving of some study, for several reasons. For a number of months it was the most significant church versus state court case in the land, first of all. Its outcome saved several American church bodies from spending millions of dollars each year in new taxes. In addition, the central figure in the case was the Wisconsin Evangelical Lutheran Synod (WELS), whose activities are always worth chronicling. And besides, the case settled quite a few very important issues, not just the frontline concern over whether a church-related school must pay unemployment taxes for its staff. What are those issues? Please read on!

I. The New Ruling from Washington.

The law around which St. Martin's and NLA v. South Dakota revolved was and still is known as the Federal Unemployment Tax Act (FUTA). It appeared originally as Title IX of the epochal Social Security Act of 1935 -- one of the most complicated and far-reaching laws ever to pass Congress. To cushion future depressions, Title IX provided for a cooperative federal-state unemployment insurance. The Act imposes an excise tax on wages paid by all "for profit" employers, which moneys are then placed into an unemployment benefits fund. Over the years the Social Security Act has undergone a series of amendments that progressively have expanded coverage of America's workforce. Each state has also enacted its own unemployment tax law, following federal guidelines. Then, in response to each federal amendment, the 50 states have also amended their own corresponding statutes in order to retain their federal certification and benefits.[2] Obviously the incentives are great for the states

to adopt all federal amendments to the Social Security Act. Today all states, including South Dakota, have adopted so-called "mirror images" of the required provisions of the Act.

The Internal Revenue Code of 1954 still had a broad examption policy as as far as the Title IX (later FUTA) was concerned. In 1960, however, the cutting down of examptions began in earnest. That year's IRS Code said that only the services performed for nonprofit organizations were not to be included within each state's unemployment program. In 1970 FUTA was amended by the addition of Section 3309 (B), which changed the government's policy dramatically. It required state coverage of nonprofit organizations and specifically exempted only three classes of service, saying,

> This section shall not apply to service performed --
> (1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which operated, supervised, controlled, or principally supported by a church or convention or association of churches;
> (2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;
> (3) in the employ of a school which is not an institution of higher education. (See also Appendix A.)

Congress again amended FUTA in 1976. It cut out the elementary and secondary school exemption contained in Section 3309 (b)(3) above. As required, states like South Dakota followed suit and repealed subsection (3) of their mirror image statutes. Subsections (1) and (2), the ones which dealt with religious employment in particular, remained unchanged. Afterwards the federal government was bombarded with questions about the amendment, so that the administrator of the Unemployment Insurance Service of the Department of Labor sent out two memoranda to clarify things for all state unemployment agencies. The first, released on December 7,

1976, advised that the deletion of Section 3309 (b) (3) did "not affect the optional exclusion in (b) (1)" for "church-related schools." Then on February 2, 1977, another memorandum to the states "made it clear that the determining exemption for religious organizations is simply to determine 'whether the workers in question are employed by a church.'"[4]

In early 1978, however, the American economy took one of the decade's many downturns. Unemployment started to rise again, so the Labor Department, in need of more funds for its insurance coffers, reversed its field. In March the Solicitor of Labor discussed how Section 3309 (b) (1) of FUTA might be applied to church elementary and secondary schools. She stated that she would be comfortable with any of three positions regarding that subsection but that the best position would <u>not</u> exempt church-related schools.[5] Secretary Ray Marshall of the Labor Department adopted the Solicitor's viewpoint almost immediately. On April 18, 1978 he wrote a public letter to the General Secretary of the United States Catholic Conference, the Most Reverend Thomas Kelley, saying that the 1976 repeal of Section 3309 (b) (3) of FUTA was

> clearly intended to result in State coverage of church-related schools, whose employees constitute over 80 percent of the employees of all nonprofit schools. In light of the repeal of 3309 (b) (3), we think the only services performed in the schools that may reasonably be considered within the scope of the exclusion permitted by 3309 (b) (1) are those strictly church duties performed by church employees pursuant to their religious responsibilities with the schools.

On May 30, 1978, the Department of Labor made its policy change official. The Secretary ruled that neither 3309 (b)(1)(A) or (B) nor 3309(b)(2) was applicable to church-run schools. He notified the states, and they took the necessary steps for the collection of unemployment taxes from church-related schools.

II. The Appeal by the Schools of the Wisconsin Synod.

The new, non-exempt tax status had application to the schools of all of the religious denominations in the United States. One of those denominations, of course, was the Wisconsin Evangelical Lutheran Synod. After the Labor Department's pronouncements of April and May of 1978, the synod's officials decided that they had no choice but to resist. The WELS Board of Trustees believed that too much would be lost if synod schools simply bowed to the Labor Department's new demands and paid unemployment insurance tax for all their teachers.

One reason to resist was financial. Paul Unke, fiscal officer of the WELS in 1978, estimated a loss of $500,000 or more to synod congregations in the first year of FUTA coverage![6] That sum, it was felt, could be considered a nearly total loss because teachers in the WELS would rarely receive any benefits from their state's unemployment insurance. How often, it was asked, is a WELS teacher laid off or fired? The Board of Trustees also concluded that the government was assuming the the right to determine the clergy of the synod. A 1978 Mailgram from the Department of Labor to its regional administrators had indicated that synod teachers were not to be regarded as "ministers of the gospel," only as "teachers." As such, they were no different than any public school teachers in the United States, and therefore they were to be covered by FUTA. That kind of government interference deserved a battle, the Board decided. It also foresaw a possible domino effect, with the change in tax exemption leading to changes in teacher housing allowances and the draft status of teachers.[7] Finally, the WELS Trustees feared that, should the new ruling on FUTA stand, the government was redefining the purpose of WELS schools. The Dept. of Labor was labeling synod schools

as existing primarily for education, while the WELS disagreed. Rev. Elton Huebner, Executive Secretary of the Board of Trustees, in testifying at an IRS hearing in December, 1978, defined the purpose of WELS schools as follows:

> All our schools, elementary and secondary, are religious in their very nature. Throughout the 128 years of its existence, our Synod has consistently placed the highest emphasis on Christian education through its entire school program. It is our conviction that religion and education are inseparable in the total training of the youth. The members of our congregations spend millions of dollars every year to erect and maintain their church-operated schools with the stated objective that these schools shall be a vital part of the work and the mission thrust of the church.[8]

It did not take long for synod officials to realize that there was more at stake besides half of a million dollars per year. The law had the potential in many ways to affect the status of 1455 teachers in 359 parochial schools in 26 states. In addition, the synod at the time had 19 area high schools with 300 teachers, many of whom would also be touched by the new use of FUTA.[9] Consequently the WELS assumed the attitude that it was prepared to spend substantial amounts of money to fight the tax. That amount, as it turned out, was indeed quite substantial. Between 1978 and 1981 the synod's Milwaukee law firm, von Briesen and Redmond, alone received from the synod over $140,000 in fees!

But where were the synod's efforts and funds to be directed? That was the next big question which demanded an answer, one that was discovered only after several months of widespread litigation. Individual WELS churches with schools as well as groups of churches made appeals to the unemployment compensation directors in several states, with varying degrees of success. The states of Michigan and Texas refused to collect taxes from their church-related schools from the start, so they presented no problems. In Wisconsin the Labor and Industry Commission held several hearings and ruled in March of 1979 that the WELS elementary schools were

not liable to coverage. But in other states the response from unemployment bureau appeals referees and from lower court judges was not as favorable. One of those states was South Dakota.

Like the other 50 states, South Dakota's lawbooks contained a mirror image of the Federal Unemployment Tax Act, including a portion identical to Section 3309(b) of FUTA. When Subsection (3) was dropped from Section 3309(b) in 1976, South Dakota did the same with its corresponding paragraph. Then, when Sec. Marshall announced that church-schools were no longer exempt under that section, the South Dakota Dept. of Taxation set the wheels in motion to begin collecting from those schools in the state. As a matter of fact, the department began notifying schools well before the new interpretation from Washington was formally released. In January of 1978 first notice of the new policy was sent out to all newly covered church-run schools -- that is, to those with four teachers or more. Two WELS schools were included in that group: St. Martin's of Watertown and Northwestern Lutheran Academy (NLA) of Mobridge, South Dakota. That first notification set off a chain of events that was both exciting and aggravating for both schools.

St. Martin's in 1978 was by far the largest WELS congregation in the Dakota-Montana District with almost 1000 communicant members. Its Christian day school had 140 pupils and 8 teachers. By coincidence, the chairman of the congregation was an employee of the South Dakota Dept. of Taxation. He was also a close friend of Mr. Daniel Boone,[10] who was the local representative of the Unemployment Tax Division for the state and who also may or may not have sold coonskin caps on the side. In January of 1978 the chairman explained to St. Martin's church council what the new interpretation of South Dakota's unemployment tax law would mean to the congregation. He believed that the congregation had no choice

but to pay the unemployment tax for its teachers, so the council voted to do just that. Soon afterward Daniel Boone went to visit St. Martin's and pioneered a program for the congregation to pay the tax, which it subsequently paid.[11]

It was at that time that Mr. Paul Unke phoned from the synod's fiscal office and informed the pastor of St. Martin's, Rev. Elwood Habermann, that the synod was going to fight to overturn the unemployment tax ruling. WELS Attorney E. Thomas Schilling of von Briesen and Redmond then arranged a meeting with Pastor Habermann. He urged the congregation to make no further payments under any circumstance. During the next several months Pastor Habermann saw both Schilling and Boone several times. Daniel Boone would visit St. Martin's, possibly with an over-sized Kentucky rifle on the gunrack of his pickup truck, to inform the congregation of the amount of penalty it would be assessed if its non-compliance to the law continued. He even told Pastor Habermann that he most likely would end up in jail if he persisted in his stand. At the same time Schilling came to South Dakota and acquired one court order after another to stop action threatened against the Watertown church.[12]

Northwestern Lutheran Academy received similar instructions from the South Dakota Unemployment Tax Division as well as from the WELS' Milwaukee law firm. President Daniel Malchow of NLA was ordered by the state in May of 1978 to pay the tax. Monthly notices indicating payment amounts were sent to the school. On legal advice, however, NLA never replied except to explain that the matter was in litigation.[13] President Malchow, too, was threatened with a contempt of court citation, but to no avail.

By the summer of 1978 the Wisconsin Synod Board of Trustees had conferred with its lawyers and concluded that South Dakota would be the

best site for a full-scale attack on Ray Marshall's FUTA ruling. Two factors influenced their decision. For one thing, the Board felt that South Dakota would be a friendly climate to appellants such as St. Martin's and NLA. The state's people, including its media, seemed to be interested in the plight of common citizens.[14] Secondly, the von Briesen and Redmond law experts knew that a case would move most quickly to the Supreme Court through a state of relatively small population like South Dakota.[15] A legal case taken to the United States Supreme Court can be launched from either a district federal court or a state court, and the docket of the Supreme Court of South Dakota was much less crowded than that of any other launching pad to Washington. Consequently the WELS stepped up its efforts to get St. Martin's and NLA into South Dakota's courts. The synod and its lawyers had a surprising forecast for those two schools: "We expect to lose!"[16] But that was only their prediction for the lower level courts. The over-all battle plan from the outset was to take the appeal to Washington and win! The WELS believed that its chances for defeating the new FUTA ruling were very good!

III. The Hearing in Aberdeen.

The first authority to which the synod took its appeal was the South Dakota Department of Labor -- Unemployment Insurance Division. That was the office from which Daniel Boone and others were demanding payment. As just noted, the synod expected to have its appeal turned down. The State of South Dakota was not necessarily unsympathetic to the WELS appeal, but it was feeling a great deal of pressure from the U.S. Department of Labor. South Dakota had received "advice directly from Washington of the possible loss of federal certification in the event they did not comply and impose the unemployment tax on all parochial schools."[17] A loss of

federal certification would have cost the state millions of dollars. Already the state's Dept. of Labor was reeling from an expensive defeat in the U.S. Supreme Court on a different case. Another such loss of revenue, the state's leaders felt, would have been disastrous.

Attorney Schilling of von Briesen and Redmond requested and quickly received permission for a hearing before a referee for the Unemployment Insurance Division. It was scheduled for July 19, 1978, to be held in Aberdeen. The referee who listened to the appeal was Don Kattke, Administrative Hearings Officer. He made the opening remarks at Aberdeen in behalf of the state. When he was finished, Attorney Schilling made introductory remarks on the basis of the brief he had submitted to Mr. Kattke. Schilling then interrogated four witnesses he had brought along. They included Principal Rolland Menk of St. Martin's, Rev. Huebner of the WELS Board of Trustees, Mr. Douglas Kluck -- Secretary of St. Martin's council, and Pres. Malchow of NLA. After their testimony, closing statements were made by Schilling, Kattke, and the attorney for the state.

The testimony which Attorney Schilling presented at the first hearing for St. Martin's and NLA was extremely important. Both sides realized that what was presented in Aberdeen would follow the litigation through all the court levels, even to the U.S. Supreme Court. Because of its bearing on later rulings, a short summary of the position ot the WELS schools, as derived from their brief to Mr. Kattke, seems appropriate.

The Appellant's Brief began with a statement of the purpose both of St. Martin's School and of Northwestern Lutheran Academy, a four-year preparatory school of the WELS. The law in question was presented next, along with the Department of Labor's interpretation of it. (In South Dakota's statutes the mirror image of FUTA Section 3309(b) was called

Section 61-1-10.4.) That was followed by the Argument, consisting of six points set forth on nineteen pages. We summarize:

I. Additional facts.

Wisconsin Evangelical Lutheran Schools continue to be exempt as part of either the church exclusion (Subsection 1, A) or as organizations which are operated primarily for religious purposes and are operated, supervised, controlled, or principally supported by a church or convention of churches. (Subsection 1, B)[18]

The main thrust of Argument I was that schools like St. Martin's and NLA should be considered "church" and "religious" in nature. Those who teach in those schools, it said, are "called" into the "ministry," whether it is the "pastoral ministry" or the "teaching ministry." This introductory argument concluded by stating that

the WELS believes that its schools are not a distinct entity serving merely a secular educational function; the Synod believes its schools are a part of its religious mission and are a vital part of the church.[19]

II. Congressional intent is not an issue.

The next argument recounted the history of FUTA.

In 1976, when FUTA was amended to eliminate the exclusion for "service in the employ of a school that is not an institution of higher education," no Committee or Conference Report made an explanation of its reasons. How can it be said (as Secretary Marshall's April 18, 1978 letter to Rev. Kelley phrased it) that Congress "clearly" intended to include parochial schools within the tax coverage of FUTA?

III. The Internal Revenue Service includes parochial schools within the definition of the word "church."

Various IRS rulings, from 1954, 1969, and 1977 (two) were cited, all of which used the word "church" in the broad sense, that is, including their schools as well.

IV. Synod schools are primarily operated for religious purposes.

Four U.S. Supreme Court cases were introduced to show that the rationale of the Court in the past was

that the parochial schools were an integral part of the church, and

that religion was so pervasive in the schools that any secular purpose was completely overshadowed by the religious elements.[21]

Two of the cases received extensive treatment. The first was Lemon v. Kurtzman, a 1970 case which raised questions about Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes tripped on one of tests of excessive government entanglement with religion, so they were declared unconstitutional.[22] The appellants in St. Martin's and NLA v. South Dakota drew special attention to Justice William O. Douglas' opinion on Lemon v. Kurtzman. He wrote that

> it is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind.

The other landmark Supreme Court case which the WELS brought out in Argument IV was more recent, Catholic Bishop of Chicago v. National Labor Relations Board (NLRB). In 1977 the Archbishop of Chicago was declared by the NLRB to be guilty of unfair labor practice because he had refused to negotiate with unionized Catholic school teachers. The NLRB's verdict, however, was overturned by the Supreme Court on the grounds that it had taken jurisdiction in a "completely religious" and not just "religiously associated" conflict.[24] The point of the WELS raising that case was to bring up the Supreme Court's detailed discussion of "the complete permeation of religious doctrine in every subject taught in a parochial school."[25]

V. Synod schools are operated, supervised, controlled, or principally supported by the church.

Here the appellants very directly stated that NLA and St. Martin's fit into the exemption described in FUTA Section 3309(b)(1)(B) and in South Dakota Statutes Section 61-1-10.4(1)(B).

VI. The imposition of the unemployment compensation tax on parochial schools has the effect of entangling the state in church affairs.

The final argument of the WELS schools before the Aberdeen appeals referee was the only one which did not direct attention toward the statute itself. Instead it cited the First Amendment to the Constitution, which says in its pertinent part:

> Congress must not interfere with freedom of religion, speech or press, assembly, or petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... (See also Appendix B.)

Argument VI raised the possibility that a teacher might be "discharged for teaching contrary to Synod doctrine and belief."[26] That teacher might request unemployment benefits, in which case a government examiner would have to investigate whether the teacher really did teach false doctrine. That, it was argued, was unconstitutional government entanglement in religious affairs. An examiner in such a situation could not avoid it! Such a problem could be skirted, Argument VI concluded, only if all government regulation of parochial schools was avoided.

In its Aberdeen approach to the FUTA difficulty, the synod made apparent its strategy for all of its litigation. It could have rested its appeal on Subsection 2 of Section 3309 (b). In fact, an effort was made by Attorney Schilling to prove that male and female teachers do, indeed, qualify for exemption under the terms "ministers of the church and members of religious orders." But that was not the primary thrust of the appeal. Nor was the protest of the government's violation of the First Amendment's establishment clause a matter of primary concern, although government entanglement in religion was mentioned on a secondary level. The primary argument, in fact, revolved around the first exemption allowed by Congress. In both FUTA's Section 3309(b) and in South Dakota's Section 61-1-10.4 that exemption from unemployment tax was applied to service performed in

the employ of

> (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

From the very beginning until the very end of the process of its appeal, the WELS aimed to prove that Labor Secretary Marshall's narrow interpretation of the term "church" was contrary to the broad interpretation used by the IRS and defined in numerous rulings by the U.S. Supreme Court. Above all, it was argued that the narrow interpretation of "church" had never been employed by the Wisconsin Evangelical Lutheran Synod in outlining the relationship between its churches and their schools.

Unfortunately (except to the WELS people who were aware of the long-range possibilities) Don Kattke of the state's Unemployment Insurance Division could not agree with the appellant's argument. As expected, he ruled against St. Martin's and NLA. For reasons that were mentioned earlier, he felt compelled to take the Labor Department's approach to the statute. He was quite blunt with his ruling:

> The Referee is of the opinion that the primary purpose of the schools is education and they are not exempt under this section... The fact remains that the students are in school to receive an education and education, not religious purposes, is therefore the primary purpose of the schools.[27]

When Referee Kattke handed down his decision on September 15, 1978, two things were readily apparent to the synod people who were present. One was that Mr. Kattke was nearly forced into ruling as he did. The other was that he believed that the WELS schools had a very strong case. His parting remark to their representatives at Aberdeen, off the record, was "You will appeal, won't you?"[28] The answer that he received was, "Of course!"

IV. The Surprise in Hughes County and Again in Pierre.

At the same time as the next WELS appeal was being drawn up, an

unusual event took place. In the summer of 1977 the synod in convention had voted to close its fourth preparatory school, NLA of Mobridge. In the summer of 1978 most of the faculty and student body moved to Prairie du Chien, Wisconsin, the home of the synod's new prep school, Martin Luther Preparatory School, while the doors of the old academy in Mobridge were locked up permanently. That meant that one of the parties in the WELS appeal of the FUTA ruling was no longer in existence!

The closing of MLA and an accompanying oversight created a potential disaster for the synod's litigation plans. President Malchow of NLA has described the problem in this way:

> We were insisting that our people would not be clamoring for unemployment comepnsation... Our (WELS) people are not fired. "We're just in a different situation," we were saying. But then the Academy closed! ... We made provisions to take care of our janitors and everybody else down the line, but we did not do anything about the cooks. The thought had not occurred to us. And one of those cooks applied for state unemployment compensation! It could have been a very embarrassing situation![29]

Somehow NLA was able to solve the problem without ruining its FUTA appeal. The closure committee for the school decided to pay its cooks for the last four months of 1979, based upon the previous year's wages. The cook who had filed for unemployment compensation agreed not to apply for any more. She even sent the money she had received back to the state. Meanwhile, the unemployment office in Aberdeen billed NLA for the amount of compensation the cook had received. On legal advice that bill was paid.[30] It required some fancy footwork, but the difficulty with the cook eventually passed.

With their sights set upon an eventual hearing before the U.S. Supreme Court, the Wisconsin Synod and the two Dakota schools in late 1978 worked on their appeal of the Aberdeen referee's decision. They were directed to the Hughes County Court of South Dakota's Sixth Judicial District.

In December the two schools presented their appeal. (Although it was closed, NLA was still legally a part of the appellant side and would remain so.) Attorneys for the state responded, and the schools were then given a chance to reply.

What the WELS schools presented to the circuit court was almost identical to their previous presentation at Aberdeen. The only difference was the addition of a new argument which stated that "female teachers are exempt from unemployment tax coverage because they are members of religious orders."[31] At Aberdeen the attorney for the state had jumped on the WELS handling of its female teachers. He wondered how women could be called on the same basis as men when they could not vote, when they often married and left their called positions, and when they supposedly made no life-long commitment to the church.[32] South Dakota's attorney had tried to prove that women teachers in the WELS were no different than public school teachers. So at the circuit court the synod pointed out that its female teachers do have a slightly different status than its male teachers. Yet it hastened to add that

> its female teachers were performing an essential religious function within the ministry of the church and should be exempt from the unemployment compensation tax as "members of a religious order" under South Dakota statutes, Section 61-1-10.4(2).[33]

Judge Robert A. Miller of the Highes County Circuit Court returned his decision on March 19, 1979. Very surprisingly, he reversed the decision of the Aberdeen appeals referee and ordered that NLA and St. Martin's were not liable to FUTA. Judge Miller explained that the appeals referee's conclusion that "church" was synonymous with "house of worship" was erroneous, since it was untenable in the context of the statute.[34] With the proper definition of church in mind, he said, it was correct to say that parochial school teachers are employees of a church. Judge Miller also

pointed out that

> the congregation of St. Martin's Church supports public schools through taxes, and the only rational reason that it would bear the additional burden of operating and financing a public school would be for religious purposes.[35]

As far as Northwestern Lutheran Academy was concerned, Judge Miller wrote that since "the Academy recruits and trains ministers for the church, it operates exclusively for religious purposes."[36]

The Sixth Circuit Court's favorable ruling was quite a shocker to the lawyers and observers on both sides, and it changed each side's outlook considerably. Suddenly the State of South Dakota had to become the appellant on the next judicial level if it wished to collect taxes from the two WELS schools. Meanwhile, the Wisconsin Synod was infused with new optimism. Its lawyers deduced that in the next court, the state's Supreme Court, the decision would also be in their favor. In May of 1979 Attorney Thomas Schilling had a cheery message for his colleagues:

> The entire unemployment tax issue appears to have taken a turn in which the Department of Labor is on the defensive to the point where it may reverse its decision and the case may never have to go to the U.S. Supreme Court. It appears that the Supreme Court is hesitant to take on a constitutional issue involving parochial schools.[37]

Sad to say, Attorney Schilling was proven wrong on both points; the battle was to continue for two more years. The WELS had reason for optimism in mid-1979, but a quick resolution of the case was not to be.

The State of South Dakota and its Department of Labor did appeal Judge Miller's decision, so Pierre, the capital of the state and the home of the South Dakota Supreme Court, became the next scene of action. The case was argued before the court there on October 10, 1979. St. Martin's and NLA had had a winning appeal on the circuit court level, so it was not altered significantly for the highest state court. Nor was the argument of the state much different than it had been previously. The state did make

one change, though. It arranged for Attorney General Mark Meierhenry to present its case. Perhaps it was an effective change, because an unexpected verdict was returned. After all the optimism expressed by the WELS side, the South Dakota Supreme Court reversed the judgment of the circuit court by a vote of 4 to 1, submitting its decision on March 26, 1980.

In defending its actions the state court emphasized several factors which in prior hearings had not received as much stress. It claimed that the background of the repeal of FUTA's Section 3309(b)(3) showed a clear intent by Congress to end FUTA's exemption for parochial schools. The reports of the House Ways and Means Committee were proof of that intent.[38] The court also pointed to a Senate report on the amendment, which estimated

> the total number of new employees who would be covered as a result of the repeal of Section 3309(b)(3) at 242,000. This figure approximates the total number of teachers in all non-profit elementary and secondary schools.[39]

As to the First Amendment question, the State Supreme Court eliminated it with an astounding seven pages of argument. Two of the chief tenets of that section deserve repetition.

> Respondents (St. Martin's and NLA) do not outline any specific religious beliefs on practices that conflict with inclusion of their school personnel in the unemployment compensation program... (Thus) they fail to meet their burden of demonstrating a violation of the Free Exercise Clause.[40]
>
> Further, coverage of parochial school employees under the unemployment tax law is permissible because it is justified by compelling governmental interest. This interest is to provide a system of income maintenance for unemployed individuals so that they have the resources for food, shelter, and other necessities of life...[41]

Those were the two outstanding reasons that the South Dakota Supreme Court expressed in behalf of its ruling. All of them, the WELS lawyers judged, were rather weak. So despite their setback, Attorney Schilling and his cohorts left Pierre with an optimistic curiosity about what the highest

court in the country might have to say about St. Martin's Evangelical Lutheran Church and Northwestern Lutheran Academy v. the State of South Dakota.

V. The Appeals by Other Churches in Other States.

It has been mentioned that Labor Secretary Marshall's ruling covering church-run schools under FUTA affected all of the church-run schools in America, not just Wisconsin Synod schools. Except in a few maverick states, all of America's church-run schools were told to pay unemployment compensation taxes, and many churches besides those of the WELS went to court. School officials of the Lutheran Church - Missouri Synod (LC-MS) estimated that their new tax payments would be about $3 million per year. Roman Catholic officials predicted that theirs might run as high as $15 million per year.[42] Churches in both church bodies made appeals in a number of states.

A few of the appeals kept pace with the Wisconsin Synod's South Dakota appeal as far as climbing the judicial ladder was concerned. In June of 1980 the Supreme Court of North Dakota affirmed the judgment of one of its district courts that had upheld the exemption from the tax belonging to one of its Lutheran churches. Three months later the Fifth United States Court of Appeals also set aside the Ray Marshall-inspired requirement to pay the tax. In that case, appeals of Marshall's ruling on FUTA had been made by the States of Alabama and Nevada in behalf of their parochial schools![43] And almost a year earlier, in October, 1979, a U.S. District Court judge in Los Angeles likewise ruled in favor of the state's church-related schools. The ruling was handed down in response to an appeal by the Southern California District of the LC-MS.[44]

Eventually all of the appeals around the nation were delayed, however. They were all waiting to see what would happen with either the LC-MS case from Southern California or the WELS case from South Dakota.

When it became apparent that St. Martin's and NLA v. South Dakota would reach Washington first, encouragement and briefs in behalf of the WELS schools came in from all over the country. The Catholic Conference, the LC-MS, and a Baptist group sent briefs to Washington. So did Americans United, the American Civil Liberties Union, and other organizations.[45] Churches and schools of many denominations were hoping that the WELS appeal would find success.

VI. The Final Ruling in the United States Supreme Court.

It was not absolutely necessary that the Wisconsin Synod take its appeal all the way to the U.S. Supreme Court. After its defeat in South Dakota, the Synod could have paused for a while, and eventually the appeal of another church would have made it to Washington. Yet the decision to push on was made without much hesitation. The Board of Trustees had already invested tens of thousands of dollars of the synod's money in the case; a further investment, it was felt, would bring some tangible results. Besides, along with the men of the von Briesen and Redmond law firm, the men on the Board believed that they had a very strong case. Another church body with a less "pure" case might have pursued its appeal on shaky grounds and lost both for its own schools and for those of the WELS.

The State of South Dakota, once again the appellee in the case, had three options regarding the WELS appeal to the highest court. First of all, it could acknowledge that the unemployment tax conflict was an important matter and agree with the WELS request for a hearing. The state's second choice was to disagree and ask the Court not to review the case. Or it could choose its third option and not respond to the WELS appeal at all, taking the chance that the Court would not find the case significant.[47] This was the option South Dakota followed.

Meanwhile, in mid-1980 the Wisconsin Synod submitted its official petition for a writ of certiorari from the U.S. Supreme Court. Certiorari, the Latin verb meaning "to be made more certain," is the name of the legal document used by a superior court in directing a lower court to send up a pending case.[48] The synod was well aware of the great odds against receiving such indication that the Supreme Court would hear the case. For the term beginning October 1, 1980, the Court had received about 6000 appeals already. It normally reviewed and rendered opinions on about 450 cases per year and heard oral arguments on only 140 to 160 per year.

In order to overcome those odds, therefore, the WELS sent in a very extensive, carefully written petition. Not surprisingly, its argument was basically the same as the one it had presented two years earlier in Aberdeen, with one new twist. Under the heading "Reasons for Granting the Petition," the appellants mentioned the usual points but also directed the Court's attention to all of the rulings which conflicted with that of the Supreme Court of South Dakota. Court rulings in Alabama, Louisiana, Oregon, Pennsylvania, Tennessee, and Illinois were brought up, along with the better known rulings in Southern California and North Dakota. The synod then concluded its petition with the statement that "the significance of the federal questions involved and the extensive litigation occurring throughout the nation warrant resolution by the United States Supreme Court."[49]

To the synod's delight and to South Dakota's chagrin, America's highest court granted a writ of certiorari to the case on November 1, 1980, with the added stipulation that it be presented orally. High priority was attached to the WELS appeal, mostly because of the "growing number of conflicting federal and state decisions on the issue,"[50] the Supreme Court explained. The Wisconsin Synod's petition had helped in convincing the Court of that conflict, as had the fact that the U.S. Department of Justice came in

as Amicus Curiae supporting the request that the case be heard.[51]

The Supreme Court gave the WELS six weeks to submit its written brief in behalf of St. Martin's and NLA. During that time the firm of von Briesen and Redmond came up with its most exhaustive study of the case to date. The "Brief for the Petitioners" turned out to be 41 pages in length, 33 pages of which were Argument. Much of that Argument had been expressed at the previous hearings and has thus already been treated in this paper. Nevertheless a short summary of the five argument headings seems to be in order:

I. THE SOUTH DAKOTA SUPREME COURT INCORRECTLY INTERPRETED SECTION 3309 OF FUTA IN DENYING CHURCH ELEMENTARY AND SECONDARY SCHOOLS EXEMPTION FROM THE UNEMPLOYMENT COMPENSATION LAW.

In this point the appellants demonstrated that the South Dakota Supreme Court ignored the "plain and unambiguous language" of the statute and instead rested its ruling on congressional intent.[52]

II. THE DECISION BY THE SOUTH DAKOTA SUPREME COURT IS CONTRARY TO THE DECISION IN NLRB V. CATHOLIC BISHOP (1979), BECAUSE THERE WAS NO CLEAR EXPRESSION BY CONGRESS OF AN AFFIRMATIVE INTENT TO BRING CHURCH SCHOOLS WITHIN STATE UNEMPLOYMENT COMPENSATION LAW.

III. THE ELIMINATION OF THE EXCLUSION FOR SERVICE IN THE EMPLOY OF A SCHOOL DOES NOT AFFECT THE EXCLUSION FOR SERVICE IN THE EMPLOY OF A CHURCH.

IV. THERE IS NO EVIDENCE OF CONGRESSIONAL INTENT TO INCLUDE CHURCH ELEMENTARY AND SECONDARY SCHOOLS UNDER UNEMPLOYMENT COMPENSATION LAW.

Argument IV is fundamentally a repetition of Arguments I and II, except here the appellants claimed that if congressional intent were something worthwhile to consider, then the intent of Congress in dropping Subsection 3 of FUTA Section 3309(b) was not to put a tax on church-related schools. It only intended to cover private secular schools.

V. SUBJECTING CHURCH ELEMENTARY AND SECONDARY SCHOOLS TO UNEMPLOYMENT COMPENSATION LAW VIOLATES BOTH THE ESTABLISHMENT AND FREE EXERCISE CLAUSES.

The brief's conclusion indicated that St. Martin's and NLA were relying on the U.S. Supreme Court seeing three basic errors in the South Dakota Supreme Court's decision on FUTA in connection with parochial schools. The conclusion reads,

> The South Dakota Supreme Court erred in every respect. It ignored the plain language of the exemptions provided by Sections (b)(1)(A) and (B) and the corresponding South Dakota Statutes; it attempts to find support in what it calls "apparent" Congressional intent where none exists; and, it fails to apply general principles of case law established by the Supreme Court of the United States guaranteeing religious freedoms protected by the First Amendment to the Constitution of the United States.
>
> The petitioners, St. Martin Evangelical Lutheran and Northwestern Lutheran Academy, request the Court to reverse and set aside the Decision by the South Dakota Supreme Court.

The WELS "Brief for the Petitioners" was submitted in December of 1980. The State of South Dakota, again led by Attorney General Mark Meierhenry, filed its brief 30 days later. Then the date for the oral presentations before the eight Supreme Court justices (One post was waiting for an appointment.) was set for March 3, 1981, allowing both sides six weeks to prepare. Normal procedure in the U.S. Supreme Court is that one hour is set aside for each case, but two hours were allowed for the oral presentation of St. Martin's and NLA v. South Dakota. The justices desired more time in which to ask questions of the attorneys.

In his oral presentation South Dakota Attorney General Meierhenry addressed the First Amendment question in a new way by noting that there was

> much entanglement between the state and church schools already with students riding to the schools on public transportation, using some books paid for with public tax dollars, and benefitting from other auxiliary services provided to both public and private school students.[54]

As to the statute itself, however, Meierhenry made the same observation that Don Kattke, the Aberdeen appeals referee, had first made. He contended that the primary purpose of church-related schools is education, not religion. Justice John Paul Stevens challenged him on that point, noting

that the schools would seem to exist for religious reasons since the church is paying the school employees' salaries and otherwise funding the school.[55] Other justices made similar statements. In fact, the attention of the justices to the presentations of both Mr. Meierhenry of South Dakota and Mr. Schilling, attorney for the schools, was said to be unusually great.[56] They asked a great number of questions and made many comments.

The two hour session before the Supreme Court came to a close, and there followed almost three months of waiting for a decision. The Wisconsin Synod's lawyers were confident of a victory, but so was Attorney General Meierhenry. He even made appearances on television news programs and assured the people of South Dakota that he had won the case.[57] Assurances of that sort did very little for his credibility with the people of his state, however, because on May 26, 1981, the U.S. Supreme Court made a ruling that proved Meierhenry dead wrong. By a unanimous vote the Court reversed the judgment of the Supreme Court of South Dakota. All church-related elementary and secondary schools in the nation were declared exempt of unemployment compensation tax under FUTA Section 3309(b)(1) and (2). The fifty states were ordered to alter their interpretations of their own tax laws accordingly.

Justice Harry Blackmun delivered the opinion of the Court. Much of what he wrote rang similar to the opinion of Hughes County Circuit Court Judge Miller. Justice Blackmun's prime focus was upon the Dept. of Labor's misuse of the term "church" in Section 3309(1)(A) of FUTA. He pointed out that "church" in that phrase had to mean "employer," not "house of worship" as Secretary Marshall had declared. Blackmun went on,

> Congress has further defined employer as "any person who ... paid wages ... or employed at least one individual"... (Therefore) the word "church" must be constured to refer to the congregation or the hierarchy itself, that is, the church authorities who conduct the business of hiring, discharging, and directing chruch employees... Neither school (St. Martin's or NLA) has a separate existence (apart

> from a church). Thus, the employees working within these schools plainly are "in the employ of a church or convention or association of churches." FUTA Subsection 3309(b)(1)(A)[58]

The basis for the Supreme Court's ruling was the simple fact that FUTA Subsection 3309(b)(1)(A) still was law! "We hold that the repeal of Subsection 3309(b)(3) did not alter the meaning of Subsection 3309(b)(1)," Blackmun declared. "Petitioners are eligible for exemption under Subsection (b)(1)(A) by virtue of the nature of their relationship to the church bodies that employ them."[59] Regarding the First Amendment issues in the case, the Court felt that their consideration was "unnecessary."[60]

Justice John Paul Stevens concurred in the judgment with a short written statement of his own. He seems to have done further research into the subject of congressional intent regarding the repeal of Subsection (3), because he discovered an interesting fact about the number 242,000. The House Ways and Means Committee had received that figure from the Dept. of Labor as the "total number of employees in all non-profit, private elementary and secondary schools"[61] in the United States. The Dept. of Labor had also expressly stated that the estimate included all of the teachers in church-related schools. That number was then advanced as the approximate number of people whose exemption to unemployment tax would be lost if the 1976 Amendment to FUTA were passed by Congress. Justice Stevens' conclusion was that Congress _did_ intend the repeal of Subsection (3) to remove the exemption from all private school teachers, even from the teachers in the nation's parochial schools.[62]

Yet Justice Stevens still had to concur with the ruling of his fellow Supreme Court justices. He explained that although Congress' intention to cover parochial school teachers with government unemployment compensation was, in his eyes, quite clear, nevertheless

> the 1976 Amendments simply failed to give effect to that intention.

> By repealing #3309(b)(3) Congress removed only one of the two statutory exemptions that, by their terms, applied to employees of parochial elementary and secondary schools. Congress left in place and did not qualify the scope of the separate exemption granted by #3309(b)(1)... I agree with the Court that these church employees are exempt under the plain language of that provision... It is not the responsibility of this Court to perform linguistic gymnastics in order to upset the plain language of Congress as it exists today.[63]

Like Justice Blackmun, Justice Stevens concentrated in his opinion upon the statute and not upon questions about First Amendment violations.

VII. Some Conclusions.

The effect of the U.S. Supreme Court's decision was immediate and far-reaching. Quite suddenly an overwhelming majority of parochial and religious schools in the United States were freed from taxes which would have amounted to tens of millions of dollars per year! A vast majority of the more than 8000 Roman Catholic elementary schools and many of the nation's 1500 Catholic high schools fell within the exempt category. Almost all of the 1400 schools of the Lutheran Church - Missouri Synod, which has the largest parochial system of any Protestant denomination, were exempted, as were over 1000 schools of the Seventh-Day Adventist Church.[64] Thousands of parochial schools from other denominations were relieved of a heavy tax burden, too -- all because the WELS had conducted an intelligent, well-planned legal campaign and had won its appeal. Letters of congratulations and of gratitude poured into the synod's Milwaukee headquarters from all over the country. Newspapers and magazines on local and national levels splashed reports on the synod's victory across their pages. There is no doubt that the case proved to be excellent for the public relations of the synod. Board of Trustees Executive Secretary Huebner has said that "it did more to promote the name of the Wisconsin Evangelical Lutheran Synod than any one thing ever has!"[65]

But the synod gained more from the outcome of St. Martin's and NLA

v. South Dakota than national publicity and the goodwill of other American church bodies. Much more! In exchange for its great expenditure of money and effort, the WELS learned -- or perhaps re-learned -- an appreciation for the tremendous God-given blessing of the United States government. This nation's rulers grant to Wisconsin Synod Lutherans, as individuals and as a group, privileges that few other earthly governments allow. The churches of the WELS enjoy an exemption from property tax; the government protects churches in their activity, affording police protection, so that services are not disrupted; it protects church property against destruction; it protects the lives and livelihood of the members of the synod against persecution for the sake of their beliefs.[66] And as the South Dakota appeal proved so effectively, the American government even gives American churches the right to challenge its decisions.

When Secretary of Labor Marshall made his controversial ruling on FUTA, it did not come across as an irrevocable mandate. There was no conspiracy between those government bodies that make the laws and those that judge the laws' constitutionality and application, such as between Congress and the South Dakota Supreme Court. There were no threats. Along with other church bodies, the WELS was given the right to challenge the ruling again and again and to change it. The people of the synod, like other Americans, often notice only their government's failures. And there are quite a few! The same Supreme Court that favored the WELS in the case over FUTA in 1981 had, in 1973, favored the laws legalizing abortion. In fact, the man who delivered the opinion on that 1973 decision was the same Justice Blackmun. Yet those Christians of the Wisconsin Synod who saw what happened with the WELS-South Dakota appeal had to realize that their government can also serve them quite well!

It has been pointed out that the Supreme Court judged the WELS appeal

entirely on the basis of the FUTA statute. What would happen if Congress changed the wording of Subsection 3309(b) to make absolutely certain that parochial school teachers were not exempt from unemployment tax under any circumstances? We can surmise about several possible results, but one certainty is that the synod would still be able to make an appeal to the country's judicial system.

> (The WELS) has pleaded in the past for draft exemption of our students who were training for the teaching and preaching ministry... (It) has fought for the continued property tax exemption of (its) parsonages, professorages, and teacherages on the basis of existing laws.[67]

As of May, 1981, the synod has also battled successfully for the right of its schools to stay out of government unemployment compensation programs. With St. Martin's and NLA v. South Dakota another successful appeal has been added to the precedent. It is another reason to thank God that our right as citizens to challenge the government's decisions affecting our religious practices remains intact! It is another encouragement for our church body to continue to make use of that privilege, too!

Finally, however, all of the gains that the Lord directed to the Wisconsin Synod through its 1981 Supreme Court experience must take a back seat to the fact that several precious beliefs of the synod were protected. The $500,000 or more that synod congregations would have lost each year to their state unemployment compensation funds may now be spent on better projects, such as local evangelism programs or world mission outreach. The favorable publicity shed upon the WELS may someday cause church bodies to listen to its message more attentively. The smooth functioning of the American judicial system, from Aberdeen to Washington, D.C., may aid citizens, WELS Christians especially, in viewing the United States government more favorably and in supporting it more consistently. The success of the South Dakota-based appeal may make it clear that even Lutherans have rights as American citizens and that one of

them is to appeal government decisions. But no development in the unemployment tax controversy was more important than that protection which was afforded the synod's Scripture-grounded teachings and principles! The doctrine of the divine call was threatened, and yet under the guiding hand of our gracious God it remained undamaged. Now even unbelievers must grant it legal recognition. The principle of the teaching ministry, especially that of the female teaching ministry, was put under close scrutiny in a high court and even was ridiculed. Yet by God's grace eventually that principle was strengthened, since more WELS members were made aware of it. The doctrine of the church, as well as the principle that the church-run school is part of "church," was tested and by God's grace confirmed during the unraveling of the events of the case. At the same time there were no concessions or losses in WELS doctrine and principle. Indeed, a close consideration of St. Martin's Evangelical Lutheran Church and Northwestern Lutheran Academy v. the State of South Dakota reveals that, besides dollars, nothing was lost to the synod, while the gains were tremendous. There is no doubt that the events of the case are further evidence that our almighty Savior-God has been very gracious to his people in the Wisconsin Evangelical Lutheran Synod.

APPENDIX A

The Federal Unemployment Tax Act (FUTA), Section 3309 (a) as passed by the United States Congress in 1970, is as follows:

"This section shall not apply to service performed --

"(1) in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

"(2) by a duly ordained, commissioned, or licensed minister of a church in the exercise of his ministry or by a member of a religious order in the exercise of duties required by such order;

"(3) in the employ of a school which is not an institution of higher education."

South Dakota Statutes Section 61-1-10.4, as passed by the legislature of that state prior to 1978, was identical to the above.

In 1976 Subsection 3 of FUTA Section 3309 (a) was repealed by the United States Congress. On January 1, 1978 the State of South Dakota did the same with Subsection 3 of Section 61-1-10.4.

APPENDIX B

The First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, provides:

"Congress must not interfere with freedom of religion, speech or press, assembly, and petition. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or or the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

APPENDIX C

The following is a time-line (without the line) of the events that are presented in this paper.

Date	Event
1935	Congress passes Title IX of the Social Security Act.
1960	First passage of the Federal Unemployment Tax Act (FUTA).
1970	FUTA amendments include Section 3309 (b) (1-3).
1970	Lemon v. Kurtzmann before U.S. Supreme Court.
1976	FUTA amendments repeal Subsection 3 of Section 3309 (b).
Dec.1976 - May 1978	U.S. Labor issues various memoranda regarding application of FUTA by the states.
1977	Catholic Bishop of Chicago v. NLRB before U.S. Supreme Court.
Jan. 1978	St. Martin's and NLA informed that they must pay unemployment compensation tax to the State of South Dakota.
May 30, 1978	Labor Secretary Marshall rules that church-related schools are no longer exempt from FUTA.
July 19, 1978	Hearing before referee of South Dakota's Unemployment Insurance Division. In Aberdeen.
Sept. 15, 1978	Appeals referee rules against St. Martin's and NLA.
December, 1978	WELS schools appeal to Sixth Circuit Court of Hughes County, South Dakota.
March 19, 1979	Circuit Court judge reverses the decision of the Aberdeen appeals referee.
Oct. 10, 1979	WELS schools present appeal to the Supreme Court of the State of South Dakota.
March 26, 1980	South Dakota Supreme Court reverses the decision of the Circuit Court. Schools are not exempt.
July, 1980	WELS petitions U.S. Supreme Court for a writ of certiorari.
Nov. 1, 1980	U.S. Supreme Court grants certiorari to St. Martin's and NLA v. South Dakota.
March 3, 1981	Oral presentations heard by U.S. Supreme Court.
May 26, 1981	U.S. Supreme Court reverses the decision of the South Dakota Supreme Court and declares church-related schools to be exempt from FUTA.

E N D N O T E S

[1]Elliott Wright, "A Taxing Question," Church and State, vol. 35, no. 4 (April, 1982), p. 12.

[2]Justice Harry Blackmun, "Text of U.S. Supreme Court Decision: St. Martin Evangelical Lutheran Church v. South Dakota," Journal of Church and State, vol. 24, no. 1 (Winter, 1982),p. 206.

[3]Edward Thomas Schilling and Ernst J. von Briesen, On Writ of Certiorari to the Supreme Court of South Dakota -- Brief for the Petitioners, 1980, p. 6.

[4]Schilling and von Briesen, Brief for the Petitioners, p. 8.

[5]Schilling and von Briesen, Brief for the Petitioners, p. 8.

[6]Elton Huebner in a personal interview, December 15, 1982.

[7]Huebner, December 15, 1982.

[8]Elton Huebner, "Oral Comments on the Proposed Procedure on Private Schools," December, 1978, p. 2.

[9]The Statistical Report of the Wisconsin Ev. Lutheran Synod, 1979 Edition. David Worgull, Statistician.

[10]Elwood Habermann in a personal letter, January 5, 1983.

[11]Habermann, January 5, 1983.

[12]Habermann, January 5, 1983.

[13]Daniel Malchow in a personal interview, December 13, 1982.

[14]Huebner, December 15, 1982.

[15]Huebner, December 15, 1982.

[16]Malchow, December 13, 1982.

[17]E. Thomas Schilling, letter to Aberdeen attorney Rory King, August 1, 1978.

[18]"Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division," p. 3.

[19]"Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division," p. 6.

[20]"Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division," p. 9.

[21] "Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division," p. 11.

[22] Leonard F. Manning, The Law of Church-State Relations (St. Paul, MN: West Publishing Company, 1981), p. 72.

[23] "Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division," p. 13.

[24] "Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division," p. 17.

[25] "Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division," p. 13.

[26] "Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division," p. 15.

[27] Don Kattke, "Opinion on St. Martin's Ev. Lutheran Church and Northwestern Lutheran Academy" Appendix C to the Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota, p. A-43.

[28] Huebner, December 15, 1982.

[29] Malchow, December 13, 1982.

[30] Malchow, December 13, 1982.

[31] "Appellant's Brief to the Sixth Judicial Circuit Court of South Dakota -- County of Hughes," p. 15.

[32] Malchow, December 13, 1982.

[33] "Appellant's Brief to the Sixth Circuit Court,", p. 16.

[34] Judge Robert A. Miller, "In the Matter of the Determination of the Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church School," Appendix B to the Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota, p. A-30.

[35] Judge Miller, "In the Matter of the Determination of Unemployment Coverage," p. A-32.

[36] Judge Miller, "In the Matter of the Determination of Unemployment Coverage," p. A-33.

[37] E. Thomas Schilling, "General Update -- Report on the Subject of FUTA," May 29, 1979, p. 1.

[38] State of South Dakota Supreme Court, "In the Matter of the Determination of the Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran School, Appendix A to the Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota, p. A-6.

[39] State of South Dakota Supreme Court, "In the Matter of the Determination of the Unemployment Insurance Coverage," p. A-6.

[40] State of South Dakota Supreme Court, "In the Matter of the Determination of the Unemployment Insurance Coverage," p. A-10.

[41] State of South Dakota Supreme Court, "In the Matter of the Determination of the Unemployment Insurance Coverage," p. A-11.

[42] "Churches Riled by Unemployment Tax," Church and State, vol. 32, no. 1 (January, 1979), p. 14.

[43] Edward Thomas Schilling and Ernst J. von Briesen, Supplemental Brief to Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota, pp. A-1 and A-2.

[44] Church and State, "Unemployment Tax Quashed." Vol. 32, no. 10 (November, 1979), p. 19.

[45] Elton Huebner, Agenda for Unemployment Compensation Tax Liability Meeting, November 11, 1980.

[46] Huebner, December 15, 1982.

[47] Huebner, Agenda for Unemployment Compensation Tax Liability Meeting, November 11, 1980.

[48] Dale E. Twomley, Parochiaid and the Courts (Berrien Springs, MI: Andrews University Press, 1979), p. 156.

[49] Edward Thomas Schilling and Ernst J. von Briesen, Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota, p. 23.

[50] Justice Blackmun, "Text of U.S. Supreme Court Decision," p. 209.

[51] Huebner, Agenda for Unemployment Compensation Tax Liability Meeting, November 11, 1980.

[52] Schilling and von Briesen, Brief for the Petitioners, p. 9.

[53] Schilling and von Briesen, Brief for the Petitioners, pp.25-28.

[54] Church and State, "Americans United Defends Parochial Schools." Vol. 34, no. 4 (April, 1981), p. 8.

[55] Church and State, "Americans United Defends Parochial Schools." P. 9.

[56] Huebner, December 15, 1982.

[57]Habermann, January 5, 1983.

[58]Justice Blackmun, "Text of the U.S. Supreme Court Decision," pp. 211-212.

[59]Justice Blackmun, "Text of the U.S. Supreme Court Decision," p. 214.

[60]Justice Blackmun, "Text of the U.S. Supreme Court Decision," p. 214.

[61]Justice John Paul Stevens, "Concurring Opinion" in the "Text of the U.S. Supreme Court Decision: St. Martin Evangelical Lutheran Church v. South Dakota," Journal of Church and State, vol. 24, no. 1 (Winter, 1982), p. 215.

[62]Justice Stevens, "Concurring Opinion," p. 214.

[63]Justice Stevens, "Concurring Opinion," p. 216.

[64]Elliott Wright, "Court Ruling Frees Most Religious Schools from Unemployment Taxes," T.R. Axis, vol. 1, no. 1 (July-August, 1981), p. 1.

[65]Huebner, December 15, 1982.

[66]Carleton Toppe, "Separate But Not Sundered," The Northwestern Lutheran, vol. 69, no. 13 (July 1, 1982), p. 196.

[67]Carl Lawrenz, "Scriptural Principles As They Apply to Laws Governing the Schools of Our Synod, "(February 8, 1977), p. 13.

BIBLIOGRAPHY

Blackmun, Harry and John Paul Stevens. "Text of the U.S. Supreme Court Decision: St. Martin Evangelical Lutheran Church v. South Dakota." Journal of Church and State, Vol. 24, No. 1 (Winter, 1982).

Church and State. "Americans United Defends Parochial Schools." Vol. 34, No. 4 (April, 1981).

Church and State. "Churches Riled by Unemployment Tax." Vol. 32, No. 1 (January, 1979, p. 14.

Church and State. "Unemployment Tax Quashed." Vol. 32, No. 10 (November, 1979).

Habermann, Elwood. Personal letter dated January 5, 1983.

Huebner, Elton. Agenda for Unemployment Compensation Tax Liability Meeting of November 11, 1980.

Huebner, Elton. "Oral Comments on the Proposed Procedure on Private Schools." December, 1978.

Huebner, Elton. Personal interview with the author on December 15, 1983.

Kattke, Don. "Opinion on St. Martin's Ev. Lutheran Church and Northwestern Lutheran Academy." Appendix C to the Petition for A Writ of Certiorari to the Supreme Court of the State of South Dakota. 1980.

Lawrenz, Carl. "Scriptural Principles As They Apply to Laws Governing the Schools of Our Synod." February 8, 1977.

Malchow, Daniel. Personal interview with the author on December 13, 1982.

Manning, Leonard. The Law of Church-State Relations. St. Paul, MN: West Publishing Company, 1981.

Miller, Robert A. "In the Matter of the Determination of the Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran Church School." Appendix B to the Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota. March 19, 1979.

Schilling, E. Thomas. "Appellant's Brief to the Sixth Judicial Court of South Dakota -- County of Hughes." December, 1978.

Schilling, E. Thomas. "Appellant's Brief to the South Dakota Department of Labor -- Unemployment Insurance Division." July, 1978.

BIBLIOGRAPHY (Continued)

Schilling, E. Thomas. "General Update -- Report on the Subject of FUTA." May 29, 1979.

Schilling, E. Thomas. Letter to Aberdeen Attorney Rory King dated August 1, 1978.

Schilling, E. Thomas and Ernst J. von Briesen, On Writ of Certiorari to the Supreme Court of South Dakota -- Brief for the Petitioners. 1980.

Schilling, E. Thomas and Ernst J. von Briesen, Petition for A Writ of Certiorari to the Supreme Court of South Dakota. 1980.

Schilling, E. Thomas and Ernst J. von Briesen, Supplemental Brief to Petition for A Writ of Certiorari to the Supreme Court of South Dakota. 1980.

State of South Dakota Supreme Court. "In the Matter of the Determination of the Unemployment Insurance Coverage of Northwestern Lutheran Academy and St. Martin's Evangelical Lutheran School." Appendix A to the Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota. March 26, 1980.

Toppe, Carleton. "Separate But Not Sundered." The Northwestern Lutheran, Vol. 69, No. 13 (July 1, 1982).

Twomley, Dale E. Parochiaid and the Courts. Berrien Springs, MI: Andrews University Press, 1979.

Wright, Elliott. "Court Ruling Frees Most Religious Schools from Unemployment Taxes." T.R. Axis, Vol. 1, No. 1 (July-August, 1981).

The Statistical Report of the Wisconsin Ev. Lutheran Synod. 1979 Edition. David Worgull, Statistician.