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## The Substantial Burden of Municipal Zoning: The Religious Freedom Restoration Act As a Means to Consistent Protection for Church-Sponsored Homeless Shelters and Soup Kitchens

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# THE SUBSTANTIAL BURDEN OF MUNICIPAL ZONING: THE RELIGIOUS FREEDOM RESTORATION ACT AS A MEANS TO CONSISTENT PROTECTION FOR CHURCH-SPONSORED HOMELESS SHELTERS AND SOUP KITCHENS

*Despite the increase in poverty and homelessness in the United States, many municipalities are attempting to use zoning regulations to limit the spread of church-sponsored programs that minister to the poor. Although the Religious Freedom Restoration Act of 1993 (RFRA) suggests that courts should find church-sponsored programs exempt from the burdens of municipal zoning, recent decisions in federal courts demonstrate that church-sponsored homeless shelters and soup kitchens will receive the same inconsistent protection they received under traditional Free Exercise Clause analysis. This Note argues that enforcement of zoning regulations places a substantial burden on church-sponsored programs that minister to the poor, and that municipalities may often fail to provide adequate justification for their regulations under RFRA. Consequently, religious plaintiffs should receive exemptions from municipal zoning regulations. Nevertheless, this Note contends that municipalities retain sufficient control over church-sponsored homeless shelters and soup kitchens through the use of reasonable safety restrictions and common law public nuisance actions.*

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## INTRODUCTION

Everyday, between six and seven hundred thousand people go without shelter in the United States.<sup>1</sup> Nevertheless, in an era in which Congress looks to churches as “the great untapped resource in the welfare reform debate,”<sup>2</sup> municipalities often seek to use zoning regulations to prevent churches from operating shelters and soup kitchens designed to alleviate the burdens of homelessness.<sup>3</sup> Faced with municipal opposition, church-spon-

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<sup>1</sup> Guy Gugliotta, *HUD Awards \$900 Million for Homeless; Programs in District, Maryland and Virginia to Get \$49 Million*, WASH. POST, July 11, 1995, at A1; Sue Anne Pressley, *Homeless Feeling the Chill; Austin, Other Cities Are Cracking Down*, WASH. POST, Dec. 26, 1995, at A1, A14.

<sup>2</sup> Laurie Goodstein, *Churches May Not Be Able to Patch Welfare Cuts*, WASH. POST, Feb. 22, 1995, at A1 (quoting Representative Tim Hutchinson (R-Ark.)).

<sup>3</sup> See, e.g., *First Assembly of God of Naples, Fla., Inc. v. Collier County*, 20 F.3d 419 (11th Cir. 1994) (reviewing county enforcement of zoning regulations to close a homeless shelter), *cert. denied*, 115 S. Ct. 730 (1995); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (reviewing municipal denial of a permit to operate a church-sponsored homeless shelter and soup kitchen); *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994) (reviewing municipal enforcement of zoning regulations to bar church-sponsored

sored homeless shelters and soup kitchens have sought to use the Religious Freedom Restoration Act of 1993 (RFRA)<sup>4</sup> to obtain exemptions from the burdens of local zoning regulation. Although recent judicial decisions in the District of Columbia and Florida suggest that religious plaintiffs are likely to enjoy mixed success in their efforts to obtain such exemptions,<sup>5</sup> this Note will argue that RFRA's elevated conception of religious liberty should provide greater protection to church-sponsored homeless shelters and soup kitchens than was previously found under traditional free exercise analysis and the standards of *Employment Division v. Smith*.<sup>6</sup>

Part I will demonstrate that RFRA's enactment represents a renewed recognition that religious liberty claims deserve strict scrutiny review by the courts. Part II will contend that church-sponsored homeless shelters and soup kitchens are traditionally religious activities such that enforcement of municipal zoning against church homeless programs represents a substantial burden on the churches' and volunteers' free exercise of religion. Finally, Part III will identify circumstances in which municipalities may regulate church-sponsored homeless programs without violating the protections afforded by RFRA.

## I. RFRA: STATUTORY PROTECTION FOR FREE EXERCISE RIGHTS

Congress enacted RFRA in response to widespread criticism of the Supreme Court's 1990 decision in *Smith*.<sup>7</sup> Prior to *Smith*, claims for religious

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soup kitchen); *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d (Mich. Ct. App. 1996) (barring homeless shelter as an "accessory use" to a church).

The problems occasioned by a vast homeless population increasingly have led municipalities to undertake a variety of measures designed to discourage the homeless from remaining a visible problem, including "public-place restrictions, police sweeps, restrictions against service providers and selective enforcement of vagrancy and other laws." Guy Gugliotta, *Hunger and Homelessness on the Rise, Mayors Warn*, WASH. POST, Dec. 20, 1994, at A8.

<sup>4</sup> 42 U.S.C. § 2000bb to 2000bb-1 (Supp. V 1993). Under RFRA, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless it can demonstrate that application of the burden "is the least restrictive means of furthering [a] compelling governmental interest." *Id.* § 2000bb-1.

<sup>5</sup> Compare *Daytona Rescue Mission*, 885 F. Supp. at 1554 (upholding denial of municipal permit for operation of a church-sponsored homeless shelter and soup kitchen) with *Western Presbyterian Church*, 862 F. Supp. at 538 (holding that enforcement of zoning regulations to bar church-sponsored soup kitchen was an impermissible burden on the church's religious freedom).

<sup>6</sup> 494 U.S. 872 (1990).

<sup>7</sup> HOUSE JUDICIARY COMM., RELIGIOUS FREEDOM RESTORATION ACT OF 1993, H.R. REP. NO. 88, 103d Cong., 1st Sess. 6 (1993), available in WESTLAW, Legislative History database [hereinafter H.R. REP. NO. 88] (noting that RFRA is "[t]he legislative

exemptions to generally applicable laws were governed by the standard developed in *Sherbert v. Verner*.<sup>8</sup> Under *Sherbert*, "any incidental burden on the free exercise of . . . religion [had to] be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate.'" After *Sherbert*, the Court applied its analysis with

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response to the *Smith* decision"); SENATE JUDICIARY COMM., RELIGIOUS FREEDOM RESTORATION ACT OF 1993, S. REP. NO. 111, 103d Cong., 1st Sess. 2 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1893 [hereinafter S. REP. NO. 111] (stating that RFRA "responds to the Supreme Court's decision" in *Smith*).

For criticism of *Smith*, see John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of Oregon v. Smith*, 25 IND. L. REV. 71 (1991); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91 (1991); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); see also James E. Ryan, Note, *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409-10 (1992) (describing media, academic, political, and religious criticism of *Smith*).

In 1995, a federal district court in Texas declared RFRA unconstitutional under the separation of powers doctrine. *Flores v. City of Boerne*, 877 F. Supp. 355, 357 (W.D. Tex. 1995), rev'd, 73 F.3d 1352 (5th Cir. 1996). Specifically, the court held that RFRA violated *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), because it was enacted to overturn the Supreme Court's interpretation of the Free Exercise Clause in *Smith*. *Flores*, 877 F. Supp. at 357. On appeal, the Fifth Circuit held that RFRA was a valid exercise of congressional power under § 5 of the Fourteenth Amendment. *Flores v. City of Boerne*, 73 F.3d 1352, 1363 (5th Cir. 1996).

With RFRA, Congress statutorily expanded the scope of free exercise protection beyond that authorized in *Smith*. According to the one-way "ratchet" theory, Congress is authorized to expand the protections of the Fourteenth Amendment under § 5 of the Fourteenth Amendment, but it is not permitted to contract protection below the minimum guaranteed by the Constitution. Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1062 (1993). Although RFRA expands the interpreted protections of the Free Exercise Clause, the incorporation of the First Amendment permits congressional expansion of free exercise rights. See *Hutto v. Finney*, 437 U.S. 678 (1978) (permitting congressional expansion of Eighth Amendment rights because of the amendment's incorporation). Accordingly, RFRA is not an unconstitutional assumption of judicial power. For a detailed analysis of the ratchet theory and RFRA's constitutionality, see Pawa, *supra*.

<sup>8</sup> 374 U.S. 398 (1963). In *Sherbert*, a Seventh-Day Adventist was fired when she refused to work on Saturday, her sabbath. *Id.* at 399. After being denied unemployment benefits because she had failed to accept offered work without good cause, *Sherbert* filed suit against South Carolina, successfully arguing that the state's refusal to grant benefits unconstitutionally burdened her free exercise rights. *Id.* at 400-01.

<sup>9</sup> *Id.* at 403 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Prior to *Sherbert*, the Court had repeatedly refused to recognize free exercise exemptions. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (holding that a neutral statute which regulated solicitation in general did not implicate free exercise protection simply because the solicitation at issue was religious); *Reynolds v. United States*, 98 U.S. 145,

varying degrees of devotion and success.<sup>10</sup> As several Representatives noted during passage of RFRA, *Sherbert* "represent[ed] the zenith of free exercise jurisprudence, where religious plaintiffs who sought to have their individual claims balanced against government interests actually prevailed."<sup>11</sup> On the other hand, notwithstanding the inconsistent application of the Free Exercise Clause's protections, *Smith* was the most explicit repudiation of the heightened scrutiny traditionally afforded religious claims.

In *Smith*, the Court held that a generally applicable law could burden an individual's religiously motivated conduct without subjecting the law to the heightened scrutiny traditionally required by *Sherbert*.<sup>12</sup> Accordingly, the

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161-62 (1878) (refusing to excuse Mormon defendant from a bigamy conviction even if he was acting "in conformity with . . . a religious duty"). *But see* *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961) (refusing to grant a religious exemption but foreshadowing *Sherbert* by noting that a generally applicable law with secular goals "is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden").

<sup>10</sup> See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) (refusing to limit timber cutting on federal land used for Native American religious rituals); *Bowen v. Roy*, 476 U.S. 693 (1986) (refusing to grant free exercise exemption from state requirement that parents obtain social security number for child in order to participate in federal social welfare programs); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (granting Amish parents an exemption from state law requiring children to attend high school until age 16).

<sup>11</sup> H.R. REP. NO. 88, *supra* note 7, at 15 (additional views of Rep. Henry J. Hyde et al.).

<sup>12</sup> *Employment Div. v. Smith*, 494 U.S. 872, 885 (1990). In *Smith*, the respondents worked at a drug rehabilitation organization until their employer discovered that the respondents had used peyote for sacramental purposes as part of their membership in the Native American Church. *Id.* at 874. The respondents were denied state unemployment benefits "because they had been discharged for work-related 'misconduct'"; namely, the consumption of illegal drugs. *Id.* *Smith* and Black sued Oregon, alleging that their free exercise rights had been violated when the State refused to grant them a religious exemption that would permit them to receive unemployment benefits. *Id.*

Although the Oregon Court of Appeals and the Oregon Supreme Court used the *Sherbert* test repeatedly to find that Oregon had violated the respondents' free exercise rights, see *Smith v. Employment Div.*, 709 P.2d 246 (Or. Ct. App. 1985), *aff'd*, 721 P.2d 445 (Or. 1986), *remanded*, 485 U.S. 660 (1988), *aff'd*, 763 P.2d 146 (Or. 1988), *rev'd*, 494 U.S. 872, 878-79 (1990), the United States Supreme Court refused to hold "that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Smith*, 494 U.S. at 878-79. Justice Scalia, the author of the majority opinion, noted that if the *Sherbert* test were employed, religious individuals would enjoy "a private right to ignore generally applicable laws . . . a constitutional anomaly." *Id.* at 886. He explicitly rejected its application to claims for exemptions from criminal laws. *Id.* at 883-84.

Although Justice Scalia had the support of Chief Justice Rehnquist and Justices White, Stevens, and Kennedy, the balance of the Court took sharp issue with the majority's rejection of the *Sherbert* test. Justice O'Connor noted:

immediate effect of *Smith* was to virtually guarantee the constitutionality of any generally applicable law that burdened religion.

Justice Scalia argued that the political process would act to protect against religious oppression and excessive burdens on free exercise.<sup>13</sup> Although courts were not permitted to excuse churches and individuals from generally applicable laws that burdened their free exercise, government could enact "nondiscriminatory religious-practice exemption[s]."<sup>14</sup> Justice Scalia recognized that "leaving accommodation to the political process [would] place [minority religions] at a relative disadvantage[,] . . . but that [was an] unavoidable consequence of democratic government."<sup>15</sup> The alternative was "a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs."<sup>16</sup>

RFRA explicitly reestablished *Sherbert*'s compelling interest test in an effort to "provide a claim or defense to persons whose religious exercise [was] substantially burdened by government."<sup>17</sup> Under RFRA, government may not substantially burden the free exercise of religion unless it demonstrates that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>18</sup> Unlike the standard established in *Smith*, RFRA

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[T]he essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether . . . imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community.

*Id.* at 897 (O'Connor, J., concurring in judgment). Similarly, Justice Blackmun warned that the majority was "effectuat[ing] a wholesale overturning of settled law concerning the Religion Clauses." *Id.* at 908 (Blackmun, J., dissenting).

When confronted with a burden on the free exercise of religion, O'Connor believed that "the sounder approach" was to apply the *Sherbert* test to balance the state's interest against the free exercise burden. *Id.* at 899 (O'Connor, J., concurring in judgment). O'Connor argued that use of the test would not invalidate a law in the face of a superior state interest; even under *Sherbert*'s heightened scrutiny, "uniform application of Oregon's criminal prohibition [was] 'essential to accomplish' its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance." *Id.* at 905 (O'Connor, J., concurring in judgment) (citation omitted). *But see id.* at 921 (Blackmun, J., dissenting) (concluding that Oregon's justifications for enforcing its drug laws against the respondents were "not sufficiently compelling to outweigh [plaintiffs'] right to the free exercise of their religion").

<sup>13</sup> *Smith*, 494 U.S. at 890.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> 42 U.S.C. § 2000bb(b)(1)-(2) (Supp. V 1993) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)).

<sup>18</sup> *Id.* § 2000bb-1(b).

does not distinguish between laws of general applicability and those which have impermissible purposes with regard to religion.<sup>19</sup> Under RFRA, courts may grant exemptions to individuals and churches whose religiously motivated conduct is substantially burdened by laws of general applicability.<sup>20</sup>

RFRA "was supported by a wall-to-wall coalition of religious and civil liberties groups"<sup>21</sup> who feared that *Smith*'s reliance on the political arena would tend to embrace only mainstream religion, leaving minority religions little chance of obtaining exemptions from laws of general application that burdened their religious exercise.<sup>22</sup> In enacting RFRA, Congress allied itself with Justice O'Connor's concurrence in *Smith*,<sup>23</sup> noting that

[s]tate and local legislative bodies cannot be relied upon to craft exceptions from laws of general application to protect the ability of the religious minorities to practice their faiths . . . .

"The very purpose of [the] Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts."<sup>24</sup>

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<sup>19</sup> See *id.* § 2000bb-1(a).

<sup>20</sup> See *id.*

<sup>21</sup> Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 895-96 (1994).

<sup>22</sup> See McConnell, *supra* note 7, at 1132 (noting that "political branches, being political, will tend to be most solicitous of the value of familiar, popular, and socially acceptable religious faiths"). But see Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1637 (1993) (arguing that minority religions could obtain majority support for toleration-based exemptions); Mark Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691, 1700 (1988) (observing that as a result of different interests, religious groups form shifting coalitions, preventing the establishment of one religious majority); Ryan, *supra* note 7, at 1445-51 (arguing that religion already enjoys great success in obtaining legislatively enacted religious exemptions, and that minority religions benefit because they often share political concerns with majority religions).

<sup>23</sup> See *Employment Div. v. Smith*, 494 U.S. 872, 902-03 (1990) (O'Connor, J., concurring in judgment).

<sup>24</sup> S. REP. NO. 111, *supra* note 7, at 8, reprinted in 1993 U.S.C.C.A.N. at 1897 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)); see also H.R. REP. NO. 88, *supra* note 7, at 6 (noting the infeasibility of combatting "the burdens of generally applicable laws on religion by relying upon the political process for the enactment of separate religious exemptions in every Federal, State, and local statute").

Although Congress enacted RFRA out of fear that the political process might afford little comfort to those seeking religious exemptions from generally applicable laws, RFRA is far from a panacea for free exercise ills. Courts are not insusceptible to majoritarian beliefs and often have little objective criteria upon which to decide whether conduct is religiously motivated.<sup>25</sup> When confronted with claims for RFRA exemptions from the burdens inflicted by municipal zoning regulations, uncertainty as to that which constitutes religion may operate to the detriment of religious plaintiffs. In turn, church-sponsored soup kitchens and homeless shelters may be thwarted in their attempts to secure exemptions from the burdens of local zoning if courts fail to recognize that enforcement of municipal zoning places a substantial burden on the free exercise of religion.

## II. MUNICIPAL ZONING OF CHURCH-SPONSORED HOMELESS SHELTERS AS A SUBSTANTIAL BURDEN ON THE FREE EXERCISE OF RELIGION

Zoning is "the most widespread local land-use control tool" in the United States.<sup>26</sup> Although forms of zoning were present in colonial times,<sup>27</sup>

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<sup>25</sup> See Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 941 (1989). "[D]ecisionmakers tend to fall back on . . . conventional Western patterns of religion [or the] simple equation[] of religion with Christianity." *Id.* Even objective standards as to that which constitutes religion "risk [a] bias toward[s] Western, monotheistic religions." *Id.* at 959.

This is not to argue that RFRA is irrelevant or fundamentally ineffective. RFRA gives the religious plaintiff an opportunity for meaningful judicial review. Without RFRA, legislative bodies would be the only means for religious individuals and churches to obtain exemptions from generally applicable laws. A minority religion that was unable to muster support for its position in the legislature would receive little assistance from the courts, regardless of the centrality of the conduct to the minority's religion, because under *Smith*, courts are permitted only due process review of regulations that have no specified exemptions. Consequently, the minority religion's chance of success would be severely limited. RFRA, however, permits courts to review the claims of churches that are unable to secure legislative exemptions from laws that burden their religion. Depending on the court's perception of whether a substantial burden exists, the court can use the compelling interest test to balance the government's and churches' interests. In addition, a court's error frequently is reviewable. Accordingly, although reliance on legislatures provides only one method of determining the need for an exemption, RFRA provides several additional effective opportunities for recognition of a free exercise exemption.

<sup>26</sup> RUTHERFORD H. PLATT, *LAND USE CONTROL: GEOGRAPHY, LAW, AND PUBLIC POLICY* 166 (1991).

<sup>27</sup> In colonial times, "slaughter houses, gunpowder mills, and the like [were relegated] to the outskirts of the municipality." ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 9.3, at 543 (2d ed. 1993). Additionally, in an effort to avoid widespread destruction in the event of a fire, many localities created "fire districts" whereby certain types of buildings were prohibited from certain areas. *Id.*



contemporary development of zoning took place during the early twentieth century when public concern over urban congestion grew.<sup>28</sup> With increased urbanization and industrialization came the realization that zoning was the natural method of balancing the individual's property rights against society's interdependency.<sup>29</sup>

Zoning is a legislative extension of public nuisance law.<sup>30</sup> The doctrine of public nuisance permits a government entity to enjoin "an 'unreasonable' activity or condition on [an individual's] land that 'substantially' or 'unreasonably' interferes" with the rights of the general public.<sup>31</sup> A nuisance is not necessarily the result of illegal activity; it "may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard."<sup>32</sup> Although similar to public nuisance law in that it restricts individuals' use of their land, zoning differs from nuisance law in that it attempts to avoid recourse to litigation by prospectively regulating land use and development before the use becomes an enjoined offense.

The Supreme Court has never addressed the application of municipal zoning to churches.<sup>33</sup> In the past, however, the Court has referred to zoning as one of the "necessary and permissible contacts" between church and state,<sup>34</sup> a conclusion that lower courts appear to have followed.<sup>35</sup> Under the standard enunciated in *Village of Euclid v. Ambler Realty Co.*,<sup>36</sup> a zoning ordinance is constitutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."<sup>37</sup> In those instances, however, where a zoning ordinance has bur-

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<sup>28</sup> PLATT, *supra* note 26, at 174-75. In conjunction with the issue of government corruption, urban congestion was the primary urban issue of the Progressive Movement. *Id.* at 175.

<sup>29</sup> RICHARD B. COUSER, *MINISTRY AND THE AMERICAN LEGAL SYSTEM* 116 (1993).

<sup>30</sup> CUNNINGHAM ET AL., *supra* note 27, § 9.3, at 543; *see Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (noting that the scope of police power permitting the exercise of zoning is analogous to the law of nuisance).

<sup>31</sup> CUNNINGHAM ET AL., *supra* note 27, § 7.2, at 417.

<sup>32</sup> *Village of Euclid*, 272 U.S. at 388; *see also* *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706 (Ariz. 1972) (holding that flies and odors from defendant's feed lot constituted a nuisance to the developing community around defendant's property); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871-73 (N.Y. 1970) (holding that cement dust from defendant's plant was a nuisance to neighboring property owners).

<sup>33</sup> COUSER, *supra* note 29, at 117.

<sup>34</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

<sup>35</sup> *See, e.g.,* *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 826 (10th Cir. 1988) (noting that "[a] church has no constitutional right to be free from reasonable zoning regulations").

<sup>36</sup> 272 U.S. 365 (1926).

<sup>37</sup> *Id.* at 395. In *Village of Euclid*, a municipality established a comprehensive zoning plan that regulated "the location of trades, industries, apartment houses, two-family houses, single family houses, . . . the lot area to be built upon, [and] the size and height

dened free exercise rights, many courts faced with Free Exercise Clause challenges have applied the *Sherbert* test to determine whether a religious exemption was appropriate. Other courts, however, avoided *Sherbert*'s compelling interest test by finding that the regulations did not substantially burden the free exercise of religion.<sup>38</sup>

Recent decisions in *Western Presbyterian Church v. Board of Zoning Adjustment*<sup>39</sup> and *Daytona Rescue Mission, Inc. v. City of Daytona Beach*<sup>40</sup> suggest that RFRA's substantial burden prong permits courts to offer similarly inconsistent protection to church-sponsored homeless programs that challenge local zoning regulations. Rather than repeat the errors of the past, courts must recognize that enforcement of zoning regulations can constitute a substantial burden on the free exercise rights of church-

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of buildings." *Id.* at 379-80. Euclid divided the village into three broad classifications: use, height, and population density. *Id.* at 380.

Many years before, Ambler Realty Co. had purchased a tract of land in the hopes of later selling and developing the land for industrial use. *Id.* at 384. When Euclid rezoned the village, Ambler Realty's property no longer was zoned exclusively for industrial use; instead, part of the tract was restricted to single- and two-family houses, and part was limited to single- and two-family houses and apartment buildings. *Id.* at 380-82. Industrial development was permitted only on the remainder of the tract. *Id.*

Ambler Realty sued to have the zoning ordinance declared an unconstitutional taking in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* at 384. Specifically, Ambler Realty alleged "that the ordinance attempt[ed] to restrict and control the lawful uses of [Ambler's] land so as to confiscate and destroy a great part of its value," deterring "prospective buyers of land for industrial, commercial and residential uses . . . from buying any part of [the] land." *Id.* at 384-85. The ordinance had substantially reduced the value of that portion of the land zoned residential. If used for industrial development, Ambler Realty's land was worth \$10,000 per acre. *Id.* at 384. If limited to residential use, the land's value was limited to \$2500 per acre. *Id.* Notwithstanding the property devaluation, the Court refused to find that the zoning regulation effected a taking, and in the process upheld the constitutionality of zoning regulations in general. *Id.* at 395.

<sup>38</sup> See Scott D. Godshall, Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562, 1568 (1984) (observing that with respect to zoning, "courts have either ignored the free exercise issue, or have applied the free exercise clause in such a way as to insulate land use regulations from [F]irst [A]mendment challenges"); Michael W. Macleod-Ball, Note, *The Future of Zoning Limitations Upon Religious Uses of Land: Due Process or Equal Protection?*, 22 SUFFOLK U. L. REV. 1087, 1095 (1988) (noting that "[c]ourts typically view zoning restraints upon religious users' property as acceptable legislative restriction upon religious action and refuse to hold such regulations as an infringement upon individuals' beliefs"); see also Daniel R. Mandelker, *The First Amendment in Land Use Law*, C851 A.L.I.-A.B.A. 1007, 1068-77 (1993) (surveying recent free exercise zoning disputes and noting that "[i]n both federal and state courts the zoning officials usually prevail").

<sup>39</sup> 862 F. Supp. 538 (D.D.C. 1994).

<sup>40</sup> 885 F. Supp. 1554 (M.D. Fla. 1995).

sponsored programs that minister to the poor. Accordingly, if a zoning regulation burdens such a program, strict scrutiny under RFRA is required.

#### A. Zoning Exemptions Under the Free Exercise Clause

Before RFRA's enactment, claims for religious exemptions from zoning regulations were litigated under the Free Exercise Clause. Prior to *Smith*, courts used the *Sherbert* test to analyze such claims.<sup>41</sup> Because RFRA explicitly adopts *Sherbert*'s free exercise analysis,<sup>42</sup> earlier cases decided under the Free Exercise Clause prove instructive to courts seeking to analyze a RFRA claim.<sup>43</sup> History suggests that the nature of the religious and secular interests involved clearly play a significant role in a court's determination of whether to apply *Sherbert*'s compelling interest test in order to grant a religious plaintiff an exemption to a generally applicable zoning regulation.<sup>44</sup>

In *St. John's Evangelical Lutheran Church v. City of Hoboken*,<sup>45</sup> a New Jersey court granted an injunction to prevent the city from closing a homeless shelter and feeding program that was operated on church premises.<sup>46</sup> Confronted by the "grave social problem" of homelessness, the court was loath to close any shelter, observing:

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<sup>41</sup> See, e.g., *Messiah Baptist Church v. County of Jefferson*, 859 F.2d 820, 824 (10th Cir. 1988); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 309 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983); *Burlington Assembly of God Church v. Zoning Bd. of Adjustment*, 570 A.2d 495, 497-500 (N.J. Super. Ct. Law Div. 1989); *St. John's Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935, 938 (N.J. Super. Ct. Law Div. 1983).

<sup>42</sup> 42 U.S.C. § 2000bb(b)(1) (Supp. V 1993); see also *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

<sup>43</sup> See *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (noting that because "RFRA does not purport to create a new substantial burden test, [courts] may look to pre-RFRA cases in order to assess the burden" on religion); *Thiry v. Carlson*, 887 F. Supp. 1407, 1412 (D. Kan. 1995) (observing that "[i]n applying [RFRA's] strict scrutiny test courts are to look to Free Exercise Clause decisions of the Supreme Court prior to its decision in *Employment Division v. Smith*"); S. REP. NO. 111, *supra* note 7, at 8-9, *reprinted in* 1993 U.S.C.C.A.N. at 1898 (stating that "[t]he committee expects that the courts will look to free exercise cases decided prior to *Smith* for guidance in determining whether the exercise of religion has been substantially burdened and the least restrictive means have been employed in furthering a compelling governmental interest").

<sup>44</sup> See COUSER, *supra* note 29, at 118 (arguing that "varying results . . . reflect the difference in value that different courts attribute to the governmental interest in a strict enforcement of the ordinance as opposed to the church's interest in the free exercise of its religious rights").

<sup>45</sup> 479 A.2d 935 (N.J. Super. Ct. Law Div. 1983).

<sup>46</sup> *Id.* at 939.

The harm here is obvious, imminent and severe. If the shelter is closed its occupants will be left without food or shelter. . . . St. John's represents the only bulwark these homeless people have. To tear that bulwark away would be a travesty of justice and compassion. Any inconvenience to the City of Hoboken and its other residents pales into insignificance when contrasted with what the occupants of the shelter would have to face if turned out into the city streets in winter weather.<sup>47</sup>

In applying *Sherbert*, the court in *St. John's Evangelical Lutheran Church* cited "centuries of scripture and practice"<sup>48</sup> to support its conclusion that use of the church as a homeless shelter was "'customarily incident' to the 'principal uses'" of the church.<sup>49</sup> Because there was a clear link between the religious mandates and the conduct sought to be protected, the court held that enforcement of the zoning regulation would pose a substantial burden on the church's free exercise of religion.<sup>50</sup> With little meaningful analysis, the court failed to find any compelling government justification for closing the shelter in the face of the plight of the homeless.<sup>51</sup>

Given the long history of church protection of the poor,<sup>52</sup> it was not unforeseeable that a receptive court would grant a zoning exemption to permit churches to house and feed the homeless. Other courts, however, have concluded that zoning regulations impose a substantial burden on conduct that is not as clearly linked to religious beliefs as is ministry to the poor, so long as the conduct has little impact on local land development and use. Accordingly, in *Burlington Assembly of God Church v. Zoning Board of Adjustment*,<sup>53</sup> another New Jersey court held that the denial of a zoning variance to permit erection of radio transmitter towers on church property constituted a substantial burden on the church's "religious activity."<sup>54</sup> As part of a radio station, the purpose of which was to broadcast religious messages, the erection of the towers represented simply "one more activity [on the church's] list of religious undertakings."<sup>55</sup> The court granted a zoning

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 937.

<sup>50</sup> *Id.* at 938.

<sup>51</sup> *See id.* at 939.

<sup>52</sup> *See infra* notes 115-130 and accompanying text.

<sup>53</sup> 570 A.2d 495 (N.J. Super. Ct. Law Div. 1989).

<sup>54</sup> *Id.* at 500.

<sup>55</sup> *Id.* at 499. The church also used the property to operate a 300-student school and to store 35 buses. *Id.* at 496.

variance for the towers after the municipality failed to prove its asserted compelling interests in safety and avoiding transmission interference.<sup>56</sup>

In *Burlington Assembly of God*, the court adopted an expansive view of religious conduct because it failed to see what harm the exemption would cause to the "general welfare of the community."<sup>57</sup> Failure to enforce the zoning regulations to bar placement of two radio towers on the church's 106 acres of land would not have had an impact on the public welfare or the ability of the locality to exert effective control over land development. Accordingly, the court's use of the compelling interest test was a reasonable method of protecting the church's interests. Conversely, other courts have applied a narrow view of religion in the context of Free Exercise Clause protections, apparently in order to avoid the burden on the general welfare that would have been occasioned had the compelling interest test been used to exempt religious plaintiffs from zoning regulations.

In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*,<sup>58</sup> a church was denied a religious exemption because the zoning ordinances were found not to burden religious activity. The Jehovah's Witnesses sought to build a church on land that they had purchased in a residential neighborhood where churches were prohibited.<sup>59</sup> The city denied the church's application for a zoning exception, citing traffic, noise, and property values.<sup>60</sup> The court began its analysis by determining whether the ordinance burdened the church's free exercise rights, noting that "[a]s a general rule, the greater the cost of practicing one's religion, the more probable that the statute creates an unconstitutional infringement."<sup>61</sup> The court, however, also considered "[t]he centrality of the burdened religious observance to the believer's faith."<sup>62</sup> Religious beliefs received absolute protection,<sup>63</sup> but conduct derived from religious beliefs was protected only if "integrally related to the underlying beliefs."<sup>64</sup> After characterizing the building of the church as an act that in and of itself had "no religious or ritualistic signifi-

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<sup>56</sup> *Id.* at 499-500. Characterizing the municipality's safety concern as "illusionary," the court noted "the absence of any real risk that the towers [might] fall or be struck by lightning; they [were] too well designed for those risks to be given any weight." *Id.* at 499. Furthermore, FCC licensing of the station provided evidence that "the station could be operated at 'acceptable' interference levels." *Id.*

<sup>57</sup> *Id.* at 498 (quoting *State v. Cameron*, 498 A.2d 1217, 1227 (N.J. 1985) (Clifford, J., concurring in result)).

<sup>58</sup> 699 F.2d 303 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983).

<sup>59</sup> *Id.* at 304-05.

<sup>60</sup> *Id.* at 305.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 306.

<sup>63</sup> *Id.* (citing *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)).

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

cance to the Jehovah's Witnesses,"<sup>65</sup> the court concluded that "[a]t most the Congregation [could only] claim that its freedom to worship [was] tangentially related to worshipping in its own structure."<sup>66</sup> Construction of the church was a "purely secular act" that resulted in only "an indirect financial burden"; accordingly, *Sherbert's* compelling interest test was inapplicable.<sup>67</sup> Under traditional due process analysis, the court found that the potential burdens of traffic congestion and noise were sufficient to justify the municipality's exercise of police power.<sup>68</sup>

In *Messiah Baptist Church v. County of Jefferson*,<sup>69</sup> the Tenth Circuit followed the reasoning of *Lakewood* to deny a similar zoning exemption to a church that sought to build in an agricultural area.<sup>70</sup> Once again the court distinguished between direct and indirect burdens on religion, noting that the zoning did not directly burden religious conduct, but merely imposed an indirect financial burden on the church.<sup>71</sup> Construction of a church on the particular site selected, although preferred by the congregation, was not "intimately related to the religious tenets of the church."<sup>72</sup> Although the county was imposing a burden on the secular act of construction, it placed only an indirect burden on religious exercise.<sup>73</sup> An indirect burden that was rooted in secular conduct did not justify an exemption.<sup>74</sup>

*Lakewood* and *Messiah Baptist Church*, therefore, are instances in which courts avoided the Free Exercise Clause's compelling interest test by finding only an indirect burden on religion. The courts' decisions demonstrate that the interpretation of the centrality of the conduct to the religious belief is of paramount importance to successful litigation of a free exercise claim.<sup>75</sup> Because RFRA analysis parallels that of the Free Exercise Clause,<sup>76</sup> it is likely that some courts may continue to avoid the compelling interest test

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<sup>65</sup> *Id.* at 306-07.

<sup>66</sup> *Id.* at 307. "[B]uilding and owning a church [was] a desirable accessory of worship, not a fundamental tenet of the Congregation's religious beliefs." *Id.* But see Comment, *Zoning Ordinances Affecting Churches: A Proposal for Expanded Free Exercise Protection*, 132 U. PA. L. REV. 1131, 1151-52 (1984) (arguing that "[a] religious group's freedom to build a church in the neighborhood of its choice is . . . an important dimension of the right to self-expression inherent in religious freedom . . . [and] should be granted [F]irst [A]mendment protection").

<sup>67</sup> *Lakewood*, 699 F.2d at 307.

<sup>68</sup> *Id.* at 308.

<sup>69</sup> 859 F.2d 820 (10th Cir. 1988).

<sup>70</sup> *Id.* at 825.

<sup>71</sup> *Id.* at 825-26.

<sup>72</sup> *Id.* at 825.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See *id.*; *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 308 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983).

<sup>76</sup> See *supra* note 43 and accompanying text.

mandated by RFRA. As documented by *Western Presbyterian* and *Daytona Rescue Mission*, the incongruent results obtained under traditional free exercise analysis have not been eliminated by the creation of a statutory right of action. Plaintiffs still must persuade courts that their religious conduct is burdened, and courts will once again be in the position of determining that which constitutes protected religious conduct.

### B. Zoning Exemptions Under RFRA

Recent federal district court opinions in the District of Columbia and Florida provide ample evidence that church-sponsored homeless shelters and soup kitchens may receive equally inconsistent protection from municipal zoning under RFRA as they once received under the Free Exercise Clause. As with prior decisions under the Free Exercise Clause, the initial determination of whether a municipal regulation substantially burdens the free exercise of religion is of paramount importance to obtaining a religious exemption.

*Western Presbyterian* presents an instance in which a church successfully asserted a claim under RFRA to permit operation of a homeless program that was otherwise barred under local zoning regulations. In 1993, Western Presbyterian Church in Washington, D.C. was planning to move to a new location, where it sought to reopen Miriam's Kitchen, a homeless feeding program that it had operated since 1984.<sup>77</sup> Despite the prior success of the feeding program, the Advisory Neighborhood Commission and a local citizens group complained to the city zoning administrator about the church's plans to feed the homeless at the new location.<sup>78</sup> Those opposing the feeding program feared that "the homeless . . . would contribute to crime in the neighborhood[,] . . . result[ing] in a decline in property values."<sup>79</sup> In response to the neighborhood's complaints, the city zoning administrator determined that the feeding program was barred by local zoning regulations.<sup>80</sup> Accordingly, the church would have had to obtain a variance to operate its program.<sup>81</sup>

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<sup>77</sup> *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 540 (D.D.C. 1994). Through its program, Western Presbyterian served breakfast in the church basement in addition to providing the homeless with bag lunches. *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 546. Notably, the Church had moved from a primarily commercial area near the White House to a location near the Watergate Hotel, a significantly more upscale part of the neighborhood of Foggy Bottom. Karen de Witt, *New Attitude on Churches: Not in My Backyard*, PLAIN DEALER (Cleveland), Mar. 27, 1994, at 14A.

<sup>80</sup> *Western Presbyterian*, 862 F. Supp. at 546.

<sup>81</sup> *Id.* at 540-41. "A variance is a form of administrative relief granted in response to specific requests for changes in the zoning plan." *Id.* at 541 n.2. Under the law of the District of Columbia:

Initially, the church tried to have the feeding program declared an "accessory use," which would have obviated the need for a variance.<sup>82</sup> When this attempt was unsuccessful, the church brought suit against the city in federal district court, asserting that enforcement of the zoning regulations would violate the church's and volunteers' rights under RFRA.<sup>83</sup>

Western Presbyterian characterized its feeding program as "an integral part of the Church's mission."<sup>84</sup> The church explained that its ministry to the poor and hungry reflected the "Gospel and two thousand years of church history."<sup>85</sup> In response, the District of Columbia asserted that it had not placed a substantial burden on Western Presbyterian's exercise of religion.<sup>86</sup> Arguing that the burden was merely financial or inconvenient, the District contended that prior Supreme Court precedents only found a burden substantial if it prevented a person from freely exercising their religion

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Variances are granted where "the strict application of any [zoning] regulation . . . would result in *peculiar and exceptional practical difficulties to or exceptional and undue hardship* on the owner of the property . . . [p]rovided, that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan . . . ."

*Id.* (emphasis added) (citing D.C. Mun. Regs. tit. 11, § 3107.2).

The church had the option of moving its feeding program to another portion of its lot that was under different zoning constraints, but it would still have needed a special exemption. *Id.* at 540. "[A] 'special exemption' is a use specifically authorized . . . but only upon specific approval . . . in individual cases[,] rather than as a matter of right." CUNNINGHAM ET AL., *supra* note 27, § 9.8, at 566-67. Western Presbyterian, therefore, needed municipal approval wherever it located its feeding program.

<sup>82</sup> *Western Presbyterian*, 862 F. Supp. at 541. District "zoning regulations provide that '[a]ny other accessory use . . . customarily incidental to the uses otherwise authorized by this chapter shall be permitted in an SP district.'" *Id.* (citing D.C. Mun. Regs. tit. 11, § 502.7. Accordingly, Western Presbyterian was seeking to have the District recognize that use of the church for a homeless feeding program was a use customarily incidental or subordinate to the principal use of the church—worship. *See* 2 ROBERT M. ANDERSON, *AMERICAN LAW OF ZONING* § 9.28, at 188 n.87 (3d ed. 1986). On appeal from the zoning administrator's decision, the Board of Zoning Adjusters [BZA] determined that the program was not an accessory use, analogizing the feeding program to "'Meals-on-Wheels[.]" which the BZA previously had found not to be an 'accessory use' to a church." *Western Presbyterian*, 862 F. Supp. at 542.

<sup>83</sup> *Western Presbyterian*, 862 F. Supp. at 542.

<sup>84</sup> Statement of Points & Authorities in Support of Plaintiffs' Motion for a Preliminary Injunction at 2, *Western Presbyterian Church v. Board of Zoning Adjustment*, 849 F. Supp. 77 (D.D.C. 1994) (No. 94-0749) [hereinafter Statement of Points & Authorities].

<sup>85</sup> *Id.* at 3 (quoting a Nov. 29, 1993 letter from Reverend James E. Andrews, Stated Clerk of the General Assembly of the Presbyterian Church (USA), to the District of Columbia's Zoning Administrator).

<sup>86</sup> Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction at 12, *Western Presbyterian* (No. 94-0749) [hereinafter Defendants' Opposition].



"without fear of prosecution or loss of a government benefit."<sup>87</sup> In addition, the city questioned whether church doctrine even required Western Presbyterian to feed the homeless from the church.<sup>88</sup> Finally, the District questioned the sincerity of Western Presbyterian's beliefs, noting that the feeding program had only been established in the last ten years.<sup>89</sup>

Unpersuaded by the District's arguments, the court ruled that the church's feeding program was "not merely a matter of personal choice but . . . a requirement for spiritual redemption . . . motivated by sincere religious belief."<sup>90</sup> It noted that religious charity was "a central tenet of all major religions"<sup>91</sup> and that application of the District's zoning laws to Western Presbyterian would place a substantial burden on the church's free exercise of religion.<sup>92</sup> Because the District of Columbia had conceded repeatedly that "it ha[d] no compelling governmental interest in prohibiting Western Presbyterian from conducting its feeding program,"<sup>93</sup> the court granted a permanent injunction against the city on the basis of RFRA.<sup>94</sup> Although the city initially challenged the decision, it ultimately dropped its appeal when Western Presbyterian promised to avoid unreasonable noise or traffic.<sup>95</sup>

*Western Presbyterian* counsels, therefore, that church-sponsored soup kitchens and homeless shelters should obtain free exercise exemptions from restrictive municipal zoning regulations.<sup>96</sup> Nevertheless, *Daytona Rescue*

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<sup>87</sup> *Id.* at 13-14 (citing *Jimmy Swaggert Ministries v. Board of Equalization*, 493 U.S. 378, 391 (1990); *Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)).

<sup>88</sup> *Id.* at 15. All of the examples cited by Western Presbyterian merely required the church to minister to the poor; they did not require that the church use the actual *building* to provide that ministry. *Id.* The District noted that the church could have fed the poor at another location, and that nothing prevented the church from operating its feeding program at the new site, so long as it was run out of the residential portion of the lot with a special exemption. *Id.*

<sup>89</sup> *Id.* at 16.

<sup>90</sup> *Western Presbyterian*, 862 F. Supp. at 544.

<sup>91</sup> *Id.* (citing examples of required religious charity to the poor and hungry found in Islam, Hinduism, and Judaism).

<sup>92</sup> *Id.* at 547.

<sup>93</sup> *Id.* at 545; see also Defendants' Opposition, *supra* note 86, at 12 n.5.

<sup>94</sup> *Western Presbyterian*, 862 F. Supp. at 547. The Order "permanently enjoined [the District of Columbia] from employing . . . zoning regulations, or any other . . . ordinance, to prevent plaintiffs from administering their program to feed the homeless on the Church premises or otherwise interfere in the operation of such feeding program so long as the feeding program is conducted in an orderly manner and does not constitute a nuisance." *Id.*

<sup>95</sup> Philip P. Pan, *D.C. Pulls out of Fight over Soup Kitchen*, WASH. POST, June 15, 1995, at D8.

<sup>96</sup> For a recent case that has adopted *Western Presbyterian's* reasoning that enforce-

*Mission* demonstrates that the inconsistencies of traditional free exercise analysis still haunt the RFRA-revived compelling interest test.

In 1993, the Daytona Rescue Mission sought permission from local authorities to open a "Church-Mission" on a property it owned in Daytona Beach.<sup>97</sup> The mission wished to use its property "as a facility for worship services, daily housing of a limited number of homeless men, and daily feeding of homeless men including those who would not be sheltered at the facility."<sup>98</sup> Although churches were permitted in each of the zones that encompassed the proposed site,<sup>99</sup> the Local Development Code expressly provided that homeless shelters and food banks were not customarily related activities and thus could not be considered accessory uses of the church.<sup>100</sup> Consequently, in order to operate a shelter on the property, the Mission was forced to apply for semi-public use status, which required local government approval.<sup>101</sup> When municipal approval was not granted, the Mission filed suit alleging that its rights under the Free Exercise Clause and RFRA were violated by enforcement of Daytona Beach's zoning regulations.<sup>102</sup>

A federal district court rejected the Mission's claims under the Free Exercise Clause on the basis of the Eleventh Circuit's decision in *First Assembly of God of Naples, Florida, Inc. v. Collier County*.<sup>103</sup> In applying

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ment of zoning regulations against a church-sponsored homeless program may constitute a substantial burden on religion, see *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 704-05 (Mich. Ct. App. 1996) (observing that "providing shelter or sanctuary to the needy . . . has been part of the Christian religious tradition since the days of the Roman Empire").

<sup>97</sup> *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1556 (M.D. Fla. 1995).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* Part of the property was zoned M-1, for local industry, while the balance was zoned R-3, a residential designation. *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1555. The Mission also unsuccessfully alleged that enforcement of the regulations violated the Establishment and Equal Protection Clauses. *Id.*

<sup>103</sup> *Id.* at 1557-58 (discussing *First Assembly of God of Naples, Fla., Inc. v. Collier County*, 20 F.3d 419 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 730 (1995)). In *First Assembly of God*, a post-*Smith* decision made under the Free Exercise Clause, the court refused to grant a zoning exemption to a church for its homeless shelter. *First Assembly of God*, 20 F.3d at 424. Accepting "for the sake of argument that sheltering the homeless [was] a central, essential element of the Christian religion," the Eleventh Circuit nonetheless found the burden constitutional under the Supreme Court's Free Exercise Clause analysis in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, and the Eleventh Circuit's earlier analysis in *Grosz v. City of Miami Beach*. *Id.* at 423-24 (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993); *Grosz v. City of Miami Beach*, 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984)).

The burden on religious exercise in *First Assembly of God* was constitutional under

*First Assembly of God* to the Mission's claims under the Free Exercise Clause, the court in *Daytona Rescue Mission* concluded that "the burden on religion [was] at the lower end of the spectrum."<sup>104</sup> The court suggested that the municipality's interest in safety and security outweighed the burden on the Mission's exercise of religion because the city already had other homeless shelters, and the church had only pursued an exemption at one site.<sup>105</sup> Accordingly, the Free Exercise Clause provided no relief to the Mission.

The Mission was equally unsuccessful under RFRA. The court initially considered whether Daytona Beach's zoning regulations imposed a substantial burden on the Mission's exercise of religion.<sup>106</sup> Although the result was somewhat predictable, this inquiry was necessary because the court's analysis of the burden under the Free Exercise Clause depended on the three part balancing test enunciated in *Grosz v. City of Miami Beach*.<sup>107</sup> Under RFRA, however, a court does not balance "competing governmental and

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*Church of the Lukumi Babalu Aye* because it was the result of a neutral and generally applicable zoning regulation that limited the location of homeless shelters. *Id.* at 423. Accordingly, the burden did not need to "be justified by a compelling governmental interest even if the law ha[d] the incidental effect of burdening a particular religious practice." *Id.* (quoting *Church of the Lukumi Babalu Aye*, 113 S. Ct. at 2226).

Furthermore, the burden in *First Assembly of God* was equally constitutional under *Grosz*. In *Grosz*, the Eleventh Circuit had enunciated a three-part test to determine the constitutionality of a government burden on religion. *Grosz*, 721 F.2d at 733. "First, the government regulation must regulate religious conduct, not belief. Second, the law must have a secular purpose and a secular effect. Third, once these two thresholds are crossed, the court engages in a balancing of competing governmental and religious interests." *Id.* After determining that the zoning regulations met the first two prongs of the *Grosz* test, the court in *First Assembly of God* balanced the competing influences to conclude:

The burden on First Assembly to either conform its shelter to the zoning laws, or to move the shelter to an appropriately zoned area, is less than the burden on the County were it to be forced to allow the zoning violation. Thus, under the *Grosz* test, First Assembly's right to free exercise of religion is not violated by the County's zoning ordinances.

*First Assembly of God*, 20 F.3d at 424. The Eleventh Circuit, therefore, upheld enforcement of local zoning regulations against a church-sponsored homeless shelter, permitting a burden on "a central, essential element" of religious conduct under two different interpretations of the Free Exercise Clause. *Id.* at 423. In denying First Assembly's petition for rehearing, however, the court noted that neither party had raised the issue of RFRA and therefore "decline[d] to discuss it." *First Assembly of God of Naples, Fla., Inc. v. Collier County*, 27 F.3d 526 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 730 (1995).

<sup>104</sup> *Daytona Rescue Mission*, 885 F. Supp. at 1558.

<sup>105</sup> *Id.* at 1559.

<sup>106</sup> *Id.*

<sup>107</sup> 721 F.2d 729 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984).

religious interests”<sup>108</sup> to determine the substantiality of the burden on religious exercise. Instead, the court required

“the religious adherent . . . to prove that a governmental [action] burdens the adherent’s practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; the burden must be substantial . . . .”<sup>109</sup>

The Mission asserted that its exercise of religion was substantially burdened because it was forced to seek government approval wherever it sought to locate in the city.<sup>110</sup> Like the District of Columbia in *Western Presbyterian*,<sup>111</sup> Daytona Beach argued that its zoning regulations did not present a serious obstacle to the Mission’s shelter or soup kitchen.<sup>112</sup> Rather, the Mission simply was barred from opening its shelter at a particular location; it could seek permission to open its facility at other locations within the city.<sup>113</sup> Explicitly rejecting *Western Presbyterian*, the court found with little discussion that Daytona Beach’s regulations did not substantially burden the Mission’s free exercise rights under RFRA because the Mission was not universally barred from locating elsewhere in the city.<sup>114</sup>

### C. The Substantial Burden of Zoning Regulations

Although RFRA provides increased opportunity for zoning exemptions, the incongruent results achieved in *Western Presbyterian* and *Daytona Rescue Mission* illustrate that courts continue to have different perceptions of that which constitutes religious exercise. Nevertheless, because the provision of shelter and sustenance to the poor is “a central tenet of all major religions,”<sup>115</sup> courts should recognize that enforcement of zoning regulations

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<sup>108</sup> See *id.* at 733.

<sup>109</sup> *Daytona Rescue Mission*, 885 F. Supp. at 1559-60 (quoting *Vernon v. City of L.A.*, 27 F.3d 1385, 1393 (9th Cir.) (citations omitted) (alteration in original), *cert. denied*, 115 S. Ct. 510 (1994)).

<sup>110</sup> *Id.* at 1560.

<sup>111</sup> See *supra* notes 86-89 and accompanying text.

<sup>112</sup> *Daytona Rescue Mission*, 885 F. Supp. at 1560.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* (rejecting *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 545-46 (D.D.C. 1994)).

<sup>115</sup> *Western Presbyterian*, 862 F. Supp. at 544.

against church-sponsored shelters may result in a substantial burden on religious exercise.

*Western Presbyterian* provides a typical example of a church's religious mandate to serve the poor. As part of Western Presbyterian's mission, the congregation is instructed to serve God by "ministering to the needs of the poor, the sick, the lonely, and the powerless, engaging in the struggle to free people from sin, fear, oppression, hunger, and injustice, [and] giving itself and its substance to the service of those who suffer."<sup>116</sup> Although the church found much support for its position in biblical teachings,<sup>117</sup> many major religions require acts of charity as part of worship.<sup>118</sup>

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<sup>116</sup> Statement of Points & Authorities, *supra* note 84, at 3 (quoting CONSTITUTION OF THE PRESBYTERIAN CHURCH (U.S.A.), PART II, BOOK OF ORDER at G-3.0300(c)(3)(b)-(c) (1994)). In addition, the mission of Western Presbyterian Church is

[p]rimarily but not limited to, promoting a spirit of Christian influence within the fellowship of the congregation and upon the community; to provide religious education by communicating the unchanging Gospel through teaching, preaching and ministering to all who are in need; to gather to worship God and share sacraments and teachings of our religious faith; to provide a Christian fellowship among our members and to the community at large; and to assist in charitable work of any nature deemed beneficial.

*Western Presbyterian*, 862 F. Supp. at 544 (citing BYLAWS OF WESTERN PRESBYTERIAN CHURCH, art. 1).

<sup>117</sup> The Bible instructs:

For I was an hungred [sic], and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger, and ye took me in . . . Verily I say unto you, Inasmuch as ye have done *it* unto one of the least of these my brethren, ye have done *it* unto me.

Then shall he say also unto them on the left hand, Depart from me, ye cursed, into everlasting fire, prepared for the devil and his angels: For I was an hungred, and ye gave me no meat; I was thirsty and ye gave me no drink; I was stranger, and ye took me not in . . . And these shall go away into everlasting punishment; but the righteous into life eternal.

*Western Presbyterian*, 862 F. Supp. at 544 n.3 (quoting *Matthew* 25:35, 40-43, 46).

Additional support for Western Presbyterian's position was found in *Ezekiel* 18:5-9 ("If a person is righteous and does what is lawful and right . . . and gives his bread to the hungry and covers the naked with a garment . . . he is righteous, he shall surely live, says the Lord God.") and *James* 2:14-17 ("What does it profit, my brethren, if a man says he has faith, but has not works? Can his faith save him? If a brother or sister is ill-clad and in lack of daily food, and one of you says to them, 'Go in peace, be warmed and filled,' without giving them the things needed for the body, what does it profit? So faith by itself, if it has no works, is dead."). *Id.*

<sup>118</sup> *Id.* at 544. In particular, the court in *Western Presbyterian* noted:

[O]ne of the five Pillars of Islam—the fundamental ritual requirements of worship, including ritual prayer—requires Muslims of sufficient means to give alms to the poor and other classes of recipients. Also Hindus belonging to the Brahmin, Ksatriya, and Vaisya castes are required to fulfill five daily obligations of worship, one of which is making offerings to guests, symbolized by giving food to a

Unlike the District of Columbia in *Western Presbyterian*,<sup>119</sup> municipalities rarely question the sincerity of the religious beliefs that motivate churches to sponsor homeless shelters and soup kitchens. Instead, municipalities argue that enforcement of zoning regulations against a church-sponsored program does not substantially burden religious exercise because a church is not forced by its beliefs to use a particular site for a homeless program.<sup>120</sup> In effect, municipalities adopt the rationale of *Lakewood* and *Messiah Baptist Church* to contend that the location of the church-sponsored homeless program is not central to a church's religion.<sup>121</sup> This rationale should be rejected because (1) the religious tradition of sanctuary counsels that the church is the appropriate place to shelter and minister to the poor, and (2) a municipality that permits a church to operate at a given location should not then be permitted to regulate the methods of worship. Accordingly, preventing a congregation from using its property for a homeless program constitutes a substantial burden on religious exercise.

Use of a church for homeless programs is related to the historical role of churches in providing a sanctuary to the poor and oppressed.<sup>122</sup> As the court noted in *St. John's Evangelical Lutheran Church*, the religious tradition of sanctuary is so strong as to have been "recognized in Roman, medieval, and English common law. During the middle ages every church was a potential sanctuary."<sup>123</sup> Noting the role of churches as sanctuaries for fugitive slaves, the court observed that "churches and religious persons became

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priest or giving food or aid to the poor. The concept finds its place in Judaism in the form of tendering to the poor clothing for the naked, food for the hungry, and benevolence to the needy.

*Id.* (citing *DICTIONARY OF LIVING RELIGIONS* 316, 347, 387-88 (Keith Crim ed., 1981)). For further discussion of the religious mandate to minister to the poor, see Susan L. Goldberg, *Gimme Shelter: Religious Provision of Shelter to the Homeless as a Protected Use Under Zoning Laws*, 30 J. URB. & CONTEMP. L. 75, 84-87 (1986).

<sup>119</sup> See Defendants' Opposition, *supra* note 86, at 16 (questioning the sincerity of Western Presbyterian's beliefs because the homeless program had only been opened within the last 10 years).

<sup>120</sup> See *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554, 1559 (M.D. Fla. 1995); Defendants' Opposition, *supra* note 86, at 15.

<sup>121</sup> See *supra* notes 65-67, 71-73 and accompanying text.

<sup>122</sup> See *St. John's Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935, 937 (N.J. Super. Ct. Law Div. 1983) (noting that "[t]hroughout history the churches have carried out [the] biblical mandate to aid the poor and the helpless") (quoting Affidavit of Rev. Felske at ¶ 2); see also *supra* notes 116-18 and accompanying text.

<sup>123</sup> *St. John's Evangelical Lutheran Church*, 479 A.2d at 937; see also *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 704 (Mich. Ct. App. 1996) (noting that "providing shelter or sanctuary to the needy . . . has been part of the Christian religious tradition since the days of the Roman Empire"); *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 984 (Sup. Ct. 1989).

stations along the Underground Railroad providing food and shelter.”<sup>124</sup> From the traditional use of churches as sanctuaries for the oppressed comes the contemporary practice of using churches to house and feed the poor—the “church as a sanctuary for the poor [has become] a religious use ‘customarily incident’ to the ‘principle uses’” of a church.<sup>125</sup>

Moreover, “[o]nce the zoning authorities of a city permit the construction of a church in a particular locality, the city must refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct.”<sup>126</sup> When a municipality argues that the location of a church-sponsored homeless program is not central to the church’s religious beliefs, it is making a judgment as to whether use of the church itself is part of the religious worship. As the United States Supreme Court observed in *United States v. Ballard*:<sup>127</sup> “Man’s relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views.”<sup>128</sup> “[T]he concept of acts of charity [is] an essential part of religious worship”;<sup>129</sup> courts and legislatures are not in a position to determine whether this “essential part of religious worship” directs the use of the church.<sup>130</sup>

Accordingly, despite the apparently incongruent results demonstrated by *Western Presbyterian Church* and *Daytona Rescue Mission*, enforcement of zoning regulations against homeless programs clearly poses a substantial burden on the exercise of religion. RFRA’s revived recognition of the importance of free exercise counsels that its compelling interest test should be applied to municipal land regulation of church-sponsored homeless shelters and soup kitchens.

### III. PERMISSIBLE RESTRICTIONS OF CHURCH-SPONSORED HOMELESS PROGRAMS

Under traditional due process analysis, zoning restrictions are constitutional unless “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>131</sup> Neverthe-

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<sup>124</sup> *St. John’s Evangelical Lutheran Church*, 479 A.2d at 937 (quoting Affidavit of Rev. Felske at ¶ 13).

<sup>125</sup> *Id.*

<sup>126</sup> *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994).

<sup>127</sup> 322 U.S. 78 (1944).

<sup>128</sup> *Id.* at 87.

<sup>129</sup> *Western Presbyterian*, 862 F. Supp. at 544.

<sup>130</sup> See *Ballard*, 322 U.S. at 87 (noting that “it would hardly be supposed that [a religious believer] could be tried before a jury charged with the duty of determining whether those teachings contained false representations”).

<sup>131</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

less, in instances where zoning significantly burdens the free exercise of religion, a municipality must satisfy RFRA's stricter standards. *Western Presbyterian* and *St. John's Evangelical Lutheran Church* counsel that church-sponsored soup kitchens and homeless shelters come within the scope of religious conduct that was intended to be protected under RFRA.<sup>132</sup> Accordingly, a municipality must have a compelling reason to enforce its zoning regulations against the church-sponsored program, and enforcement of the regulations must be the least restrictive means of furthering the compelling interest.<sup>133</sup>

Municipalities typically assert that enforcement of zoning regulations against programs that minister to the homeless is necessary to prevent the devaluation of property or an increase in noise and crime, or to protect the character of the neighborhood and the general zoning scheme.<sup>134</sup> Although these may be compelling interests, application of zoning regulations to bar operation of the church-sponsored homeless shelter or soup kitchen usually should be considered too excessive to satisfy RFRA's least restrictive means requirement. Nevertheless, even if a church-sponsored homeless program is permitted to operate in deviation from generally applicable zoning regulations, municipalities may continue to exert some limited control over its operation through building and safety regulations and, should it become necessary, common law nuisance actions.

#### A. *Compelling Justifications for Municipal Zoning of Church-Sponsored Homeless Programs*

Because of the high value placed on religious exercise, traditional measures of the reasonableness of enforcing zoning regulations are of little use: the emphasis on the "high character of religious use . . . seems clearly to subordinate the interest of neighboring landowners."<sup>135</sup> The maintenance of property values or interests founded on speculative fears are insufficiently compelling government interests.<sup>136</sup> Similarly, although cases have held the

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<sup>132</sup> See *supra* notes 49-51, 85-94 and accompanying text.

<sup>133</sup> 42 U.S.C. § 2000bb(b)(1)(2) (Supp. V 1993).

<sup>134</sup> See, e.g., *First Assembly of God of Naples, Fla., Inc. v. Collier County*, 20 F.3d 419 (11th Cir. 1994) (finding a compelling interest in maintenance of zoning scheme), *cert. denied*, 115 S. Ct. 730 (1995); *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (finding a compelling interest in protection of general zoning scheme); *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996) (finding a compelling interest in prevention of crime).

<sup>135</sup> 2 ANDERSON, *supra* note 82, § 12.23, at 548; see also *Alpine Christian Fellowship v. County Comm'rs*, 870 F. Supp. 991, 994 (D. Colo. 1994) (noting that because the state "must show some 'compelling state interest,' . . . the state interests which justify zoning codes in general are not applicable").

<sup>136</sup> See 2 ANDERSON, *supra* note 82, § 12.24, at 550 (noting that "[a]n adverse effect



maintenance of the character of a neighborhood and a general zoning scheme to be compelling interests,<sup>137</sup> such interests should be less compelling when a church is seeking to operate a homeless shelter or soup kitchen in its present building.<sup>138</sup> On the other hand, the prevention of crime, noise, and litter are compelling municipal interests.<sup>139</sup> Accordingly, if a city asserts such compelling justifications, it may enforce its zoning regulations so long as enforcement constitutes the least restrictive means of achieving the municipal interests.

In *Western Presbyterian*, the issue of a compelling state interest was moot; the District of Columbia had conceded repeatedly that "it ha[d] no compelling governmental interest in prohibiting Western Presbyterian from conducting its feeding program . . . so long as appropriate controls [were] in place."<sup>140</sup> Had the District been less quick to concede that its interest was less than compelling, it might have mounted a more successful defense to the church's challenge.

If the District had demonstrated that the church's feeding program would have had a substantial negative effect on the safety of the neighborhood, it could have asserted a compelling interest in the denial of a zoning exemption. The District could have attempted to demonstrate the increased

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on property values is an insufficient reason for denial of a permit to establish a religious use"); see also *Alpine Christian Fellowship*, 870 F. Supp. at 994 (noting that "negative reaction of the residents in the neighborhood . . . of course, does not constitute a compelling governmental interest"); *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 989 (Sup. Ct. 1989) (refusing to enjoin church homeless shelter for reasons "based solely on speculative fears of crime, drugs and diminution of property values"). See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993) (holding that city ordinance prohibiting the ritual slaughter of animals did not serve a compelling governmental interest).

<sup>137</sup> See, e.g., *Christian Gospel Church, Inc. v. City of S.F.*, 896 F.2d 1221, 1224 (9th Cir. 1990) (noting a "strong [municipal] interest in the maintenance of the integrity of its zoning scheme and the protection of its residential neighborhoods"); *Grosz v. City of Miami Beach*, 721 F.2d 729, 738 (11th Cir. 1983) (finding significant interests in prevention of traffic, noise, and litter), cert. denied, 469 U.S. 827 (1984); *Daytona Rescue Mission*, 885 F. Supp. at 1560 (noting in dicta that the municipality has a compelling interest in "enforcing fair and reasonable regulations throughout its jurisdiction").

<sup>138</sup> At that point, the program's impact on the zoning scheme or character of the neighborhood will be minimal if the program will not substantially alter the character of the church. If, however, the church seeks to construct a large apartment-style shelter in a neighborhood of single family homes, the municipality's interests would be more compelling.

<sup>139</sup> See, e.g., *Grosz*, 721 F.2d at 738 (finding significant interests in the prevention of traffic, noise, and litter); *City of Rapid City v. Kahler*, 334 N.W.2d 510, 513 (S.D. 1983) (noting that "[t]he public is entitled to preservation of its health and safety").

<sup>140</sup> *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 545 (D.D.C. 1994).

risk to public safety by comparing crime statistics at similar feeding programs in the District, both before a program was instituted, and after a program had begun. Furthermore, in between the time that Judge Sporkin granted the preliminary injunction and the time he granted the permanent injunction, the director of Western Presbyterian's feeding program was attacked by a homeless man who was eating breakfast at the church.<sup>141</sup> The director was out of work for almost four months with a fractured skull, and although she said that "most" of the program users were well-behaved, local leaders considered the attack to be evidence of the feeding program's increased threat to neighborhood safety.<sup>142</sup> Accordingly, even after the preliminary injunction was granted, the District might still have established a compelling government interest by demonstrating that the feeding program posed a threat to public safety.

Difficulties arise, however, when a municipality attempts to prove that enforcement of its zoning regulations is the least restrictive means possible of achieving the municipality's compelling interest.<sup>143</sup> Assuming that the District had asserted a compelling interest in public safety, it would have had to show that preventing the feeding program from operating out of Western Presbyterian was the least restrictive means possible of achieving that goal. Whether a complete shut down of the program would have been the least restrictive means is debatable. The church probably could have argued successfully that there were other methods that would have worked equally well—increased internal security, restricted hours, and a larger police presence in the neighborhood are but a few. Before shutting down the program, the District would have had to "at least initially attempt to address community concerns" through other, less draconian, means.<sup>144</sup> Accordingly, although there are instances in which a municipality can assert a compelling interest to justify its zoning, it often may be difficult to demonstrate that its burden on religion is the least restrictive means of achieving that goal. Thus, church-sponsored homeless shelters and soup kitchens often should obtain free exercise exemptions from restrictive municipal zoning regulations.

#### B. *Post-Exemption Municipal Control*

Even though a municipality often will be unable to meet the burdens of RFRA's compelling interest test so as to justify its enforcement of zoning

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<sup>141</sup> Hamil R. Harris & Toni Locy, *Soup Kitchen Director Back on Job After Attack: Some Still Call Foggy Bottom Program Unsafe*, WASH. POST, Oct. 4, 1994, at B8.

<sup>142</sup> *Id.*

<sup>143</sup> See Comment, *supra* note 66, at 1155 n.114.

<sup>144</sup> See *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 705 (Mich. Ct. App. 1996).

regulations against a church-sponsored homeless shelter or soup kitchen, it nevertheless retains two important methods of minimizing any negative effects of such programs: building and safety regulations, and common law nuisance actions.

### 1. *Building and Safety Regulations*

Like their secular counterparts, church-sponsored homeless programs are subject to the constraints of appropriate applicable health and safety requirements.<sup>145</sup> Accordingly, courts have enforced local ordinances requiring the installation of fire safety devices.<sup>146</sup> Similarly, a church may not operate a homeless shelter or soup kitchen in violation of reasonable occupancy limits designed to ensure safe operation.<sup>147</sup> Finally, church-sponsored shelters and soup kitchens should comply with reasonable health regulations governing food preparation and cleanliness.<sup>148</sup> A municipality's interest in the enforcement of its health and safety regulations is of sufficient "magnitude to justify even substantial inroads on the free exercise of religion."<sup>149</sup>

Nevertheless, in applying and enforcing health and safety regulations to church-sponsored programs that minister to the poor, municipalities and courts must maintain a realistic perspective on what constitutes reasonable regulation.

The requirements should be appropriate to a shelter for the homeless. . . . Moreover, the laws and regulations should be interpreted in a reasonable and common sense manner bearing in mind that overly strict enforcement might force the shelter to close, leaving its occupants in a far worse state than remaining in a crowded shelter.<sup>150</sup>

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<sup>145</sup> See 2 ANDERSON, *supra* note 82, § 12.23, at 546; COUSER, *supra* note 29, at 122.

<sup>146</sup> See, e.g., *Congregation Beth Yitzchok of Rockland, Inc. v. Town of Ramapo*, 593 F. Supp. 655 (S.D.N.Y. 1984) (requiring a synagogue to install fire-safety devices if it wished to operate a religious nursery school); *Market Street Mission v. Bureau of Rooming & Boarding House Standards*, 541 A.2d 668 (N.J. 1988) (permitting enforcement of fire regulations against a religious mission that operated a rooming house), *appeal dismissed*, 488 U.S. 882 (1988); cf. *Antrim Faith Baptist Church v. Commonwealth*, 460 A.2d 1228, 1231 (Pa. Commw. Ct. 1983) (holding that fire regulations do not burden a church school's religious exercise and noting the compelling state interest in protecting human life).

<sup>147</sup> See *St. John's Evangelical Lutheran Church v. City of Hoboken*, 479 A.2d 935, 939 (N.J. Super. Ct. Law Div. 1983) (requiring that church shelter not be dangerously overcrowded).

<sup>148</sup> *Id.* (requiring church shelter to comply with "appropriate health and safety laws").

<sup>149</sup> *Congregation Beth Yitzchok*, 593 F. Supp. at 663.

<sup>150</sup> *St. John's Evangelical Lutheran Church*, 479 A.2d at 939; see also Goldberg, *su-*

A church-sponsored shelter or soup kitchen, although offering living accommodations or meals, is not a hotel or restaurant. Although basic standards of cleanliness and safety are mandated, it is unwarranted and often financially impossible to demand that charitable homeless programs meet the same requirements as those to which commercial establishments are subject. Municipal enforcement of health and safety regulations beyond that which is necessary and appropriate for a church-sponsored homeless program would therefore be insufficiently tailored to satisfy RFRA.

## 2. *Common Law Nuisance Actions*

Churches that secure exemptions should "be at least as sensitive to their neighbors' legitimate concern to be free of disturbance as they would wish their neighbors to be to them."<sup>151</sup> Nevertheless, on some occasions, continued operation of a church-sponsored homeless shelter or soup kitchen may engender a host of problems for the program's neighbors. In those instances, municipalities and neighborhood associations may resort to public nuisance actions in an effort to obtain relief from those church-sponsored programs that "interfer[e] with the health and safety of the public."<sup>152</sup> Even if resulting from a church-sponsored program, a nuisance is "not insulated by the First Amendment from some curtailment, restriction, or regulation."<sup>153</sup>

A church shelter or soup kitchen may be liable as a public nuisance if it is operated in such a way "as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons."<sup>154</sup> Compliance with local

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*pra* note 118, at 109 (noting that health and safety regulations "should not be so stringent that the church would be defeated in its mission to assist the homeless").

<sup>151</sup> COUSER, *supra* note 29, at 121.

<sup>152</sup> *Wilkinson v. LaFranz*, 574 So. 2d 403, 407 (La. Ct. App. 1991); *see also* *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 547 (D.D.C. 1994) (permitting operation of church-sponsored shelter "so long as the feeding program is conducted in an orderly manner and does not constitute a nuisance"); *Armory Park Neighborhood Ass'n v. Episcopal Community Servs.*, 712 P.2d 914 (Ariz. 1985) (affirming preliminary injunction of public nuisance caused by church-sponsored feeding program for indigents).

<sup>153</sup> *Wilkinson*, 574 So. 2d at 407 (noting also that "[f]reedom of religion does not provide anyone with the right to conduct a true nuisance"); *see also* *Osborne v. Power*, 890 S.W.2d 570, 573 (Ark. 1994) (observing that RFRA "would not [operate to] bar restrictions on activities that are nuisances"); *Tennessee ex rel. Swann v. Pack*, 527 S.W.2d 99, 111 (Tenn. 1975) ("Free exercise of religion . . . does not include the right to commit or maintain a nuisance."). *See generally* John Lasseigne, Comment, *Structured Charity: The Clash Between Zoning Laws and Religious Free Exercise in New Orleans Soup Kitchens*, 37 LOY. L. REV. 279, 297-303 (1991) (analyzing nuisance claim against Louisiana soup kitchens under Louisiana law).

<sup>154</sup> *Greentree at Murray Hill Condominium v. Good Shepherd Episcopal Church*, 550

zoning regulations does not bar a finding of a public nuisance.<sup>155</sup> Similarly, a church-sponsored program will not escape responsibility by arguing that the church has no control over acts committed by its patrons off church premises.<sup>156</sup> Valid reasons for which a municipality or a neighborhood association might seek to enjoin a church-sponsored shelter or soup kitchen as a nuisance include excessive noise or litter; public drunkenness, loitering, or urination; assaults; and excessive panhandling.<sup>157</sup>

In *Armory Park Neighborhood Ass'n v. Episcopal Community Services*,<sup>158</sup> the Supreme Court of Arizona balanced "the utility and reasonableness of the conduct . . . against the extent of harm inflicted and the nature of the affected neighborhood"<sup>159</sup> to determine whether an injunction against a church-sponsored feeding program was appropriate. Surrounding property owners complained that

[t]ransients frequently trespassed onto residents' yards, sometimes urinating, defecating, drinking and littering on the residents' property. A few broke into storage areas and unoccupied homes, and some asked residents for handouts. The number of arrests [had] increased dramatically. Many residents were frightened or annoyed by the transients and [had] altered their lifestyles to avoid them.<sup>160</sup>

Although recognizing that the program's "charitable purpose . . . [was] entitled to greater deference than pursuits of lesser intrinsic value," the court concluded that the extent of the interference was substantial enough to con-

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N.Y.S.2d 981, 988 (Sup. Ct. 1989) (refusing to enjoin church shelter as a public nuisance after neighboring landowner failed to allege facts to support a public nuisance claim and because the municipality was the proper party to bring a public nuisance suit). *But see Armory Park*, 712 P.2d at 918-19 (permitting neighborhood residents and homeowners association to bring public nuisance action against church-sponsored feeding program); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972) (permitting private party developer to prosecute and prevail in a public nuisance action against neighboring feed lot owner).

<sup>155</sup> *Armory Park*, 712 P.2d at 921.

<sup>156</sup> *Id.* at 920 (holding that church-sponsored feeding program could be "enjoined upon the showing of a causal connection" between the feeding program and the nuisance). The issue is whether the shelter or soup kitchen "frequently attract[s] patrons whose conduct violate[s] the rights of residents to peacefully use and enjoy their property." *Id.*

<sup>157</sup> *Id.* at 916, 920-21; *see also* *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538, 546 (D.D.C. 1994) (noting that citizens "are entitled to walk the streets without being harassed by panhandlers or assaulted in any way").

<sup>158</sup> 712 P.2d 914 (Ariz. 1985).

<sup>159</sup> *Id.* at 921.

<sup>160</sup> *Id.* at 916.

stitute a nuisance.<sup>161</sup> The court refused to "believe that the law allows the costs of a charitable enterprise to be visited . . . upon the residents of a single neighborhood."<sup>162</sup>

In crafting a remedy for a public nuisance occasioned by operation of a church-sponsored program for the homeless, a court nevertheless is constrained by RFRA's "least restrictive means" requirement.<sup>163</sup> If a program is "willing to work with city officials to develop guidelines . . . to mitigate community concerns[,] . . . the City must at least initially attempt to address community concerns in this fashion."<sup>164</sup> Only after lesser means have failed is a permanent injunction warranted.

Municipalities and neighborhoods are not forced to suffer unreasonable burdens posed by church-sponsored homeless shelters and soup kitchens. If operation of the program results in substantial interference with the surrounding community, church-sponsored programs may be enjoined as nuisances without offending RFRA.

#### CONCLUSION

In RFRA, Congress has rejected the Supreme Court's narrow interpretation of *Smith* to once again place free exercise rights in their constitutionally privileged position. Nevertheless, church-sponsored homeless shelters and soup kitchens still will be forced to demonstrate a close link between the operation of the shelters and their religious beliefs. Ministry to the poor, however, is a fundamental form of worship entitled to RFRA's protections. Because municipal zoning regulations may burden church-sponsored homeless programs, enforcement of such regulations should only be permitted if justified by a compelling interest. In those instances where a municipality has a compelling interest, enforcement must be the least restrictive means of achieving that interest; otherwise, a RFRA-based free exercise exemption is due. Even if an exemption is granted, operation of shelters and soup kitchens must still comply with reasonable municipal restrictions, and courts will not excuse a nuisance simply because it results from the free exercise of religion. Accordingly, with appropriate judicial interpretation of RFRA, church-sponsored homeless shelters and soup kitchens should be able to fulfill their religious mandates of ministering to the poor without fear that local zoning will prevent the programs from operating.

MARC-OLIVIER LANGLOIS

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<sup>161</sup> *Id.* at 921.

<sup>162</sup> *Id.*

<sup>163</sup> 42 U.S.C. § 2000bb-1(b) (Supp. V 1993); see also *Jesus Ctr. v. Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698, 703-05 (Mich. Ct. App. 1996).

<sup>164</sup> *Jesus Ctr.*, 544 N.W.2d at 705.