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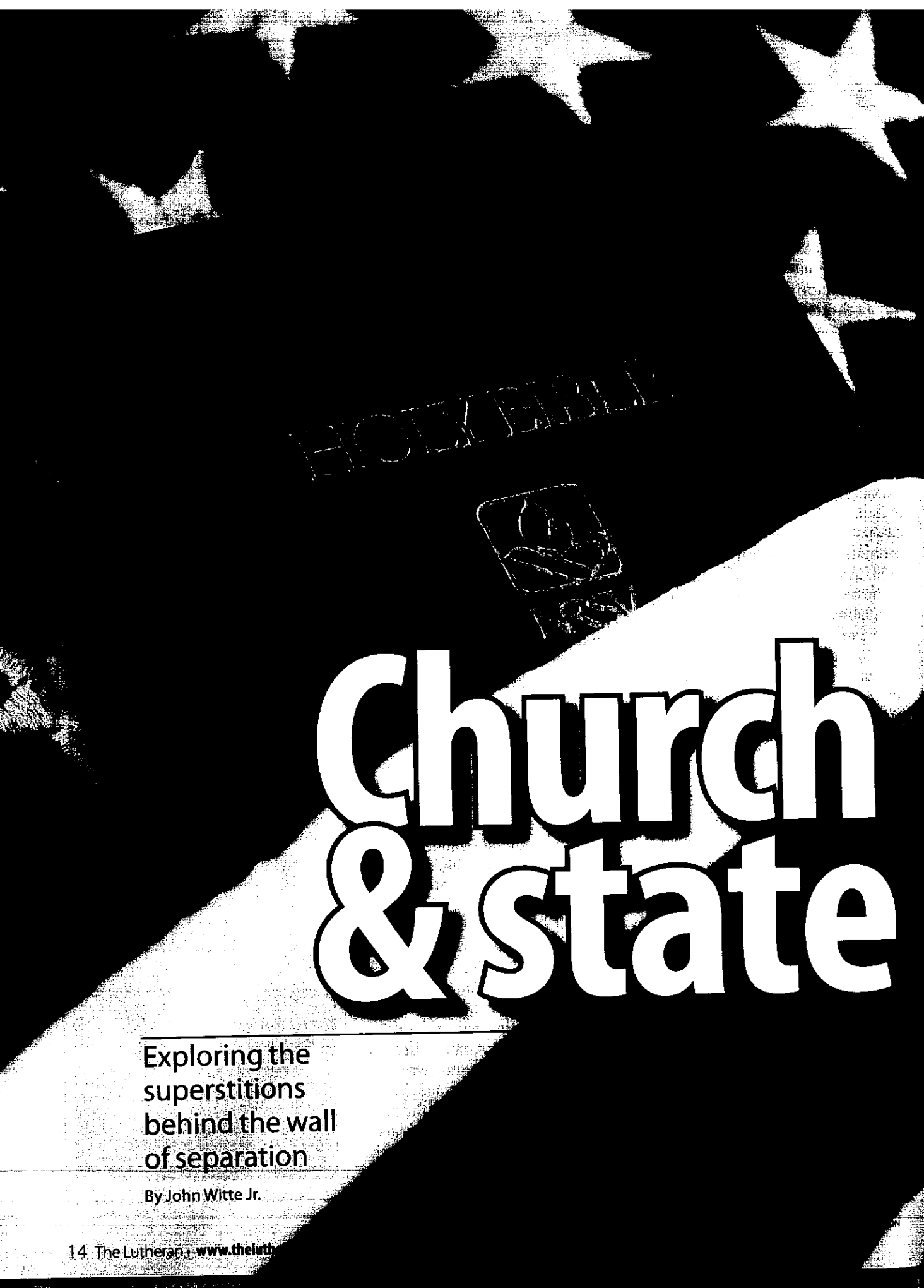


Church & state

Exploring the superstitions behind the wall of separation

By John Witte Jr.

For a study guide, see page 20.

The civic catechisms of our day still celebrate Thomas Jefferson's experiment in religious liberty. To end a millennium of repressive religious establishments, we are taught, Jefferson sought liberty in the twin formulas of privatizing religion and secularizing politics. Religion must be "a concern purely between our God and our consciences," he wrote in 1802. Politics must be conducted with "a wall of separation between church and state." "Public religion" is a threat to private religion, and must thus be discouraged. "Political ministry" is a menace to political integrity and must thus be outlawed.

These Jeffersonian maxims remain for many today the cardinal axioms of a unique American logic of religious freedom to which every patriotic citizen and church must yield.

Religious privatization is the bargain we must strike to attain religious freedom for all. A wall of separation is the barrier we must build to contain religious bigotry for good.

Separation of church and state was certainly a prominent part of American law when many of today's public opinion-makers were in school. In the 1940s the U.S. Supreme Court for the first time used the First Amendment religion clauses to declare local laws unconstitutional. The court also read Jefferson's call for "a wall of separation between church and state" into the First Amendment. In more than 30 cases from 1947 to 1985, the court purged public schools of their traditional religious trappings and cut religious schools from their traditional state support. Hundreds of lower court cases struck down many other traditional forms and forums of church-state cooperation in the public square.

After 40 years of such cases, it's no surprise that Jefferson's metaphor of "a wall of separation between church and state" became for many the source and summary of American religious freedom.

Switch on separation

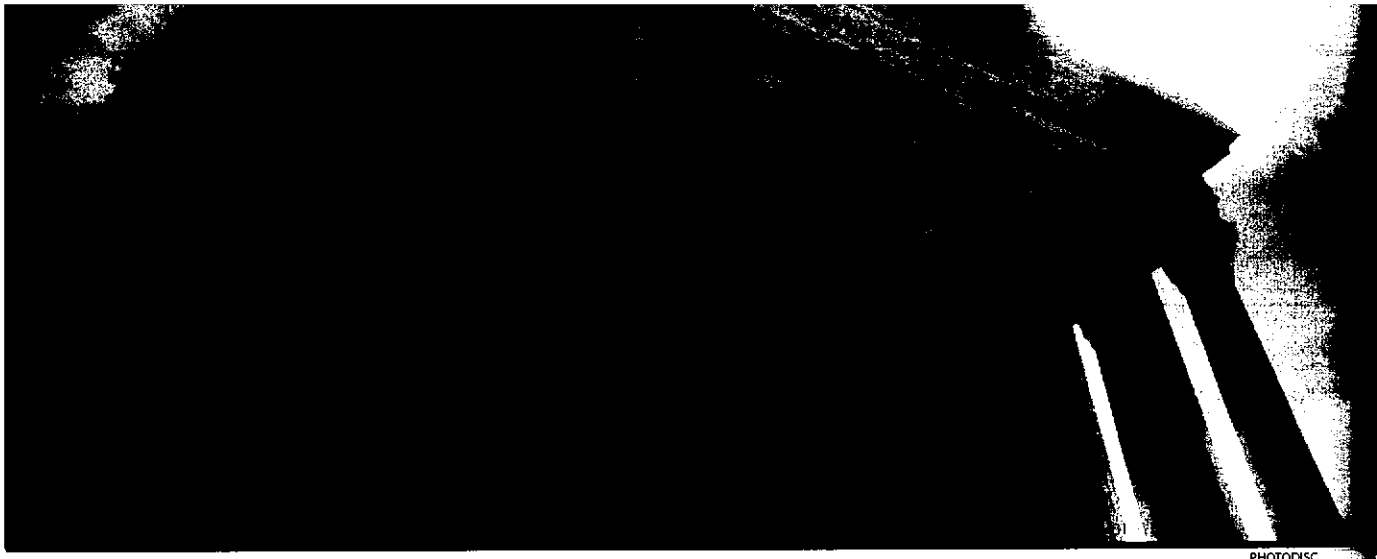
Separation of church and state alone, however, is no longer the law of the land. In the past two decades the Supreme Court has abandoned much of its strict separationism and reversed four of its harshest cases. In a score of new cases the court upheld government policies that support the public access and activities of religious groups—so long as they are voluntary and so long as nonreligious groups are treated the same way.

Religious counselors could be funded as part of a broader federal family counseling program. Religious student groups could have equal access to public facilities and forums that were open to other civic groups. Religious student newspapers were just as entitled to public university funding as their secular counterparts. Religious schools were just as entitled to participate in a state-sponsored school voucher program as other private institutions. Religious messages were just as welcome in open public forums as secular messages. Religiously based civic-education groups were just as entitled as others to run after-school recreational and remedial programs for public school students.

The Supreme Court has defended these holdings on wide-ranging constitutional grounds. Several recent cases have featured brilliant and heated rhetorical fireworks in majority and dissenting opinions. Part of this back-and-forth is typical of any constitutional law in action. "Constitutions work like clocks," John Adams once put it. To function properly, they must swing back and forth, and their mechanisms and operators get wound up from time to time. Despite this back-and-forth, several common teachings about religious liberty are beginning to emerge in these cases.

One teaching is that public religion must be as free as private religion. Not because the religious groups in these cases are really nonreligious. Not because their public activities are really nonsectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these public groups and activities deserve to be free just because they are religious, just because they engage in sectarian practices, just because they sometimes take their stands above, beyond and against the cultural mainstream. Religion, the court has come to realize, can provide leaven and leverage for the polity and society to improve.

A second teaching of these cases is that freedom of public religion cannot mean establishment of a common civil religion. Government support of a common civil religion might have been defensible in earlier times of religious homogeneity. It's no longer defensible in modern times of reli-



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gious pluralism.

Today our public religion must be a collection of particular religions, not the combination of religious particulars. It must be a process of open religious discourse, not a product of ecumenical distillation. All religious voices, visions and values must be heard and deliberated in the public square. All peaceable public religious services and activities must be given a chance to come forth and participate.

Some conservative Protestants and Roman Catholics today have seized on this new insight better than most. Their recent rise to prominence in the public square and in the political process should not be met with glib talk of censorship or reflexive incantation of Jefferson's mythical wall of separation. The rise of the Christian right should be met with the equally strong rise of the Christian left, of the Christian middle, as well as the rise of sundry Jewish, Muslim, Hindu, Buddhist and other religious groups who test and contest its premises, prescriptions and policies. That is how a healthy democracy works.

The real challenge of the Christian right is not to the integrity of American politics but to the apathy of American religions. It's a challenge for people of all faiths, and of no faiths, to take their place in the marketplace.

A third teaching of these cases is that the freedom of religion sometimes requires the support of the state. Today's state is not the distant, quiet sovereign of Jefferson's day from which separation was both natural and easy. Today's state is an intensely active sovereign from which complete separation is impossible.

Few religious bodies now can avoid contact with the modern welfare state's pervasive regulations of education, charity, child care, health care, family, construction, zoning, workplace, taxation and security. Both confrontation and cooperation with the modern state are almost inevitable for any religion.

When a state's regulation imposes too heavy a burden on a particular religion, the First Amendment free exercise clause provides a pathway to relief. When a state's appropriation imparts too generous a benefit to individual religions, the establishment clause provides a pathway to dissent. But when a general government scheme provides public religious groups and activities with the same benefits afforded to all other eligible recipients, constitutional objections now rarely work.

Prudent use for separationism

A final teaching of these cases is that the principle of separation of church and state serves religious liberty best when it is used prudentially and not categorically, as in the past. Separationism needs to be retained, particularly for its original insights of protecting the church from the state, and protecting the state from the church.

Today, as in the past, the state has no constitutional business interfering in the internal affairs of religious

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groups. The church has no constitutional business converting the offices of government into instruments of their mission and ministry. Government has no business funding, sponsoring or actively involving itself in one religion alone. Religious groups have no business drawing on government sponsorship or funding for their core religious exercises. All such conduct violates the core principle of separation of church and state and should be outlawed.

The principle of separation of church and state, however, also needs to be contained and not used as an anti-religious weapon in the culture wars of the public square, public school or public court. Separationism must be viewed as a shield, not a sword, in the great struggle to achieve religious liberty for all.

James Madison, despite his firm separationist beliefs, warned in 1833 that "it may not be easy, in every possible case, to trace the line of separation between the rights of Religion and the Civil authority, with such distinctness, as to avoid collisions & doubts on unessential points."

It's even more imperative today than in Madison's day that the principle of separation of church and state not be pressed to reach the "unessentials." Government must strike a balance between coercion and freedom. The state can't coerce citizens to participate in religious ceremonies or subsidies, or in religious programs or policies that they find odious.

But the state can't prevent citizens from participation in public ceremonies and programs just because they are religious. It's one thing for the court to outlaw daily Christian prayers and broadcasted Bible readings from the public school, quite another thing to ban moments of silence and private displays of the Ten Commandments in the same schools. It's one thing to bar direct tax support for religious education, quite another thing to bar tax deductions for parents who wish to educate their children in the faith. It is one thing to prevent government officials

Presidential candidates John McCain and Barack Obama each got a letter from ELCA Presiding Bishop Mark S. Hanson recently—suggesting specific policy and priorities, and urging presidential leadership on topics from poverty to energy policy to peace. Read the letter at **http://archive.elca.org/bishop/messages/candidatesletter.html**.

Other Lutheran leaders who signed the letter are: Ralston H. Deffenbaugh Jr., president, Lutheran Immigration and Refugee Service; John A. Nunes, president, Lutheran World Relief; and Jill A. Schumann, president, Lutheran Services in America.

Separation of church and state must be balanced with other essential principles of the First Amendment, notably liberty of conscience, freedom of exercise and religious equality. The court must be at least as zealous in protecting religious consciences from secular coercion as in protecting secular consciences from religious coercion. It should be at least as concerned to ensure the equal treatment of religion as to ensure the equality of religion and nonreligion.

It's no violation of the principle of separation of church and state when a legislature or court accommodates judiciously the conscientious scruples of a religious individual or the cardinal callings of a religious body. It's also no violation of this principle when government grants religious individuals and institutions equal access to state benefits, public forums or tax disbursements that are open to nonreligionists similarly situated. To do otherwise is to move toward what Justice Potter Stewart once called "the establishment of a religion of secularism." □

Witte is director of the Center for the Study of Law and Religion at Emory University, Atlanta. He has published 22 books, including most recently three Cambridge University Press titles: To Have and to Hold *(with P.L. Reynolds);* The Reformation of Rights *and* Law and Christianity: An Introduction *(with F.S. Alexander).*

Read before you vote

With an eye on the upcoming election, the ELCA offers "Called to Be a Public Church: 2008 ELCA Voting and Civic Participation Guide" at **http://archive.elca.org/advocacy/publicchurch/index.html**.