



Written by [John Eidsmoe](#) on November 6, 2020

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## Quarantining the Church?

Though religion is now considered to be “nonessential” in the age of coronavirus in parts of the country and world where only *essential* businesses (in the eyes of government officials) are allowed to stay open, this was far from the norm throughout history. Consider the year of our Lord 1665, when the bubonic plague swept through England. The Church of England published a special prayer, which beseeched God for aid, saying in part,

O Most gracious God, Father of Mercies, and of our Lord Jesus Christ, look down upon us, we beseech thee, in much pity, and compassion, and behold our great misery and trouble.

For there is wrath gone out against us, and the Plague is begun....

O our God, forget not thou to be gracious: neither shut thou up thy loving kindness in Displeasure. For his sake, who himself took our Infirmities, and bare our Sicknesses, have mercy upon us, and say to the destroying Angel, It is enough....

O let us live, and we will praise thy Name; and these thy Judgements shall teach us to look every Man into the plague of his own Heart: that being cleansed from all our sins, we may serve thee with pure hearts all our days, perfecting holiness in thy Fear, till we come at last, where there is no more Sickness, nor Death, through thy tender Mercies in him alone, who is our Life, and our Health, and our Salvation, Jesus Christ, our ever blessed Saviour, and Redeemer, Amen.



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Also, on July 3, 1849, in the face of a cholera epidemic that ravaged the United States, President Zachary Taylor proclaimed a National Day of Fasting, Humiliation, and Prayer, stating,

It is recommended to persons of all denominations to abstain as far as practical from secular occupations and to assemble in their respective places of public worship, to acknowledge the Infinite Goodness which has watched over our existence as a nation, and so long crowned us with manifold blessings, and to implore the Almighty in His own good time to stay the destroying hand which is now lifted against us.

Fast forward to 2020: To help suppress the spread of COVID-19, in state after state, community after community, officials have ordered churches either to close, to hold only drive-in services, to limit their attendance to a certain number of persons (commonly 10), or not to sing, pass out literature, or share the sacraments.

## Why the Change?

Why the different response? I suggest three reasons:

(1) Earlier generations believed that God is real, that He acts in human affairs, and that His grace, favor, and help are efficacious to ward off national disasters. Believing that God is the Source of help in time of trouble, state officials in those days wanted the prayers of the church in times of crisis more than ever.

Today we are more likely to regard God as a metaphysical abstraction Who exists in some dimension of reality but Who pays little attention to the affairs of this world. Prayers, therefore, are rituals that perhaps need to be accommodated, but the possibility that prayer may actually move God to heal our land is not even part of the equation.

(2) Views of church/state relations have changed. Our Founding Fathers believed, as had Christians for most of church history, that church and state are two distinct entities, each established by God for a particular purpose. As Luther wrote in “Secular Authority: To What Extent It Should Be Obeyed” (1523), “These two kingdoms [church and state] must be sharply distinguished, and both be permitted to remain; the one to produce piety, the other to bring about external peace and prevent evil deeds; neither is sufficient in the world without the other.”

The functions of church and State are different but not incompatible. In a crisis like this, each kingdom should work for the glory of God, the edification of man, and the preservation of sacred human life. Unfortunately, we seem to be moving away from Luther’s and Calvin’s understanding that church and State are two kingdoms ordained of God (a view that is close to that of the Founders of our constitutional republic) and moving toward a view such as that of Jean-Jacques Rousseau, who taught that the state is the supreme social organism that stands above all other societal associations (labor unions, clubs, schools, societies, and churches), and therefore the State has authority to regulate all other societal organizations, including the church. If we give the State this type of authority, the State is becoming our god.

(3) The U.S. Constitution, with its First Amendment that prohibits an “establishment of religion” and infringements on the “free exercise thereof,” is regarded by many as an evolving document. Instead of interpreting the Constitution as securing full protection for religious liberty, some courts misinterpret



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the Constitution to subordinate religious liberties to the needs of the state.

## COVID Restrictions on Churches

State COVID-19 executive orders have varied widely. Some states, such as Texas, have specifically exempted churches from their orders, while others, such as Virginia, have not. Understandably, some high-population-density states have been very restrictive, while low-density states have been more open. But while the Dakotas have had no stay-at-home orders, Montana, with more open space than the Dakotas, has employed a strict stay-at-home order — although Montana had no limit on in-home gatherings, so if a church chose to hold worship services in a member's house, it could do so apparently with no limit on the number of attendees or requirements for social distancing.



**Denigrating religion:** Under COVID lockdowns, why are liquor sales considered “essential” but worship is not? The First Amendment guarantees free exercise of religion, not free exercise of drinking. *(Photo credit: AP Images)*

Many states imposed stay-at-home orders with exceptions for “essential activity.” Places such as Pennsylvania and West Virginia defined churches as “essential” activities, while others such as Virginia and Vermont did not. In others, such as Alabama, church employees could work in the church and people could travel to the church for counseling or other services, but in-house worship services were limited to nine people, although churches could hold services outside with no limit on attendees. In many states the status of religion was unclear, and in some states the issue varied by locality.

## Enforcement and Response

Enforcement of closure orders upon churches has varied. Michigan's governor refused to classify churches as essential businesses, but said people would not be prosecuted for going to church. In other places, enforcement has been draconian:

- Tampa, Florida: Pastor Rodney Howard-Browne was arrested March 30 for having held a church service at The River at Tampa Bay Church on March 29, even though the church had spent \$100,000 for a hospital-grade air purification system as a COVID-19 precaution. After Liberty Counsel came to the church's defense, Governor Ron DeSantis declared religious worship “essential,” and on May 15, the charges were dismissed.



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- Greenville, Mississippi: Churchgoers who attended drive-in services at King James Bible Baptist Church and Temple Baptist Church were issued \$500 tickets for simply sitting in their vehicles listening to their pastors, though the only social-distancing violations that took place happened when they had to roll down their windows to receive the tickets from the officers. Governor Tate Reeves rebuked Greenville Mayor Errick Simons for the action, saying, “If you send police after worshippers trying to social distance, you are going to have Mississippians revolt.” First Liberty filed a lawsuit on behalf of the church, and the U.S. Department of Justice intervened in the lawsuit on the church’s behalf, saying the ticketing “strongly suggests that the city’s actions target religious conduct.” On April 15, the city dismissed the tickets and withdrew the order.



**Where’s the “tolerance”?** According to graffiti left at the scene, this church was torched for filing a lawsuit against coronavirus restrictions. Ironically, the leftist violence shows that leftists really don’t think masks work — if masks did work, gatherings would be nothing to worry about. *(Photo credit: AP Images)*

- Chincoteague, Virginia: On Palm Sunday, the pastor of Lighthouse Fellowship was issued a summons for holding a worship service attended by 16 people within a facility that seats 200, because Governor Ralph Northam’s order prohibited gatherings of more than 10. Again Liberty Counsel filed suit for the church, and again the U.S. Department of Justice intervened on the church’s behalf, saying, “For many people of faith, exercising religion is essential, especially during a crisis.” A federal court denied the church’s request for an injunction, and the case is pending on appeal.

- Chicago, Illinois: One of the most egregious examples of abuse is that which Chicago Mayor Lori Lightfoot has directed against two Romanian churches. As Liberty Counsel explains,

On Sunday [May 17], Mayor Lightfoot blocked off nine blocks around the churches posting “No Parking” signs, hoping she would get the neighbors mad at the church. However, the churches are not using street parking with their limited services. The aldermen sent letters to the neighbors of the churches instructing them not to park on the street from 7 a.m. to 9 p.m. The letters stated the reason for the “No Parking” signs was due to the Romanian churches holding limited services.

When Mayor Lightfoot realized this tactic did not work, she stationed police Sunday night at the entrance to the private parking lot of Elim Romanian Pentecostal Church, refusing to





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allow anyone to park.

## Enter the Courts

When churches have petitioned for redress, sometimes governors and other public officials have retracted restrictive orders. Other times, churches have sought relief in the courts. In some instances the courts have denied relief, as in Virginia, Maine, and Illinois. But in others the churches have been successful.

For example, shortly before Easter, the mayor of Louisville, Kentucky, announced that he was banning religious services. This included drive-in services, because, he said, “It’s not really practical or safe to accommodate drive-up services taking place in our community,” even though drive-through restaurants and liquor stores remained open. The church On Fire petitioned the federal district court, and on the Saturday before Easter, Federal Judge Justin Walker ordered the city not to enforce prohibitions against drive-in services. As the court stated:

On Holy Thursday, an American mayor criminalized the communal celebration of Easter.

That sentence is one that this Court never expected to see outside the pages of a dystopian novel, or perhaps the pages of *The Onion*. But two days ago, citing the need for social distancing during the current pandemic, Louisville’s Mayor Greg Fischer ordered Christians not to attend Sunday services, even if they remained *in their cars* to worship — and even though it’s *Easter*.

The Mayor’s decision is stunning.

And it is, “beyond all reason,” unconstitutional. [Emphasis in original.]

Before the injunction was made permanent, the city agreed to withdraw its prohibition. In spite of this, Kentucky Governor Andy Beshear still insisted on prohibiting in-person worship services, so Maryville Baptist Church appealed to the Sixth Circuit. And the Sixth Circuit ruled in favor of the church:

The orders allow “life-sustaining” operations and don’t include worship services in the definition. And many of the serial exemptions for secular activities pose comparable public health risks to worship services. For example: The exception for “life-sustaining” businesses allows law firms, laundromats, liquor stores, gun shops, airlines, mining operations, funeral homes, and landscaping businesses to continue to operate so long as they follow social-distancing and other health-related precautions.... But the orders do not permit soul-sustaining group services of faith organizations, even if the groups adhere to all the public health guidelines required of the other services.

Keep in mind that the Church and its congregants just want to be treated equally.... The Governor has offered no good reason for refusing to trust the congregants who promise to use care in worship in just the same way it trusts accountants, lawyers, and laundromat workers to do the same.

In North Carolina, a federal district court held that the governor’s order requiring that all worship



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services be held “outdoors unless impossible” is unconstitutional. In *Berean Baptist Church et al. v. Cooper*, the court stated flatly, “There is no pandemic exception to the Constitution of the United States or the Free Exercise Clause of the First Amendment.”



**Not taking abuse sitting down:** John MacArthur of Grace Community Church called California’s lockdown orders “government overreach” since, constitutionally speaking, government is not allowed to intrude on churches. (Photo credit: [Gracechurch.org](#))

In Holly Springs, Mississippi, police officers disrupted a church Bible study and Easter service and cited the church for violating city orders. A federal court refused to issue an injunction protecting the church, and on May 20, the church was burned to the ground. Two days later the Fifth Circuit intervened 3-0, reversing the district court and issuing an injunction. Judge Don Willett wrote in his concurring opinion,

The First Pentecostal Church of Holly Springs was burned to the ground earlier this week. Graffiti spray-painted in the church parking lot sneered, “Bet you Stay home Now YOU HYPOCRITS [*sic*].”

The City mentions the church burning in its latest brief, but in a manner less commendable than condemnable. One might expect a city to express sympathy or outrage (or both) when a neighborhood house of worship is set ablaze. One would be mistaken. Rather than condemn the crime’s depravity, the City seized advantage, insisting that the Church’s First Amendment claim necessarily went up in smoke when the church did: “the Church was destroyed from an arson fire ... making the permanent injunction claim moot.”

This argument is shameful.

When the parishioners of First Pentecostal Church leave their homes on Sundays, they are not *going* to church; they *are* the church. The church is not the building. When the New Testament speaks of the church, it never refers to brick-and-mortar places where people gather, but to flesh-and-blood people who gather together. Think people, not steeple. [Emphasis in original.]

Although churches have fared quite well in court, some of the best results have occurred when



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churches stood firm together, as they did in Minnesota. On May 20, the presidents of the North and South Districts of the Lutheran Church Missouri Synod, the president of the Minnesota District of the Wisconsin Evangelical Lutheran Synod, the president of the Evangelical Lutheran Synod, and the Roman Catholic archbishop of the Archdiocese of St. Paul and Minneapolis, wrote to the governor of Minnesota. They said they had tried to work with the governor to establish a plan that would protect public health while accommodating religious worship, but “We were thus surprised and disappointed when the Governor rebuffed our efforts at coordination and refused to move toward the reopening of churches. That decision is a violation of our fundamental religious freedom, and indicates that churches are seen as a less than essential part of society.” They therefore announced to the governor that “our churches may reinstate public gatherings as of May 26, 2020, with the first Sunday services occurring on Pentecost Sunday, May 31.” On Saturday May 23, Governor Tim Walz backed off and agreed that churches could meet at 25-percent occupancy, provided they would adhere to certain safety requirements.

On July 24, after California Governor Gavin Newsom ordered churches closed, Pastor John MacArthur of Grace Community Church called the order “government overreach” and announced that his church has a “duty to remain open” to serve the needs of his people during this crisis. He acknowledged the general duty to obey government but explained that “while civil government is invested with divine authority to rule the state, neither of those texts [Romans 13 and I Peter 3] (nor any other) grants civic rulers jurisdiction over the church.” “Therefore,” he said, “in response to the recent state order requiring churches in California to limit or suspend all meetings indefinitely, we, the pastors and elders of Grace Community Church, respectfully inform our civic leaders that they have exceeded their legitimate jurisdiction, and faithfulness to Christ prohibits us from observing the restrictions they want to impose on our corporate worship services.” The case is pending in court.

## **Equal Treatment With Businesses**

A common argument raised by churches, and accepted by some courts, is that churches are entitled to at least equal treatment with other facilities. A prohibition on more than 10 people gathering for church is unfair, many argue, when no such limit is imposed upon people shopping at Walmart or the liquor store.

That argument was presented to the Supreme Court recently, but the court’s answer was inconclusive. The South Bay United Pentecostal Church of California asked the Supreme Court to issue an emergency injunction on its behalf, and the court declined. Four Justices — Ruth Bader Ginsburg, Stephen Breyer, Elena Kagan, and Sonia Sotomayor — declined to issue the injunction and issued no writing. Chief Justice John Roberts concurred in a written opinion. Justice Brett Kavanaugh, joined by Justices Clarence Thomas and Neil Gorsuch, issued a written dissent saying the court should issue an injunction. Justice Samuel Alito dissented but did not join Justice Kavanaugh’s dissent. More recently, a case from Nevada produced a similar split.

An emergency injunction is an extremely rare remedy, to be used only where “the legal rights at issue are indisputably clear,” and even then “sparingly and only in the most critical and exigent circumstances.” The court’s refusal does not indicate how the court would vote if this issue were decided on its merits.

Chief Justice Roberts, writing alone, said other establishments are “dissimilar activities, such as



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operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.” But Justice Kavanaugh, joined by Thomas and Gorsuch, said these establishments are “comparable” and asked, “Assuming all of the same precautions are taken, why can someone safely walk down a grocery store aisle but not a pew? And why can someone safely interact with a brave deliverywoman but not with a stoic minister?” To Justice Kavanaugh’s observation, I would add that people in church commonly sit together as families and stay in place throughout the service, while people in stores commonly brush against each other, touch merchandise that has been touched by innumerable others, and exchange cash and credit cards. Furthermore, the Free Exercise Clause of the First Amendment secures protection for the first and foremost of our God-given rights, that of religious liberty. The Supreme Court didn’t resolve this issue, and it remains a viable question.

## The Jacobson Precedent

Court cases on state authority to impose health regulations commonly cite *Jacobson v. Massachusetts* (1905) for the proposition that the judiciary must defer to the states’ judgment in dealing with emergency health crises. The following observations about *Jacobson* are in order:

- (1) *Jacobson* involved a state law that empowered health departments to compel vaccinations to prevent the spread of smallpox.
- (2) Mr. Henning Jacobson simply argued that the law violated his right to decline vaccination; he did not raise a religious objection to vaccination.
- (3) *Jacobson* did restrict the state’s authority to regulate in ways that are “beyond all question, a plain, palpable invasion of rights secured by the fundamental law.”
- (4) Using *Jacobson*, many current court cases claim that the doctrine of “strict scrutiny” — the doctrine that government can infringe fundamental rights only by demonstrating a compelling state interest that cannot be achieved by less restrictive means — need not be met in pandemic cases. But *Jacobson* is a 1905 case, decided before the courts developed “strict scrutiny.” When current courts use *Jacobson*, they probably will reinterpret the decision in light of current strict scrutiny standards, requiring the state to prove it has a compelling interest that cannot be achieved by less restrictive means.

And some argue that even the strict scrutiny test does not satisfy the First Amendment. Church and state are separate institutions, and the state may not regulate the church under any circumstances. A Louisiana pastor is raising these issues in a case that is currently before the Fifth Circuit Court of Appeals.

## Law vs. Executive Order

Another key difference between *Jacobson* and current cases is that *Jacobson* involved the constitutionality of a state statute, whereas most current cases involve executive orders. Does a governor’s executive order have the force and effect of law, even if a state statute authorizes the governor to issue the order?

The doctrine *delegata potestas non potest delegari* simply means that no delegated powers can be further delegated. According to the U.S. Constitution, we the people delegated certain powers to each branch of the federal government. Those powers delegated by the people to one branch of government





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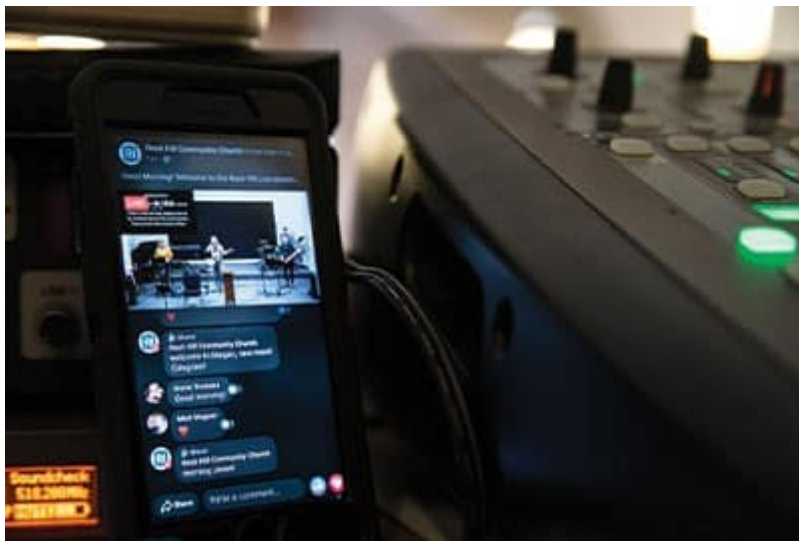
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may not be re-delegated by that branch to another branch. This rigid legal structure is meant to respect the wishes of the people and their determination of where that power should vest, or reside permanently, and to preserve accountability so that a branch of government may not evade responsibility and accountability by passing its duties to another branch.

However, with the growth of administrative law and the administrative state wherein branches of government create entities such as government departments to manage day-to-day activities for the government, the courts have modified the nondelegation doctrine, but have not overruled it. The courts commonly say a legislature may not delegate legislative authority but may delegate “rule-making” authority. A delegation will be considered rule-making authority if the legislature provides reasonably clear guidelines or criteria as to how that authority is to be exercised. The Supreme Court has also said those guidelines need to be narrow and explicit if the rules affect fundamental rights.

If a governor or other official has issued an executive order restricting churches, one should examine the state statute or constitutional provision that purports to authorize the order and determine whether it constitutes a valid delegation of power. The Wisconsin Supreme Court on May 14, 2020 and the Michigan Supreme Court on October 2, 2020 struck down COVID orders as invalid delegations of legislative powers to the executive branch of government.

## Is Live-streaming Sufficient?



**We say it's good enough:** Churches have often been told that since they can send out sermons via live-feed video, they are not being stopped from their work. However, it is up to Christians to determine what they are required to do by their faith, not outsiders. *(Photo credit: AP Images)*

When Christians say the state is violating their right to worship, some ask, “What are you complaining about? You can livestream your services, so your rights aren’t being violated at all.”

But state officials may not dictate to churches what does and doesn’t violate their religious convictions. Many Christians take Hebrews 10:25 — “not forsaking the assembling of ourselves together” — and other passages of Scripture as requiring in-person attendance at church services. Others note that worship services include (depending on the particular denomination) singing, participating in Communion, laying of hands, greeting fellow believers, and other activities that cannot be carried on through livestreaming. Drive-up services may be better than livestreaming, but even then the personal



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contact of worship is limited.

Livestreaming may satisfy some believers' religious convictions, but it may not satisfy others'. Telling a religious person what does and does not violate his convictions is tantamount to telling him what his convictions are. As the federal district court ruled October 9 in *Capitol Hill Baptist Church v. Bowser*, "It is for the church, not the District [of Columbia] or this court, to define for itself the meaning of 'not forsaking the assembling of ourselves together.'"

Another result may have been unintended and unanticipated. Church attendance is a discipline cultivated by long-term habit. Once the habit is broken, it is difficult to reestablish. Some have become comfortable with livestreaming and are not eager to go back to church. With livestreaming we can sleep in later, sit in comfortable easy chairs, avoid traffic, avoid socializing, and tune in to whatever channel we want. As local pastors try to livestream their services, it is difficult to compete with national ministries and their choreographed services, beautiful settings, professional musicians, trained cameramen, and polished messages. By breaking people of the church-going habit, the state may have dealt the church a devastating blow.

If church officials decide, for the protection of their members, that they should not hold services during an epidemic, or that they should hold services in the parking lot or suggest that more vulnerable members stay home, they certainly may do so. But they should not close their doors just because a state official orders them to do so. Romans 13:1-7 enjoins Christians to obey those in authority, but Acts 5:29 says Christians should obey God rather than men when the state forbids what God commands. Furthermore, Romans 13:1-7 emphasizes the obligation of individual Christians to obey civil authorities, because Christians are citizens of both kingdoms (church and state) and have duties to both church and state. But commanding individual Christians is different from commanding the church, because church and state are separate institutions.

## A Closing Warning

It might be tempting to overlook this state encroachment as a minor infringement. However, as James Madison warned,

It is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.

Restrictions on liberty are commonly imposed at times of war, epidemic, or other major crises, because at such times people are much more likely to accept restrictions. However, such restrictions often remain after the emergency ends, or if not, the precedent for future restrictions is set, and future restrictions, sometimes more severe, are more readily accepted. Soon, such restrictions become the rule rather than the exception. The thought that churches might be closed each year because of flu season would have seemed ludicrous a few months ago, but now that possibility must be taken seriously.

As President Ronald Reagan reminded us,

Freedom is a fragile thing and is never more than one generation away from extinction. It is not ours by inheritance; it must be fought for and defended constantly by each generation,



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for it comes only once to a people. Those who have known freedom and then lost it have never known it again.

Let us carefully guard the public health, but as we do so, let us make sure we keep liberty alive. And let us be grateful to those who have put themselves on the line during this crisis to protect the liberties of us all.



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