

Oct 2, 2020

# We're All Marsilians Now



*No, you are not being persecuted for your beliefs.*

*Photo by Jacob Bentzinger*



## **Brad Littlejohn**

Bradford Littlejohn is a senior fellow of the Edmund Burke Foundation and president of the Davenant Institute. He is the author of *The Peril and Promise of Christian Liberty* (Eerdmans, 2017) and numerous other writings in the areas of Christian ethics, political theology, and Reformation history. He lives in Leesburg, Virginia, with his wife, Rachel, and four children.



Nearly six months ago, when COVID-19 was spreading like wildfire through many American communities largely undetected and untreatable, the orders came down, from mayors and governors, city councils and county judges, to do something truly remarkable in a land defined by religious liberty and the separation of church and state: to close America's churches.

And then something even more remarkable happened: nearly everyone complied.

To be sure, there were a few high-profile holdouts that made national news, and a few indignant cries of protest. But by and large, throughout this vast country, tens of thousands of congregations made their transition (some gracefully, some not so gracefully) to doing something that would once have been unthinkable for many of them: worshipping together online.

Some churches, no doubt, did not see this as obedience to the magistrate's decrees per se; some complied cheerfully because they agreed the virus was a threat, and would have suspended meetings with or without government orders. Others complied grudgingly, deeming that discretion was the better part of valor. But most, I think,



complied out of a deep-seated but often largely inarticulate sense that this was *not*, after all, a violation of religious liberty.

During the months that have followed, restrictions have eased, but remain onerous. In many jurisdictions, churches must significantly limit their seating capacity to maintain social distancing. In many, mask-wearing is mandatory. Some continue to restrict central elements of Christian worship such as the Eucharist or hymn-singing, and some churches have been forced to meet outdoors for worship.

As the virus has become more familiar and less scary for many, and trust in public officials has waned in the face of changing and inconsistent regulations, the outcries on behalf of religious liberty have grown steadily louder, with evangelical leader John MacArthur making national news in recent weeks for his brazen defiance of California worship restrictions. Somewhat curiously given earlier broad compliance, many recent complaints have framed their protest in universal and categorical terms, decrying all of the relevant health mandates as impositions on the liberty of the church, gross violations of the proper boundaries between Christ and Caesar. But if this were the case, then so were the restrictions back in March, which most of us cheerfully accepted. So which is it?

### **Spiritual and Temporal Matters**

I would suggest that, as often in America, our initial commonsense intuitions were sounder than our subsequent reflections. When Christians across America tacitly granted the rights of civil authorities to restrict religious practice in a time of pandemic, they were acting in response to a recognition that, in an important sense, the church's authority is not of this world. This insight we owe, in its clearest form, to a largely forgotten fourteenth-century Italian physician named Marsilius of Padua.

The name of Marsilius is unlikely to register even vague recognition among most Protestants, and if any Catholics know it, they are liable to shudder. After all, Pope Clement VI wrote in 1343, "We are bold to say that we have almost never read a worse heretic than that Marsilius. For we have extracted from the mandate of Benedict our predecessor on a certain book of his more than 240 heretical articles." The book in question was the *Defensor Pacis*, or *Defender of the Peace*, perhaps the most remarkable work of political theory to appear in the entire Middle Ages. It laid the intellectual foundations for the Protestant Reformation, and, although few realize it, the basic structure of church-state relations that prevails in the modern West (to which, now, even the Roman Catholic Church has largely adapted).

When Marsilius wrote, the relationship of church and state was one that, to modern eyes at least, would have looked more like the clash of two feuding political institutions than anything else. The closest analogy is probably the fraught relationship of the European Union and several of its constituent nations: a transnational bureaucracy with its own laws and coercive powers, and within it, distinct national states more or less intent on asserting their own laws and coercive powers.



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But this analogy only gets us so far; for in Marsilius’s time, one could almost say that church and state constituted not merely distinct administrative structures and legal regimes within the same territories, but distinct bodies of citizens: clergy and laity. The church held immense properties, which it administered as feudal domains, which were capable in some places of raising their own military forces. It enjoyed a great deal of financial independence, with significant tax revenues off-limits for civil authorities and reserved for the papacy; it presided over a wholly independent judiciary, which could serve as a court of appeals for many cases involving laity, and which enjoyed original jurisdiction in cases involving clergy. This last was, as one can imagine, a particular point of tension, since it meant that clergy enjoyed functional immunity from civil prosecution in many domains.

As Marsilius saw it, all of this was a recipe for interminable conflict. This confusion of jurisdiction was “the singular cause . . . of intranquility or discord in a city or realm.” After all, if there were two rival authorities laying the same kind of claims over the same territories, “it would result in division and opposition between the citizens, fighting, separation and finally the destruction of the city, with some of them wanting to obey one prince and some the other”—exactly what Marsilius saw happening throughout Europe in his day.

For us today, “spiritual” and “temporal” ordinarily designate two distinct realms, planes, or dimensions of life; pastors, theologians, and ethicists argue endlessly about how





exactly to characterize the difference, but we nearly all seem to agree that they do not strive to occupy the same kinds of physical spaces in the same way.

In Marsilius's day, however, that is exactly what they did. A piece of farmland or a mine owned by a monastery was "spiritual," whereas one owned by a lay baron was "temporal." A knight belonging to one of the crusading orders was "spiritual," whereas his lay counterpart was "temporal." A priest arraigned for assaulting a local girl was a "spiritual" person accused of a "spiritual" crime and tried in "spiritual" courts; a local burgess accused of the same was a "temporal" person answerable for a "temporal" crime in "temporal" courts.



Marsilius fulminated against this distinction: "For not all of their actions are or should be called 'spiritual'; on the contrary, many of them are civil, contentious and carnal or temporal. For it is quite possible for them to borrow, deposit, buy, sell, strike, kill, steal, commit adultery, rape, betray, deceive, bear false witness, defame, lapse into heresy and in general commit all other enormities, crimes, and acts of contention in just the same way they are committed by non-priests."

This was a typical jeremiad against the bad behavior of clergy, of course—but it was more than that too. He wasn't simply accusing clerics of debauchery and so on: he was making a point about the distinction of the jurisdiction of different polities over different people and their behavior.

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Marsilius proposed a way of making the distinction that took as its starting point the basic meaning of the Latin word for "temporal"—which means, of course, "having to do with time." In itself, this is not very helpful, since everything that we do takes place in time, whether praying, playing, or paying taxes. However, since the key feature of politics is *judgment*, the key political distinction of "spiritual" and "temporal" must relate to the question, When does judgment occur? Temporal acts, Marsilius argues, are those that are subject to coercive judgment in the here and now, within the horizon of history;





spiritual acts are those for whom coercive judgment—the rewards of faithfulness and the punishments of wickedness—are reserved for the age to come.

Now, to be sure, God himself can visit these judgments within history, but only as proleptic anticipations of final judgment. And of course a priest or pastor may pronounce spiritual judgment here in time, whether in the pulpit or the confessional, but he cannot himself execute it, or even guarantee its accuracy; it serves simply as a proclamation or warning of the judgment that Christ will enact at the last day. (Marsilius had some strong words to say about the late medieval penitential system, which anticipated by two centuries many of the central critiques of the Protestant Reformers.)

### What's Wrong With Erastianism Anyway?

Now, what does all this have to do with public health regulations during a global pandemic? Well, let's follow the argument and see where it leads. With his distinction of temporal and spiritual, Marsilius, in one fell swoop, sharply defined the modern concept of political jurisdiction, and at the same time excluded from it all ecclesiastical authority.

If Marsilius was correct, if church authorities, qua church authorities, could not enact coercive judgments binding actions in the here and now, then neither could they countermand such judgments made by other authorities, or exempt anyone from obedience to them. Their authority was moral and proclamatory only. They could *declare* that anyone committing a certain act was guilty of mortal sin, or even that anyone obeying an unjust command of civil authority was guilty of mortal sin. Such authority was not, on Marsilius's view, infallible—as Protestants would later insist, it was bound to the Word of God—but it might well be weighty, and courageous ministers of the Word have changed the course of history more than once by mere proclamation. But such authority could not dispense with property or withhold taxes, it could not commit to prison or set free, it could not legally bind or nullify a law.

To be sure, Marsilius recognized that, European society being what it then was, priests and bishops might need to continue doing many of these things—church courts played very important roles in regulating many areas of ordinary life—but when they did so, they exercised only a *delegated authority* on behalf of the civil magistrate. In fact, any actions that churches took to regulate the outward order of their institutions, and the outward conduct of their officers and members, was, strictly speaking, a form of temporal authority delegated from the state.

Such a view, after it took hold throughout Europe during the Protestant Reformation, was often maligned as Erastianism (from Thomas Erastus, a Swiss Reformed theologian and incidentally, like Marsilius, also a physician), as a way of “turning the church into a department of the state.” And it is true that in many places (both Protestant and Catholic), the sixteenth century saw the church reduced to a position of unseemly subservience to cynical lay bureaucrats. Looking around today at hundreds of denominations and thousands of churches more or less free to govern their own affairs, most of us are apt to assume that the ideas of Erastus and Marsilius are ancient history, that the church has long since thrown off these legal shackles. But in that case, on what possible basis could a mayor or governor order a church to suspend services, to limit attendance, or to require the wearing of masks?

There are really only two possible answers. Either the governor’s “orders,” although legally binding outside the four walls of the church, are really no more than mere *recommendations* within those walls, and pastors and bishops have simply taken note of those recommendations and then issued their own internally binding orders to comply. Or else they are real *orders*, with real power to change the time, location, and circumstances of a worship service—in which case, under ordinary circumstances, pastors and bishops make their own decisions about the time, location, and circumstances of worship using a power *delegated* or *permitted to them* from the civil authorities. This might seem a jarring thought at first, but the logic is straightforward. The CEO of a large multinational might only meddle in the affairs of one of its subsidiaries on extraordinary occasions, but the mere fact that he *can* shows that their internal authority is a delegated one.

The analogy is an imperfect one, of course, but in the American legal system, the internal authority of churches is the same as that of other “voluntary associations”: they are governed by *bylaws*, which are instruments of self-government whose binding authority is ultimately subject to that of the civil laws, enforced by civil courts. Many churches still practice church discipline against their members via church courts or episcopal authorities, and the state wisely stays out of such proceedings as a matter of course, but if they actually wish to physically exclude a defiant parishioner, they might find the matter before a civil court. They might ordain or defrock their own ministers, but that does not mean they are immune to the possibility of a wrongful termination suit. They might ordinarily manage their own properties, but—as we have sadly seen in recent years—that does not mean that a building-ownership dispute between a breakaway congregation and a former denomination might not find its way to the Supreme Court. A church faced with such a suit cannot simply refuse to answer a court

summons and insist on trying the case in a church court or appealing it to the pope. To this extent, we are all Marsilians now.

And when we think about it, this is the best way to make sense of all sorts of regulations that we take for granted. When churches hire and fire staff, they ordinarily do so in accordance with general employment law. When churches construct their buildings, they ordinarily abide by fire codes and accessibility codes; it is not as if the COVID-19 pandemic were the first time the state dictated how many people could safely gather in a worship space.

Such examples could easily be multiplied. Again, we could conceive of all these regulations as mere *suggestions*, which generous-minded church leaders, although vested with full jurisdictional autonomy, comply with voluntarily when it makes sense to them. This is how John MacArthur's church framed their initial compliance and subsequent defiance of California's COVID restrictions. But it is more plausible and coherent, I would argue, to see ourselves as living under a Marsilian regime of unified coercive jurisdiction. This arrangement, over the centuries of trial and error since the Reformation, has increasingly ceded relative autonomy to religious bodies and interferes in their internal decision-making only when urgent public goods are at stake. Nevertheless that cession of autonomy is provisional and prudential only, and not a matter of a church's actual right to self-regulation in these matters. Such right to self-regulation does not, in fact, exist.

### **Church, Brunch, and the Goods of Religion**

To be sure, we would be naïve to suppose that it might always continue that way. The Marsilian settlement only works as long as society shares a general consensus that the goods of religion, or of a particular subset of religions, are broadly compatible with the goods of the society. Marsilius himself, although decrying papalism as a “pernicious plague . . . profoundly inimical to human calm and happiness,” thought that Christian faith as such was a strong support to a virtuous society, and that “the faithful human legislator” would want to promote it. His later Protestant followers agreed, though it was long before they trusted Roman Catholics enough to be reliable citizens. And of course Christian pacifist groups have had many unpleasant experiences with the Marsilian arrangement, especially during times of war.

Not many years hence, many Christian institutions may find themselves on the wrong side of laws that see the protection of a proliferating array of sexual identities as an urgent public good. A number of Christian leaders in recent months have suggested that

we are already crossing that threshold, and that the laws restricting worship during Covid-19 are the tip of a spear meant to silence Christian witness in the modern world. My own observation of recent policies and trends suggests a less alarmist, though perhaps no more encouraging, conclusion. In many jurisdictions, churches have labored under particularly onerous COVID restrictions not because mayors and governors are terrified of the cultural power of orthodox Christians and looking for opportunities to weaken and silence them, but rather because they see the church as just a social club and entertainment venue with practices that make it particularly susceptible to virus transmission.

This attitude was thrown into sharp relief during the BLM protests in early summer. A *Washington Post* article at the time quoted epidemiologist Ranu Dhillon, with no sense of irony: “Protesting against systemic injustice that is contributing directly to this pandemic is essential. The right to live, the right to breathe, the right to walk down the street without police coming at you for no reason . . . that’s different than me wanting to go to my place of worship on the weekend, me wanting to take my kid on a roller coaster, me wanting to go to brunch with my friends.” Setting aside debates about the prudence of the protests, the striking point here is the blasé assumption that the decision to worship on the weekend is simply a consumeristic choice among a menu of options including theme parks and brunch dates. If that’s all that church is (and let’s be honest, for many Americans it is), if the blood of Christ and a brunch mimosa are on par, then why *shouldn’t* we stop these particular consumers from engaging in pandemic-prone practices?

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This is the real danger of the Marsilian arrangement. I happen to believe that Marsilius, improved on by his Reformational followers, put his finger squarely on theological realities about the nature of the church, and political realities about how to prevent conflicts of jurisdiction. The reduction of the church to a voluntary society has been, I am convinced, a great blessing on the whole for Christian witness and political flourishing. However, it does threaten to neuter the church’s witness, to domesticate it

into merely another department of society that can be ushered off into a corner when it starts making others uncomfortable. The challenge we face today, which COVID has helped throw into sharp relief, is how to cheerfully accept the church's position of formal subordination to the state, while boldly reminding the state of its ultimate subordination to Christ. To carry out this difficult task will require courage, clarity, and charity in equal measure.

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