

# The Church-Disclosure Bill and Religious Freedom: An Analysis and Critique

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## I. Introduction

Senate Bill 1074, “An Act Relative to Charities in Massachusetts,” purports to authorize intrusive supervision by government officials of churches’ internal affairs and second-guessing by the state of religious decisions about mission and ministry. Although it has been packaged and presented by many, misleadingly, as a “sunshine” bill about fairness and “transparency,” it is in fact a statist power-grab. (Indeed, even after Archbishop Sean O’Malley presented a sweeping, far-reaching disclosure plan, the Bill’s sponsor and others refused to abandon their goal of supervisory power.<sup>2</sup>) The Bill is inconsistent with our traditions and poses a grave threat to the freedom of religion endorsed and protected in the Constitutions of the United States and of the Commonwealth of Massachusetts. The Bill is both anomalous and unnecessary,<sup>3</sup> it should be resisted and rejected.

Any examination and evaluation of the Bill should start from a fundamental, bedrock premise: As President Clinton put it a decade ago, “religious freedom is literally our first freedom.”<sup>4</sup> In other words, the freedom of religion was *central* to our Founders’ vision for

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<sup>1</sup> See, e.g., *Religion, Division, and the First Amendment*, \_\_\_ GEORGETOWN L. J. \_\_\_ (forthcoming 2006); *Assimilation, Toleration, and the State’s Interest in Religious Doctrine*, 51 U.C.L.A. L. REV. 1645 (2004); *American Conversations With(in) Catholicism*, 102 MICH. L. REV. 1191 (2004) (forthcoming) (reviewing JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* (2003)); *The Theology of the Blaine Amendments*, 2 FIRST. AMD. L. REV. 45 (2003); *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J. ETHICS, L. & PUB. POL’Y 541 (2003); *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771 (2001); *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001); *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000).

<sup>2</sup> See, e.g., Jay Lindsay, *Archdiocese Promises Greater Openness; Lawmakers Unsatisfied*, BOSTON GLOBE (Oct. 21, 2005) (quoting Sen. Marian Walsh’s complaint that “[w]hen it’s a voluntary policy, it’s just that, a voluntary policy”).

<sup>3</sup> See, e.g., Lindsay, *Archdiocese Promises Greater Openness*, *supra* (noting that “Archbishop Sean O’Malley pledged ‘full disclosure’ of the archdiocese’s finances, including the sources of all clergy sex abuse payments and the fiscal health of every parish”).

<sup>4</sup> President William Jefferson Clinton, *Religious Liberty in America* (July 12, 1995). See also, e.g., THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243 (2000).

America.<sup>5</sup> To be sure, the Framers did not always agree about what the “freedom of religion” meant, but they knew and agreed that it mattered. What is more, it is worth remembering and reminding each other that the protections afforded to religious freedom in our constitutional texts and traditions are neither accidents nor anomalies. Our laws do not regard religious faith with grudging suspicion, or as a bizarre quirk or quaint relic. Quite the contrary: In the United States and in Massachusetts, religious freedom has long been recognized and cherished as a basic human right and a non-negotiable aspect of human dignity. For us, faith is a gift to be protected, not a threat to be contained. John Garvey, Dean of the Boston College Law School, put it well: Our laws protect the freedom of religion because “religion is important” – because, put simply, “the law thinks religion is a good thing.”<sup>6</sup>

Senate Bill 1074’s ambitions and assertions not only offend our deeply rooted commitments to religious liberty, they are also at odds with longstanding principles of limited government and political freedom. Indeed, to appreciate fully what is at stake, one should recall one of the most important and dramatic stand-offs in history: Nearly a thousand years ago, the excommunicated Emperor Henry IV, who had sought to assert control over the appointment and property of bishops, knelt in the snow for days outside the castle of Canossa, in north-central Italy, seeking reconciliation with Pope Gregory VII, who had resisted Henry’s takeover efforts. This unforgettable confrontation was the culmination of an epic struggle for control over the structure, governance, and mission of the Church.

As Professor Harold Berman has shown, the vindication in January 1077 of the freedom of the Church – that is, of the Church’s right to order its internal life, of its independence from secular control – provided the seeds and inspiration for the idea of limited government and the ideals of political freedom contained in our Constitution.<sup>7</sup> That is, in the words of John Courtney Murray, it was the freedom of the Church that first “served as a limiting principle of government” and as the crucial “norm [that could] check the encroachments of civil power” and preserve basic human freedoms from the power of the state.<sup>8</sup> By undermining this “limiting principle,” Senate Bill 1074 would endanger these freedoms.

A statement by Voice of the Faithful, a vocal and prominent supporter of the Bill, illustrates clearly both the constitutional weaknesses of, and the danger posed by, the proposal:

Some in our society hold that religion is primarily an instrument of personal conversion. They believe that if institutions are managed by moral leaders, then such institutions will positively contribute to the common good. Catholic Social Teaching holds that individuals are not the only ones that need conversion. Institutions do, as well, and when institutions function unjustly, they pose an even greater threat than individuals do because institutions have a greater potential to perpetuate injustice.

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<sup>5</sup> See generally, e.g., JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES (2000); JOHN T. NOONAN, THE LUSTRE OF OUR COUNTRY: THE AMERICAN EXPERIENCE OF RELIGIOUS FREEDOM (1998).

<sup>6</sup> JOHN H. GARVEY, WHAT ARE FREEDOMS FOR? 42, 57 (1996).

<sup>7</sup> See generally HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983).

<sup>8</sup> JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 204 (1960).

Non-religious non-profits in Massachusetts have to disclose certain financial information to the Attorney General; it is only fair that churches do the same. Our churches need to support this bill. Our churches need to heed the words of St. Paul (Eph 5:8-9): “For you were once darkness, but now you are light in the Lord. Live as children of light, for light produces every kind of goodness and righteousness and truth.”<sup>9</sup>

Given our longstanding commitments to political freedom and limited government, however, it is not enough merely to assert that it is “fair” to subject churches to the regulatory burdens imposed on non-profit corporations generally; churches are not, as Bill’s sponsor suggests, “just like a Little League.”<sup>10</sup> Moreover, to enlist, as this Bill would do, the powers of government in order to prompt the Church’s “conversion,” to call “[o]ur churches” out of “darkness,” and to inspire believers to “[I]ive as children of light” is to undo a millennium’s worth of progress toward authentic freedom. Such a move would – again quoting Murray – stand the First Amendment “on its head. And in that position it cannot but gurgle nonsense.”<sup>11</sup>

Senate Bill 1074 should be rejected, then, for at least four reasons: *First*, the coercive regulation and intrusive oversight that the Bill would authorize are not necessary to encourage the openness and transparency that many reasonable and well-meaning people have asked of the Archdiocese of Boston, and of the Church.<sup>12</sup> Conversation and dialogue in parish halls and the courts of public opinion, not in the halls of legislatures and in the courts of law, are the constitutionally and morally appropriate vehicles for bringing about the desired changes. *Second*, Senate Bill 1074 runs afoul of well settled constitutional doctrines and religious-freedom principles. *Third*, the Bill is not only intrusive and dangerous, it is *uniquely* intrusive and dangerous. That is, no other jurisdictions employ the entangling combination of disclosure, oversight, and interference that the Bill would allow. Wholly and apart from complicated constitutional arguments and abstract philosophical theories, the Bill should be suspect for the simple reason that it contradicts longstanding and still-honored practices and sensibilities about churches’ independence and church-state separation. *Finally*, as was noted above, by attacking churches’ independence, the proposal would undermine the foundations of our bedrock commitments to limited government and to a free, thriving civil society.

## II. An Overview of Senate Bill 1074

To understand what is wrong with Senate Bill 1074, one must first state accurately and understand clearly what it would do. The Bill is no mere “sunshine” law; it demands more than “transparency.” It would impose new, detailed registration and disclosure requirements on churches and religious organizations. And, more important, it would both authorize and invite intrusive oversight by government officials of churches’ decision-making, organization, and

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<sup>9</sup> <http://www.votf.org/walsh/>

<sup>10</sup> Lindsay, *Archdiocese Promises Greater Openness*, *supra*.

<sup>11</sup> John Courtney Murray, *Law or Prepossessions?*, 14 J. L. CONTEMP. PROBS. 23, 23 (1949).

<sup>12</sup> *See, e.g.*, Lindsay, *Archdiocese Promises Greater Openness*, *supra*.

ministry.<sup>13</sup> Put simply, the Church-Disclosure Bill would permit and encourage *precisely* the kind of government overreaching that the religious-freedom provisions of the Constitutions of the United States and of the Commonwealth of Massachusetts were designed to prevent.

*First*, Sections 1-3 of the Bill amend Section 8F of chapter 12 of the General Laws, and cancel churches' exemption from the annual financial reporting requirements of the Attorney General's Director of Public Charities. Under current law,<sup>14</sup> "[t]he trustee or trustees of the governing board of every public charity" in Massachusetts must file a written annual report – disclosing, among other things, the charity's financial transactions, payments made for professional services (lawyers and accountants, for example), employees' salaries, and an account of solicitation activities – with the Director of Public Charities in the Attorney General's office. In addition, charities that receive in a year more than the specified amount of support and revenue must also file a complete, audited financial statement. At present, the law exempts churches from these requirements; Senate Bill 1074, however, would eliminate this exemption.

The Bill would also add to the law a new requirement that churches disclose, as part of their annual reports to the Director of Public Charities, the "address of each parcel of real property owned by the public charity and any related organization."<sup>15</sup> (Of course, information concerning the ownership of real property is a matter of public record. Senate Bill 1074 would impose on churches the new and costly burden of gathering and filing this already-public information.<sup>16</sup>)

The disclosures required, and the burdens imposed, by these Sections of the Bill involve more than just the gathering and sharing of information. In fact, these Sections' purpose and effect is to bring churches within the law's public-charity oversight provisions<sup>17</sup> -- in other words, to subject their internal activities to government supervision – one of which directs the Attorney General to "enforce the due application of funds given or appropriated to public charities within the commonwealth and prevent breaches of trust in the administration thereof." If, for instance, the Attorney General "believes that charitable funds have not been or are not being applied to charitable purposes or that breaches of trust have been or are being committed in the administration of a public charity," he "may conduct an investigation upon application to and with the approval of a judge of the trial court."<sup>18</sup>

Make no mistake: The investigations authorized by the Bill's new requirements are not rubber-stamp or paper-pushing exercises; they could involve wide-ranging and intrusive fishing-expeditions into "any documentary material of whatever nature relevant to such alleged

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<sup>13</sup> See, e.g., Frank Phillips, *Bill Would Force Church to Disclose its Finances*, BOSTON GLOBE (Aug. 8, 2005) (quoting the observation of Dr. Diane Kessler, executive director of the Massachusetts Council of Churches, that "legislators, a majority of whom are Roman Catholics, are trying to deal with concerns that are about the internal workings of the church and using the power of government to deal with it").

<sup>14</sup> Mass. Gen. Laws ch. 12, § 8F.

<sup>15</sup> S. 1074 § 1. "Owned" and "related organization" are defined quite broadly. S. 1074 § 3.

<sup>16</sup> See, e.g., Lindsay, *Archdiocese Promises Greater Openness*, *supra* ("[Archbishop] O'Malley said it would cost the archdiocese \$3 million annually to comply with the bill and that would detract from programs to help the needy.").

<sup>17</sup> See generally Mass. Gen. Laws ch. 12, §§ 8-8M.

<sup>18</sup> Mass. Gen. Laws ch. 12, § 8H.

misapplication of charitable funds or breach of trust.”<sup>19</sup> Under the proposed legal regime, the Attorney General could even ask the courts to order changes to any of a church’s internal operations that he or she regards as contrary to the public trust.

*Second*, Section 4 of the proposed Bill would change the rules governing churches’ fund-raising, stewardship, and social-ministry efforts by requiring them to report annually to the government their solicitation activities. Under current law, charitable organizations that intend to solicit contributions in Massachusetts must file a detailed, comprehensive annual registration statement with the Division of Public Charities. (The statement is usually filed with the annual report, discussed above).<sup>20</sup> Senate Bill 1074 would strip churches and religious charities of their exemption from this requirement.<sup>21</sup>

Like those contained in Sections 1-3 of the Bill, the revisions to the law proposed in Section 4 purport to subject some of churches’ core religious activities – their mission and ministry, their poverty-relief and social-justice efforts – to government oversight and investigations.<sup>22</sup> After all, what some might regard as “solicitation activities” are, when it comes to churches, inescapably religious: For the Church, to “solicit” funds is to urge believers and others to respond to the call to good stewardship, engaged discipleship, and solidarity with the less fortunate. These are not activities that may, consistent with our Nation’s and the Commonwealth’s commitments to religious freedom, be conditioned on official approval or endorsement.<sup>23</sup>

*Third*, Section 5 would impose on churches yet another set of new filing requirements. At present, all corporations must register with the Secretary of the Commonwealth by submitting an annual certificate.<sup>24</sup> The proposed Bill would eliminate the exemption for churches from this demand, while leaving intact the exemption that many other charitable corporations currently enjoy. In other words, Senate Bill 1074 is not so much about fairness and equal treatment to churches as it is about selectively imposing on churches requirements that are, apparently, too burdensome to impose on charitable hospitals, tax-exempt libraries, and non-profit colleges.

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In sum, Senator Walsh’s proposed Church-Disclosure Bill is about much more than disclosure and “transparency”; it is about supervision and control. (In any event, churches’ finances and property-holdings are already “transparent” to those willing to sit through meetings, read parish-council reports, and examine local records). Senate Bill 1074 is about using the coercive powers of government to bend the practices and structure of churches to suit some

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<sup>19</sup> *Id.*

<sup>20</sup> Mass. Gen. Laws ch. 68 § 19.

<sup>21</sup> Mass. Gen. Laws ch. 68 § 20.

<sup>22</sup> See Mass. Gen. Laws ch. 68 §§ 30, 32.

<sup>23</sup> As Archbishop O’Malley observed recently, “[t]he church has been granted rights in this country so we cannot be manipulated by the state[.] One of the ways churches can be manipulated is finances.” Lindsay, *Archdiocese Promises Greater Openness, supra*.

<sup>24</sup> Mass Gen. Laws ch. 180 § 26A. This certificate must state, among other things, the location of the corporation’s principal office or headquarters, the date of its last annual meeting, and information about all officers and directors.

citizens' preferences. It is best regarded not as inviting "sunshine," but as imposing new, burdensome, and intrusive requirements on churches and as conferring new and troubling powers over churches on state officials. But if the "separation of church and state" means anything, it means that the government should no more supervise the internal workings and core mission of churches than church officials should control the budgets or policy priorities of governments. In a free society, the "conversion" of religious institutions it is not the government's job – it is not even the government's *business*.

### III. The Church-Disclosure Bill's Context, Background, and Purpose

According to the web site of Senator Marian Walsh, Senate Bill 1074 is "about bringing true transparency to public charities in Massachusetts" and about "strengthening [such] charities . . . through financial openness."<sup>25</sup> The *Needham Times*, in an editorial supporting the Bill, characterizes it as a "sunshine law."<sup>26</sup> Similarly, the *Boston Globe* reports that the Bill's goal – *i.e.*, "financial transparency" – "seems a small price to pay for independence from taxation" and insists that "[n]o organization should be exempt from accountability standards in the name of a higher calling."<sup>27</sup>

"Sunshine," "transparency," "openness," "accountability" – these and other unobjectionable, pleasant-sounding terms obscure the Church-Disclosure Bill's real purpose and effects, and distract from the threats it poses to religious freedom. In fact, the Bill is not about "bringing true transparency" to charities, or "strengthening" charities; it is an effort to have the Commonwealth of Massachusetts take sides in disputes between and among Catholics. Put simply, and in the words of John Garvey, "[s]ome Catholics are unhappy with the Church's handling of [the clergy sexual-abuse scandal and parish closings] [and] State Senator Marian Walsh of West Roxbury has proposed a law that would enlist the attorney general on the side of unhappy Catholics."<sup>28</sup> Such an effort, though, is utterly at odds with any meaningful commitment to the separation of church and state, properly understood. The representative of the Massachusetts Council of Churches put it well, testifying not long ago in opposition to the Bill, when she highlighted the "impropriety of using the legislative arm of government to deal with a[n] . . . internal dispute in one denomination, in this case the Roman Catholic Church."<sup>29</sup>

It is clear that the primary impetus for this Bill is the ongoing parish-reconfiguration process in the Archdiocese of Boston and also the widespread negative public reaction to the revelations in recent years of abuse by some Roman Catholic priests. More specifically, it is widely believed that the Archdiocese is selling property, and closing parishes, in order to pay huge money-damages awards to victims of clergy abuse.<sup>30</sup> It is this belief, rather than an

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<sup>25</sup> "Q & A – S. 1074 – An Act Relative to Charities in Massachusetts" (*see* <http://www.marianwalsh.com/charitiesbill.html>).

<sup>26</sup> Editorial, *A Fair Regulation for Financial Disclosure* (Aug. 18, 2005).

<sup>27</sup> Editorial, *Church Accountability* (Oct. 8, 2004).

<sup>28</sup> John Garvey, *No on Church Disclosure Bill*, *BOSTON GLOBE* (Aug. 11, 2005).

<sup>29</sup> Laura Everett, Program Associate of the Massachusetts Council of Churches, Testimony Submitted to the Joint Committee on the Judiciary in Opposition to S. 1074 (Aug. 10, 2005).

<sup>30</sup> "The Rev. J. Bryan Hehir, president of Catholic Charities Archdiocese of Boston, acknowledged that the church has been hit hard by the sex abuse scandal. He said financial pressures and the need to restructure parishes

abstract, general concern for “transparency” and “sunshine,” that is fueling the Bill.<sup>31</sup> Indeed, as the *Globe*’s editorial writers concede, “[Sen.] Walsh makes no secret of the fact that she is motivated by the plight of constituents who face the loss of their parishes.”<sup>32</sup> They note also the incontrovertible fact that “[t]he credibility of the archdiocese also suffered greatly in the clergy abuse scandal,” while warning – appropriately – that “[i]t is essential that any rancor toward religion not be allowed to pollute the bill.”

Unfortunately, this is precisely what is happening. Some of the Bill’s leading supporters have been highly critical of the fact that – given its legal existence as a “corporation sole”<sup>33</sup> – the Archbishop may and does act as absolute owner of all Church property. They charge that the “corporation sole” model, coupled with the current exemptions for churches from some financial-disclosure requirements, allows the Archbishop to operate behind a “shroud of secrecy.”<sup>34</sup> Others base their endorsement of the Bill on the assertion that “[s]unlight is the best disinfectant” for alleged corruption in the Church.<sup>35</sup> And, as was noted above, it is the position of Voice of the Faithful that the Bill’s aims find support in the words of St. Paul’s letter to the Ephesians: “For you were once darkness, but now you are light in the Lord. Live as children of light, for light produces every kind of goodness and righteousness and truth.”<sup>36</sup> For these Catholics, the virtue of Senate Bill 1074 is not merely that it would increase the flow of financial information from churches to the government, but that it would facilitate – or, perhaps, force – the “conversion” of “institutions [that] function unjustly.”<sup>37</sup> Put differently, it appears that much of the energy behind the Bill is being supplied by those for whom its purpose is to renew their trust in the Church. As Sen. Jarrett Barrios, a co-sponsor of the Bill, stated in his August 8, 2005

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has added to the strain in the church’s relationship with its parishioners and the political and civic communities.” Frank Phillips, *Bill Would Force Church to Disclose Its Finances*, BOSTON GLOBE (Aug. 8, 2005).

<sup>31</sup> In addition, some Boston-area Catholics have demanded an investigation into the management of priests’ pension funds, following Archbishop O’Malley’s November 13, 2004 disclosure of an unfunded pension liability of \$80 million. *See Full Text of Archbishop’s Letter*, BOSTON GLOBE ONLINE (Nov. 14, 2004).

<sup>32</sup> *See also* Sen. Marian Walsh, Dear Colleague Letter, Aug. 16, 2004 (tying introduction of the bill to “the recent events with the Archdiocese, and particularly, the closure and potential sale of income generating assets” including a parish in her district).

<sup>33</sup> A corporation sole is, “[a] series of successive persons holding an office; a continuous legal personality that is attributed to successive holders of certain monarchical or ecclesiastical positions, such as kings, bishops, rectors, vicars, and the like. This continuous personality is viewed, by legal fiction, as having the qualities of a corporation.” BLACK’S LAW DICTIONARY 342 (7<sup>th</sup> ed. 1999). A corporation sole is essentially the incorporation of an ecclesial or political office recognized by the state as having perpetual succession and absolute power over property vested in the office holder, an individual operating as a corporate entity acting under the office. The Archdiocese of Boston has operated on a corporation-sole model for more than a century.

<sup>34</sup> Hearing Testimony of William F. Galvin, Joint Committee on the Judiciary (Aug. 8, 2005). *See also*, Bill Zajac, *Tax Exemptions Face Challenge*, THE REPUBLICAN (Aug. 14, 2005) (reporting that “John M. Bowen of Longmeadow, who heads the East Longmeadow affiliate of the Voice of the Faithful, testified before the Judiciary Committee Wednesday that the Catholic Church needs state oversight because it continues to operate in secrecy despite its claims of transparency”).

<sup>35</sup> Thomas P. O’Neill and Steven Krueger, *Let the Sun Shine In*, BOSTON GLOBE (August 10, 2005). Thomas P. O’Neill is a former Lieutenant Governor of Massachusetts and Steven Krueger is a founding member of Voice of the Faithful. Both testified at the August 8, 2005 hearings before the Joint Committee on the Judiciary. Mr. O’Neill also stated, during the hearings, that he wanted “to give the Church a tweak.”

<sup>36</sup> *See* <http://www.votf.org/walsh/> (“Our churches need to support this bill. Our churches need to heed the words of St. Paul (Eph 5:8-9)[.]”).

<sup>37</sup> *See* <http://www.votf.org/walsh/>.

testimony, the bill is as much about “faith in [our] church” as it is about legal “transparency” in general or in the abstract.<sup>38</sup>

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Senate Bill 1074 would impose new obligations on churches and would increase the power of government officials over churches’ structure, internal operations, and ministry. These new obligations and powers are being proposed not merely to put churches on the same regulatory footing with other, secular charitable institutions, but to lend the law’s power and processes to Catholics seeking to challenge their Church and its ministers and leaders. Now, to be sure, there is nothing unconstitutional or inappropriate about Catholics trying to change or “reform” their Church, or to resist parish closings. (It is worth remembering that, in fact, the Catholic Church’s own laws provide ways to appeal and revisit such closings,<sup>39</sup> and conversations about them are ongoing within the Church.) What *is* inappropriate, though – indeed, what is constitutionally illegitimate – is for governments to take sides in essentially religious disputes or to express their disapproval of church leaders and practices by targeting them with new and intrusive regulatory burdens. The Supreme Court has made this clear, time and again: The government may not “lend its power to one or the other side in controversies over religious authority or dogma[.]”<sup>40</sup>

According to news reports, a prominent supporter of the Bill told the Joint Committee on the Judiciary that it is “one way of sending the church the message that it cannot continue with medieval despotism in the 21<sup>st</sup> century. We are no longer uneducated peasants although we are treated that way by the hierarchy.”<sup>41</sup> Putting to one side, for present purposes, the merits of this supporter’s understanding of history, the crucial point remains: Neither our Constitution nor our understanding of political freedom permits the government to serve as a coercive messenger for unhappy Catholics. Whether or not the Church hierarchy treats believers like “uneducated peasants” is, put bluntly, not something our government is allowed to care about.

#### **IV. The Church-Disclosure Bill and the Constitutions**

As has already been emphasized, the freedom of religion is our “first freedom” and it has long been at the heart of our shared vision for this nation. In a free society like ours, with values, ideals, and laws like ours, the “[t]he calculus of religious liberty . . . is determined” not by the extent to which governments manage to confine religious expression to the privacy of homes and churches, or to bring religious communities and activities under government supervision and

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<sup>38</sup> Testimony of Sen. Jarrett Barrios, Joint Committee on the Judiciary (Aug. 8, 2005).

<sup>39</sup> See Michael Paulson, *10 of 82 Parishes Fight Archdiocese on Closure Plans*, BOSTON GLOBE (August 12, 2004).

<sup>40</sup> *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990). See also, e.g., *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

<sup>41</sup> Zajac, *Tax Exemptions Face Challenge*, *supra* (quoting statement of John M. Bowen).

oversight, but instead “by the measure of religiously motivated thought and action that is insulated from public authority.”<sup>42</sup>

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So far, Senate Bill 1074’s supporters have been content to offer cursory and unhelpful assurances that the proposal “satisf[ies] constitutional requirements” and “respect[s] the church-state wall of separation.”<sup>43</sup> Senator Walsh reports, for example, that “[t]his bill is constitutional. Filing the [annual report] does not interfere with the establishment of [*sic*] nor the free exercise of religion. This does not bring about entanglement between the church and state.”<sup>44</sup> The Voice of the Faithful’s “talking points” are similarly conclusory: “Requiring religious organizations to file this form does not violate the First Amendment of the Constitution because this form hinders neither the establishment of nor the free exercise of any religion. The state cannot interfere with the practice of religion and filing this form is not such interference.”<sup>45</sup>

In fact – as even some supporters of the Bill will concede<sup>46</sup> -- the Church-Disclosure Bill is constitutionally suspect. But first, a few preliminary clarifications are important: The right question here is not whether “filing this form” “interfere[s] with the practice of religion,” nor is it even whether churches should be “exempt from accountability standards in the name of a higher calling.”<sup>47</sup> Churches are not, of course, above the law; and, our Constitutions’ religious-freedom guarantees are not infringed merely because incorporated churches have to file disclosure forms from time to time. To understand why the Bill is inconsistent with our religious-freedom commitments, one must be clear about what it does, that is, it imposes new disclosure requirements *for the purposes* of responding to some constituents’ *religious* objections to the Church’s *religious* decisions and it purports to grant the government new oversight powers over such decisions in order to enlist the state in the service of what is, in the end, a *religious* agenda: The “conversion” of the Church and its leaders and the restoration of some Catholics’ faith in their Church.

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The proposed Bill falls short in many ways and is vulnerable on many fronts. *First*, it burdens the “free exercise of religion” protected by the Religion Clause of the First Amendment to the Constitution of the United States. (It does not appear that the Bill’s supporters have focused on its effects on free exercise). Now, it has been clearly established by the Supreme Court of the United States that not all burdens on religious exercise or activity are

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<sup>42</sup> JOSEPH P. VITERITTI, CHOOSING EQUALITY: SCHOOL CHOICE, THE CONSTITUTION, AND CIVIL SOCIETY 165 (1999).

<sup>43</sup> See Editorial, *Church Accountability*, *supra*.

<sup>44</sup> “Q & A – S. 1074 – An Act Relative to Charities in Massachusetts,” *supra*.

<sup>45</sup> See <http://www.votf.org/walsh/WalshTalkingPoints.pdf>.

<sup>46</sup> Indeed, Laurie Flynn, the writer of a staff memorandum to Secretary of the Commonwealth William F. Galvin, concedes in that memo that “a challenge by the attorney general with regard to the discretion of a religious organization to use solicited funds for religious purposes would likely be held an impermissible intrusion into ecclesiastical authority.” Memorandum to William Francis Galvin, Secretary of the Commonwealth, from Laurie Flynn, Legal Counsel (Aug. 8, 2005).

<sup>47</sup> Editorial, *Church Accountability*, *supra*.

unconstitutional and also that religious believers and institutions are not entitled to exemptions from most generally applicable, neutral laws.<sup>48</sup> Thus, the fact that some religious persons desire to use illegal drugs, for religious reasons or in religious rituals, does not entitle them to an exemption from the drug laws. And, it can be conceded that a legal requirement that churches, like all other corporations, file certain forms or disclose certain information to the appropriate regulators would not necessarily violate the Religion Clause.

But Senate Bill 1074 presents a different case, and in several ways. For starters, it is not clear that the proposed new burdens are “generally applicable.” As has already been discussed, some non-profit hospitals, libraries, and colleges would continue to enjoy some of the regulatory exemptions that the Bill would deny to churches.<sup>49</sup> However, in cases involving laws that are *not* of general applicability, the government may justify its infringement upon the particular religious practice only by demonstrating that the infringement is narrowly tailored to further a compelling governmental interest.<sup>50</sup> In addition, it remains black-letter constitutional law that even facially “neutral” laws can violate the First Amendment’s Religion Clause if they are motivated by a desire to target religious believers or practices. As the Court insisted, in the *Church of the Lukumi Babalu-Aye*, “[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt.”<sup>51</sup> In that case, the Justices examined closely the legislative record and the relevant political and social context, and concluded that a purportedly neutral law against animal sacrifice was, in fact, designed to target the particular practices of a particular religion. Senate Bill 1074, which is a legislative effort to assist some Catholics who are frustrated with the Church’s handling of parish closings and the clergy-abuse crisis, would likely be vulnerable on similar grounds.

Under this same heading, it is crucial to note that the Free Exercise Clause is thought by prominent scholars to protect not only the conscience rights of individual believers, but also the independence and autonomy of *churches*. As Professor Douglas Laycock has shown, “[q]uite apart from whether a regulation requires a church or an individual believer to violate religious doctrine or felt moral duty, *churches* have a constitutionally protected interest in managing their own institutions free of government interference.”<sup>52</sup> The Justices captured this idea well, in their 1952 *Kedroff* case, when they invoked and endorsed a constitutionally protected “spirit of freedom for religious organizations, an independence from secular control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”<sup>53</sup> It is easy to see how a law like Senate Bill 1074, authorizing review and supervision of churches’ decisions about raising and spending money,

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<sup>48</sup> See, e.g., *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>49</sup> See, e.g., *Rader v. Johnston*, 924 F. Supp. 1540 (D. Neb. 1996) (concluding that a state university’s rule requiring full-time freshmen students to live on campus was not a rule of general applicability because the university had created system of individualized government assessment of students’ request for exemptions).

<sup>50</sup> See, e.g., *Church of the Lukumi Babalu-Aye v. City of Hialeah*, 508 U.S. 520 (1993). See generally, Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise*, Smith, Lukumi, and the General Applicability Requirement, 3 U. PA. J. CONST’L L. 850 (2001).

<sup>51</sup> *Church of the Lukumi Babalu-Aye*, *supra*, at 532.

<sup>52</sup> Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church-Labor Relations and the Right to Church Autonomy*, 81 COLUMBIA L. REV. 1373, 1373 (1981).

<sup>53</sup> *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952).

closing and operating parishes, and organizing and conducting their ministry, directly implicates and undermines these values.

*Second*, as every law student learns, the Court famously interpreted the Religion Clause in *Lemon v. Kurtzman* to require, among other things, that laws have a “secular legislative purpose.”<sup>54</sup> This basic rule means, among other things, that the government “may not express an opinion about religious matters,” or “take an official position on matters of religion,” or communicate such a position via legislation.<sup>55</sup> And, just this past summer, the Justices re-affirmed this requirement in two Ten Commandments cases, insisting that a government purpose of “taking sides” with respect to religion or on a religious matter is *not* a valid, secular legislative goal.<sup>56</sup>

Accordingly, in *McCreary County*, the Court invalidated a Ten Commandments display – notwithstanding the fact that the Commandments were surrounded with a variety of other historical, apparently secular documents – where the display’s history and the legislative record indicated its religious purpose. Here, too, despite the frequent invocation by the Bill’s supporters and sponsors of neutral-sounding interests in “transparency” and “strengthening charities,” the political and social context out of which the Bill has emerged – to say nothing of the tone and content of many supporters’ statements during the recent hearings before the Joint Committee on the Judiciary – provide a strong basis for concluding that this law’s decidedly non-“secular purpose” is to restore some unhappy Catholics’ faith in their Church and its leaders, and to coerce the Church in a direction favored by some legislators and their constituents.<sup>57</sup>

*Third*, the Bill would violate the Establishment Clause by badly “entangling” the regulatory power of government with the religious mission of churches.<sup>58</sup> In fact, many of Senate Bill 1074’s supporters have acknowledged, only to minimize or shrug off, the risk of such entanglement.<sup>59</sup> But the need to protect the “garden” of religious faith and freedom from the “wilderness” of state power and political ambition is one of the oldest themes in our constitutional tradition.<sup>60</sup>

Of course, requirements that churches or other religious institutions disclose facts about their day-to-day operations, or engage in routine recordkeeping, do not, generally speaking,

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<sup>54</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>55</sup> Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 89, 109, 111 (2002).

<sup>56</sup> *McCreary County v. ACLU*, 125 S.Ct. 2722, 2733 (2005). *See also, e.g., Corp. of Presiding Archbishop v. Amos*, 483 U.S. 327, 335 (1987) (noting that when the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides).

<sup>57</sup> *See generally, e.g.,* Michael Levenson, *Archdiocese Skips Hearing, Stirs Ire*, BOSTON GLOBE (Aug. 11, 2005).

<sup>58</sup> *See, e.g.,* Levenson, *Archdiocese Skips Hearings, supra* (quoting Laura E. Everett of the Council of Churches as warning that “[t]his legislation will constitute unwarranted intrusion and excessive entanglement in the lives of all churches”); Edward F. Saunders, *Testimony Presented to the Joint Committee on the Judiciary* (Aug. 10, 2005) (“The entanglement with religion would be excessive, going far beyond any ‘routine regulatory interaction’ and thus raises substantial First Amendment concerns.”).

<sup>59</sup> *See, e.g.,* Editorial, *Church Accountability, supra* (noting that “a vague sense that disclosure on the part of churches would create government entanglement with religion”).

<sup>60</sup> *See, e.g.,* MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS* (1965).

create unconstitutional entanglements between government and religion.<sup>61</sup> With respect to Senate Bill 1074, though, the supposed innocuousness of the mandated disclosures is a distraction. The Bill is offensive to the Constitution and to religious-freedom principles not so much because it would require churches to file some forms, but because it would do so for the purposes of *taking sides in a religious dispute* and of *authorizing government oversight, supervision, and even revision of religious decisions*. But again, if the Religion Clause means anything, it surely means that government may not “lend its power to one or the other side in controversies over religious authority or dogma[.]”<sup>62</sup>

The Supreme Court emphasized this point, more than 35 years ago, in the *Blue Hull Memorial Presbyterian Church* case.<sup>63</sup> In that case, two local Presbyterian churches in Savannah, Georgia had asked that state’s courts to rule that the Presbyterian Church in the United States – a hierarchically governed association of Presbyterian churches – had strayed so dramatically from traditional church doctrine that it had lost its rights to the local churches’ property. (As Voice of the Faithful might put it, the local congregations sought to use the law to call the national church to re-“conversion.”) The Justices rejected this effort, insisting that:

[F]irst Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern.<sup>64</sup>

Thus, the institutions of religion and government are unconstitutionally “entangled” not only when the state assumes for itself the power to monitor and revise churches’ internal and religious practices, but also when state officials and laws purport to take sides in religious controversies or to take an interest in churches’ reform or “conversion.”

*Finally*, the Bill’s defenders have rarely, if ever, acknowledged that, in the Commonwealth of Massachusetts, religious freedom is protected, and government is constrained, by provisions that significantly pre-date, and perhaps out-work, the First Amendment. The “free exercise” provision of Massachusetts’ own Constitution, for example, has been interpreted by the Supreme Judicial Court as providing greater protection for the free exercise of religion, and closer scrutiny of government-imposed burdens, than does the First Amendment.<sup>65</sup> Under this provision, the mere fact – assuming, for now, that it is a fact – that the law at issue here is neutral and generally applicable would not immunize the intrusive review it authorizes and the regulatory burdens it imposes from careful review.

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<sup>61</sup> See, e.g., *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378 (1990).

<sup>62</sup> *Smith*, *supra*, at 877.

<sup>63</sup> *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969).

<sup>64</sup> *Id.* at 449.

<sup>65</sup> *Attorney General v. Desilets*, 418 Mass. 316, 320-22 (1994).

Also, Article II of the Massachusetts Constitution – unchanged since its adoption in 1790 – “plainly contemplates broad protection for religious worship.”<sup>66</sup> In a 1990 case, *Society of Jesus of New England v. Boston Landmarks Comm’n*,<sup>67</sup> the Supreme Judicial Court invalidated a decision of the Boston Landmarks Commission on the ground that it unconstitutionally burdened the Jesuits’ freedom of worship under Article II. The Landmarks Commission had declared areas of the Church of the Immaculate Conception to be historic landmarks and prohibited the Jesuits from renovating those areas without approval. Specifically, the Commission argued that placement of the altar and other internal design features of the church were merely secular considerations. The Court disagreed, writing that “[t]he configuration of the church interior is so freighted with religious meaning that it must be considered part and parcel of the Jesuits’ religious worship.” And, the Court went out of its way to emphasize that the Commission’s declaration was invalid not simply because the public interest in historic preservation was somehow outweighed by competing freedom-of-worship concerns; instead, the Court recognized the free exercise of religion as a “primary right” in Massachusetts, one that occupies a top spot in the Commonwealth’s “hierarchy of constitutional values.”

It should be clear that a law authorizing the attorney general to review, and even to reverse, churches’ decisions relating to allocation of resources, priorities in ministry and clergy, and parish closings burdens the exercise of religion in a way analogous to a historic-preservation declaration about the placement of the altar.

What is more, Article III of the Massachusetts Constitution – citing the fact that “the public worship of God and instructions in piety, religion, and morality promote the happiness and prosperity of a people and the security of a republican government” – specifically protects the right of religious societies “to elect their pastors or religious teachers, to contract with them for their support, [and] to raise money for erecting and repairing houses for public worship, for the maintenance of religious instruction[.]”<sup>68</sup> Like courts interpreting the First Amendment, courts in Massachusetts have made clear that “it is not the province of civil courts to enter the domain of religious denominations for the purpose of deciding controversies touching matters exclusively ecclesial.”<sup>69</sup> Since the question whether the Bishops in Massachusetts should disclose more financial information is internal to the Catholic Church and implicates issues exclusively ecclesial in nature, the state should not intervene in its resolution.

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<sup>66</sup> *Soc’y of Jesus of New England v. Boston Landmarks Commission*, 409 Mass. 38, 41 (1990). See also Mass. Const. art. II (“It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the Supreme Being, the great Creator and Preserver of the universe. . .”).

<sup>67</sup> 409 Mass. 38 (1990).

<sup>68</sup> Mass. Const. art. III. See also Mass. Const. art. XI.

<sup>69</sup> *Greek Orthodox Community v. Malicourtis*, 267 Mass. 472, 482 (1929) (citing *Moustakis v. Hellenic Orthodox Society*, 261 Mass. 462, 466 (1928)). See also *McNeilly v. First Presbyterian Church in Brookline*, 243 Mass. 331, 340 (1923) (Constitution protects churches from implied restrictions on charitable gifts when donors seek to alter the internal election process of the church by way of an implied trust on donations.).

## V. Conclusion: Understanding the Separation of Church and State

In the end, the fundamental defect and most deeply troubling feature of the Church-Disclosure Bill is that it violates, as much as any seriously considered legislative proposal ever has, the principle of separation of church and state.

To be sure, many public officials and citizens misunderstand, and therefore misuse, the meaning of the phrase, the “separation of church and state,” and the place of this idea in our constitutional traditions. Certainly, those words do not appear in the text of the First Amendment or of the relevant provisions of the Constitution of the Commonwealth of Massachusetts. That said – as thinkers from St. Augustine to Roger Williams to James Madison have taught us<sup>70</sup> -- the “separation of church and state,” properly understood, is an important component of religious freedom. That is, the *institutional and jurisdictional separation* of religious and political authority, the independence of religious communities from government oversight and control, respect for the freedom of individual conscience, government neutrality with respect to different religious traditions, and a strict rule against formal religious tests for public office – all these “separationist” features of our constitutional order have helped religious faith to thrive in our nation and communities. Properly understood, the separation of church and state is not an anti-religious ideology, but a “means, a technique, [and] a policy to implement the principle of religious freedom.”<sup>71</sup>

True, many have confused Thomas Jefferson’s “figure of speech”<sup>72</sup> about a “wall of separation between church and State” with a novel and unsound rule that would obligate public officials to scrub clean the public square of all “sectarian” residue. This view of church-state separation is seriously mistaken. It is untrue to the vision of our Founders and to the text of our Constitution.<sup>73</sup> In fact, our Constitutions separate “church” and “state” not to confine religious belief or silence religious expression, but to *curb the ambitions and reach of governments*. In our laws, “Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God’s. (Surely this is one of history’s more encouraging examples of secular modesty.) The State realistically admits that there are . . . limits on its authority and leaves the churches free to perform their work in society.”<sup>74</sup> And, as Professor – now Judge – Michael McConnell has explained, this “division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of civil society, as apart from

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<sup>70</sup> See generally, e.g., John Witte, Jr., Book Review, *That Serpentine Wall of Separation*, 101 MICH. L. REV. 1869 (2003).

<sup>71</sup> John Courtney Murray, *Law or Prepossessions?*, 14 J. L. CONTEMP. PROBS. 23, 32 (1949).

<sup>72</sup> See *McCullum v. Board of Education*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) (“A rule of law should not be drawn from a figure of speech.”).

<sup>73</sup> See generally, e.g., PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* (2000); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); GERALD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987). See also, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 91-113 (1985) (Rehnquist, J., dissenting).

<sup>74</sup> William Clancy, *Religion as a Source of Tension*, in *RELIGION AND THE FREE SOCIETY* 27-28 (1958).

government, bearing primary responsibility for the formation and transmission of opinions and ideas.”<sup>75</sup>

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To borrow Professor Laycock’s words – offered in another, but relevant, context<sup>76</sup> – the proposed Church-Disclosure Bill would be a “shocking interference with internal church affairs.” After all, the Bill represents, in the end, an effort to get on what many legislators perceive to be the right side of an essentially theological debate about church governance. And, as Justice David Souter once observed, “[one] can hardly imagine a subject less amenable to the competence of [government officials], or more deliberately to be avoided where possible.”<sup>77</sup>

It is true that the Church is not above the law, but our Constitution does not permit the law to be used to reform or refashion the Church. This constraint exists not only to protect the particular interests of the Church but also, and more generally, the political freedom that depends fundamentally on principles of limited government that the freedom of the Church inspired and sustains.

For all these reasons, Senate Bill 1074 should be rejected by careful and conscientious legislator and citizens alike.

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<sup>75</sup> McConnell, *Why Is Religious Liberty the “First Freedom,”* *supra*, at 1244.

<sup>76</sup> This is how Professor Laycock characterized a California law requiring all employers – even Catholic Charities – to pay for contraception coverage for their employees.

<sup>77</sup> *Lee v. Weisman*, 505 U.S. 577, 616-17 (1992) (Souter, J., concurring).