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Church-State Conflict under the Texas Child Care Licensing Act: A Ten-Year History

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CHURCH-STATE CONFLICT UNDER THE TEXAS CHILD CARE LICENSING ACT: A TEN-YEAR HISTORY

by Terry Marcus Henry

THE Texas Child Care Licensing Act[1] provides for the licensing and regulations of child care facilities in Texas. Many churches and religious organizations provide child care ministries that fall within the purview of the Act,[2] giving rise to conflicts between the state and churches over the licensure and control of religious child care facilities. Each conflict that has progressed to appellate court litigation, including the recent case of *State v. Corpus Christi People's Baptist Church, Inc.*,[3] has involved the child care institutions associated with the late Lester Roloff of Corpus Christi. In *People's Baptist Church* the Texas Supreme Court upheld the Child Care Licensing Act over claims by the church that the Act violated the guarantees of the religion clauses of the first amendment of the United States Constitution.[4]

The Act has governed Texas child care for approximately ten years.[5] A review of the developments in the law during the last decade is necessary to understanding whether the recent decision by the Texas Supreme Court fully and properly addressed first amendment objections to the Act. This Comment sets forth the various claims of religion clause violations asserted by religious institutions against the Act and briefly reviews decisions of the courts of appeal and supreme court in Texas concerning these allegations. Finally, this Comment analyzes the present state of child care law in Texas.

I. THE CHILD CARE LICENSING ACT

The Texas Child Care Licensing Act arose out of a crisis in Texas child care.[6] The crisis situation included allegations of and indictments for child

1. TEX. HUM. RES. CODE ANN. §§ 42.001-.076 (Vernon 1980).

2. *See infra* note 9; Esbeck, *State Regulation of Social Service Ministries of Religious Organizations*, 16 VAL. U.L. REV. 1, 2 (1981) (list of typical church social service ministries).

3. 683 S.W.2d 692 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985).

4. 683 S.W.2d at 696-97. The first amendment to the U.S. Constitution states, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

5. The effective date of the Act was January 1, 1976. Child Care Licensing Act, ch. 708, § 27, 1975 Tex. Gen. Laws 2240, 2250.

6. TEX. HOUSE COMM. ON HUM. RES., 63D LEG., REPORT ON THE INTERIM STUDY ON CHILD-CARING IN TEXAS 7 (Nov. 12, 1974).

abuse in private child care institutions.[7] Furthermore, child care agencies in other states that had placed children in Texas facilities removed those children in the midst of allegations of mistreatment of the children.[8]

The Act has the express purpose of promoting the health, safety, and welfare of children in child care facilities throughout the state.[9] To further that goal it empowers the Texas Department of Human Resources (DHR) to regulate and license child care facilities.[10] As part of the mandate to the DHR, the Act gives the DHR authority to promulgate and enforce rules and minimum standards for child care facilities.[11] The DHR has rulemaking powers over the personal health and safety of children, physical facilities used for children, staffing of facilities, food service to children, discrimatory practices of facilities, and parent or guardian involvement in the child care program.[12] In addition to authorizing minimum standards, the Act itself contains requirements for immunizations, inspections, and recordkeeping.[13]

Under the Act no person may operate a child care facility without a license.[14] Moreover, a facility may obtain a license only by compliance with the requirements of the Act, including the minimum standards of the DHR.[15] Operation of a facility without a license or nonconformity with minimum standards provides the state with grounds to close the facility[16] as well as grounds for civil and criminal penalties against the operator of the facility.[17]

In establishing this broad regulatory scheme for child care facilities, the Texas Legislature expressly disclaimed any intent to encroach upon religious freedoms guaranteed by the first amendment. The Act expressly denies the DHR authority to regulate or become involved in the religious instruction or

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7. *Id.* at 1-2.

8. *Id.* at 3.

9. TEX. HUM. RES. CODE ANN. § 42.001 (Vernon 1980). Child care facilities that are subject to the requirements of the Act include, inter alia, foster homes, day care centers, and institutional care facilities. *Id.* §§ 42.002, .041, .042. Facilities that are exempted from licensing requirements of the Act include shopping center nurseries, church nurseries, Sunday schools, church summer camps, and others. *Id.* § 42.041.

10. *Id.* § 42.021.

11. *Id.* § 42.042.

12. *Id.* § 42.042(e)(1)-(6).

13. *Id.* §§ 42.043, .044, .045.

14. *Id.* § 42.041.

15. See *id.* § 42.072, which provides for the denial of a license if a facility does not comply with the requirements of the Act, the standards of the DHR, or specific terms of the license. Section 42.049 of the Act states that a potential licensee must meet all requirements. Since the Act does not specifically define "all requirements," the Corpus Christi People's Baptist Church, Inc., challenged the Act as overly vague. *See* Brief for Corpus Christi People's Baptist Church, Inc. at 16-20, State v. Corpus Christi People's Baptist Church, Inc., No. 10-83-128-CV (Tex. App.—Waco 1982), *rev'd*, 683 S.W.2d 692 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985) (incorporated into Amended Answer for Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985)) [hereinafter cited as People's Baptist Brief]. Potential licensees may obtain a waiver of specific minimum standards only if compliance is economically impractical. TEX. HUM. RES. CODE ANN. § 42.042(j) (Vernon 1980).

16. TEX. HUM. RES. CODE ANN. §§ 42.073-.074 (Vernon 1980).

17. *Id.* §§ 42.075-.076.

curriculum of a school sponsored by a religious organization.[18] Unfortunately, the legislature, in limiting its concern to encroachment into curricula, failed to provide limits on encroachment into the constitutionally protected religious freedoms of noncurricular operations and activities of child care facilities that belong to religious organizations.[19] Litigation based on noncurricular encroachments under the Child Care Licensing Act has focused primarily on the first amendment's free exercise and establishment clauses.[20]

II. FIRST AMENDMENT OBJECTIONS TO THE CHILD CARE LICENSING ACT

A. Religious Freedoms Under the First Amendment

The first amendment to the United States Constitution restricts government involvement and interference with religious beliefs and practice.[21] Using the bare text of the first amendment, the United States Supreme Court has classified first amendment restrictions on federal and state governments into two areas. First, the free exercise clause[22] of the first amendment absolutely prohibits the government from inhibiting or regulating religious belief.[23] The clause also prohibits government interference with most religious activity.[24] Second, the establishment clause[25] prevents state and federal gov-

18. *Id.* §§ 42.001, .042(k). The prohibition on DHR involvement in religious instruction supplements the restriction on DHR authority to regulate church nurseries, Sunday schools, and summer camps. *See id.* § 42.041.

19. *See* Esbeck, *supra* note 2, at 32.

20. *E.g.*, State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692, 696-97 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985); Oxford v. Hill, 558 S.W.2d 557, 559 (Tex. Civ. App.—Austin 1977, writ ref'd); Roloff Evangelistic Enters. v. State, 556 S.W.2d 856, 858 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *appeal dismissed*, 439 U.S. 803 (1978). Although at least one litigant has also challenged the Act on the basis of the Texas Constitution (*see People's Baptist Church*, 683 S.W.2d at 697), the challenge was unsuccessful. This Comment, therefore, limits consideration to federal issues.

21. For the relevant language of the first amendment, see *supra* note 4. The first amendment promotes separation of church and state. Abington School Dist. v. Schempp, 374 U.S. 203, 219-20 (1963) (quoting Zorach v. Clauson, 343 U.S. 306, 312 (1952)). The Supreme Court has, however, limited this philosophy in recent years. Under this limited view the first amendment dictates a course of "benevolent neutrality" toward religion instead of absolute separation of church and state. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

22. "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I. In Cantwell v. Connecticut, 310 U.S. 296, 303-05, 311 (1940), the Supreme Court held that the free exercise clause applied to the states. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 813-14 (1978).

23. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Reynolds v. United States, 98 U.S. 145, 164 (1878).

24. In order to justify interference with religious practice the government must demonstrate a compelling interest that cannot be served by a less restrictive means. *See infra* notes 27-32 and accompanying text. Originally the Court interpreted the first amendment to prevent only regulation of beliefs. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878). The Court later abandoned this simple but inadequate test in favor of the compelling interest test first enunciated in Sherbert v. Verner, 374 U.S. 398, 403-07 (1963). Bangor Baptist Church v. Maine, 549 F. Supp. 1208, 1216 (D. Me. 1982); Drake, *Attempted State Control of the Religious School: Congress Shall Make No Law Inhibiting the Free Exercise of Religion?*, 7 OHIO N.U.L. REV. 954, 958-59 (1980).

25. "Congress shall make no law respecting an establishment of religion . . . ." U.S.

ernments from advancing, aiding, or establishing religion.[26] The Court's decisions have produced tests for determining government violation under each of the religion clauses. Based upon the tests set forth by the Supreme Court, religious opponents to the Child Care Licensing Act have raised objections under both religion clauses of the first amendment.

B. Free Exercise Objections to the Act

The United States Supreme Court has developed a multi-prong compelling interest test to establish violations of the free exercise clause.[27] First, a party claiming a free exercise clause violation must demonstrate that an infringement of religious beliefs exists. The challenged state law, regulation, or activity thus must burden conduct that is based upon truly held religious beliefs.[28] Under this first prong of the compelling interest test a court may not inquire into the veracity of a claimant's religious belief, but may inquire into the sincerity of the belief.[29] Once a claimant demonstrates an infringement of a first amendment right, then the state must justify the infringement.[30] The state must have more than a general interest in regulation of

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CONST. amend. I. Everson v. Board of Educ., 330 U.S. 1, 13-16, 18 (1947), made the establishment clause applicable to the states. L. TRIBE, *supra* note 22, at 813-14.

26. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 770-72 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Everson v. Board of Educ., 330 U.S. 1, 15 (1947). Arguably, the framers of the Constitution did not intend the establishment clause to prevent aid to religion, but rather intended it to prevent the federal government from supplanting the official religions of the several states with one federally established religion. *See* L. TRIBE, *supra* note 22, at 818; Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 362-63 (1984). Decisions of the Supreme Court, however, have liberalized the definition of establishment to prevent government aid to religion. *See, e.g., Nyquist*, 413 U.S. at 770-72; *Lemon*, 403 U.S. at 612; *Everson*, 330 U.S. at 15. For a critical analysis of this liberalized definition, see R. CORD, SEPARATION OF CHURCH AND STATE 223-39 (1982).

27. Sherbert v. Verner, 374 U.S. 398, 403-07 (1963); *see* Drake, *supra* note 24, at 958-59.

28. *See* Thomas v. Review Bd., 450 U.S. 707, 713-16 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972); Sherbert v. Verner, 374 U.S. 398, 403-05 (1963). The burden placed upon religious conduct by state regulation must involve some element of coercion. *See Thomas*, 450 U.S. at 716-18; *Sherbert*, 374 U.S. at 404. A burden exists when compulsion is direct, such as the imposition of a fine for engaging in religious conduct, as well as when the compulsion is indirect, such as denial of benefits to those engaged in religious activity. *See Thomas*, 450 U.S. at 717-18.

29. United States v. Ballard, 322 U.S. 78, 86-87 (1944). Only beliefs based on religion receive first amendment protection. Thomas v. Review Bd., 450 U.S. 707, 713 (1981). A belief does not lose first amendment protection, however, solely because the entire religious sect does not uniformly share the belief. *Id.* at 715-16; Esbeck, *supra* note 26, at 397-98; *see* United States v. Lee, 455 U.S. 252, 257 (1982) (Court refused to examine whether Amish litigant's belief was correct Amish belief). The free exercise clause, however, does not protect beliefs based upon secular or philosophical grounds. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). The possibility exists for a claim to be so "bizarre" and "clearly non-religious in motivation" as not to merit constitutional protection. *Thomas*, 450 U.S. at 715.

In actual litigation the government usually stipulates as to the sincerity of the claimant's belief. *CLA Seeks to Establish Sincerity of Beliefs in Court*, THE BRIEFCASE, Sept. 1985, at 4 (Christian Law Association Newsletter). For a discussion of the "judicial gymnastics" often involved when the state does not stipulate to the sincerity of the claimant's belief, see Shugrue, *An Approach to Mutual Respect: The Christian School Controversy*, 18 CREIGHTON L. REV. 219, 232-35 (1985).

30. *See* United States v. Lee, 455 U.S. 252, 257-59 (1982); Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

the activity in question; only compelling interests or "interests of the highest order" are sufficient to overcome an infringement upon the free exercise of religion.[31] Finally, even if the state demonstrates a compelling interest, the state must also prove that the challenged restrictions constitute the least restrictive means to achieving the state's compelling interest.[32]

Litigants have attacked the Child Care Licensing Act on the basis of the compelling interest test.[33] The licensing requirement of the Child Care Licensing Act is the primary subject of attack in litigation. Many churches and religious institutions believe that their child care ministries originated from Biblical instructions to aid and evangelize needy children and children of Christian parents.[34] These organizations consider their child care activities to be an integral and inseparable part of their ministry.[35] Thus, the groups believe that subjecting part of the church's ministry to state approval or censure violates the lordship of Christ over the church.[36]

The Act also requires that the DHR license the administrator of a child care facility.[37] This licensing requirement may disqualify otherwise theologically qualified persons from the administrator position if those candidates for the position do not meet state licensing requirements.[38] The licensing requirement thus burdens the religious freedom of a church or religious organization by limiting the organization's choice and forcing the organization to find an administrator who meets licensing requirements as well as theological criteria.[39]

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31. *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981). Compelling interests include some threat to the "public health, safety, peace, or order," (Sherbert v. Verner, 374 U.S. 398, 403 (1963)), such as interests in preventing polygamy (Reynolds v. United States, 98 U.S. 145 (1878)), controlling child labor (Prince v. Massachusetts, 321 U.S. 158 (1944)), and compelling vaccinations during epidemics (Jacobson v. Massachusetts, 197 U.S. 11 (1905)).

32. Thomas v. Review Bd., 450 U.S. 707, 718 (1981). Relevant to the least restrictive means inquiry is consideration of whether exemption from regulation unduly interferes with the accomplishment of the state's compelling interest. *See* United States v. Lee, 455 U.S. 252, 259-60 (1982) (exempting employer from paying his share of employees' social security tax would lead to creation of many other exemptions and make maintenance of social security system impossible).

33. Litigants have also challenged the Act on the basis of parents' rights to provide religious education for their children and children's rights to obtain religious teaching. *See* State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692, 697 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985); People's Baptist Brief, *supra* note 15, at 28-29. *See generally* Esbeck, *supra* note 2, at 33 (enumerating issues often decided by courts dealing with state regulation of social service ministries).

34. Roloff Evangelistic Enters. v. State, 556 S.W.2d 856, 858 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *appeal dismissed*, 439 U.S. 803 (1978); People's Baptist Brief, *supra* note 15, at 11-13; Esbeck, *supra* note 2, at 1-2.

35. People's Baptist Brief, *supra* note 15, at 11-13; Esbeck, *supra* note 2, at 7-8.

36. *See California Fights Churches for Control of Child Care*, THE BRIEFCASE, Sept. 1985, at 3 (Christian Law Association Newsletter); *see also* State v. Shaver, 294 N.W.2d 883, 887 (N.D. 1980) (pastor's testimony that seeking state approval of church school removes Christ from position as head of Church).

37. TEX. HUM. RES. CODE ANN. § 43.003 (Vernon 1980).

38. *Cf.* Bird, *Freedom from Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 2 HARV. J.L. & PUB. POL'Y, 125, 194-95 (1979) (addressing free exercise clause concerns in state accreditation of Christian school teachers).

39. *See* People's Baptist Brief, *supra* note 15, at 14-15; Esbeck, *supra* note 2, at 8; *cf.* Bird, *supra* note 38, at 194-95 (teacher certification requirements can disqualify theologically quali-

In addition to the licensing requirements of the Act, the minimum standards promulgated by the DHR also generate free exercise clause objections. For example, the minimum standards require that children in a facility participate in community activities.[40] Churches assert that Biblical principle, by contrast, instructs that Christians separate to some degree from the world.[41] The minimum standards further require facilities to provide clothing to children that is comparable to community standards.[42] Some religious facilities maintain scripturally based dress codes, which are often more strict than community dress standards. The statutory minimum standard could require relaxation of the scripturally based dress codes; thus, the religious groups may object to the standard on free exercise grounds. Another minimum standard prohibits facilities from requiring children to perform at public gatherings.[43] This requirement arguably could prevent a facility from maintaining a performing children's choir. The standards also direct facilities to obtain professional treatment for children who experience trouble adjusting to society.[44] This requirement draws objections from some religious institutions that seek to help troubled children through religious teaching rather than through secular, professional treatment.[45]

Minimum standards concerning administration of child care facilities also draw free exercise clause objections from religious organizations.[46] The standards require predictable operating funds and also reserve funds for a child care facility.[47] This requirement raises objections because the Bible instructs churches to rely on God to provide finances for church

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fied teachers and abridge churches' first amendment rights); Comment, Douglas v. Faith Baptist Church *Under Constitutional Scrutiny*, 61 NEB. L. REV. 74, 82 (1982) (free exercise clause infringement exists when parent of Christian school pupil cannot employ uncertified but theologically qualified teacher due to state teacher certification requirements); Note, *Government Noninvolvement with Religious Institutions*, 59 TEX. L. REV. 921, 948-49 (1981) (disqualification of theologically qualified Christian school teachers due to state certification requirement raises free exercise issues); Comment, *State Regulation of Private Religious Schools in North Carolina—A Model Approach*, 16 WAKE FOREST L. REV. 405, 412 (1980) [hereinafter cited as Comment, *State Regulation*] (teacher certification burdens religious freedom because schools must find teachers meeting theological and state qualifications).

40. Tex. Dep't of Hum. Res., 40 TEX. ADMIN. CODE § 83.614(f) (Shepard's Nov. 1, 1981).

41. *See* People's Baptist Brief, *supra* note 15, at 24.

42. Tex. Dep't of Hum. Res., 40 TEX. ADMIN. CODE § 83.614(c) (Shepard's Nov. 1, 1981).

43. *Id.* § 83.617(h).

44. *Id.* § 83.613(c).

45. *See* People's Baptist Brief, *supra* note 15, at 23-24.

46. The minimum standards also require compliance with fire, health, and sanitation requirements. Tex. Dep't of Hum. Res., 40 TEX. ADMIN. CODE §§ 83.621-.623 (Shepard's Nov. 1, 1981). For an example of health laws that churches may find objectionable, see Comment, *State Regulation*, *supra* note 39, at 417-18. These health laws may require, for example, providing contraceptives under the label of personal health aids. *Id.* Less controversial, but potentially objectionable, are safety codes that have much more stringent requirements for child care facilities than for the same facilities used for church functions on Sunday. *See* Esbeck, *supra* note 2, at 5 n.15 (discussing Michigan case involving such safety codes).

47. Tex. Dep't of Hum. Res., 40 TEX. ADMIN. CODE § 83.603(d) (Shepard's Nov. 1, 1981).

ministries.[48]

These possible infringements by the Child Care Licensing Act address the first prong of the test for violations of the free exercise clause. Two elements of the compelling interest test remain, the compelling interest factor and the least restrictive means factor.[49] The state has an interest in the safety and health of children in child care facilities and an obligation to protect them from physical abuse and neglect.[50] Most churches accept reasonable fire, safety, and health standards in recognition of the state's interest in the safety of children in child care institutions.[51] At least one religious organization maintains that these health and safety requirements, along with existing laws that regulate child abuse and neglect,[52] form a sufficiently comprehensive scheme to protect the state's interest and are less restrictive than the licensing scheme required by the Child Care Licensing Act.[53]

C. Establishment Clause Objections to the Act

The establishment clause of the first amendment prohibits the government from making any law respecting the establishment of religion. The United States Supreme Court has interpreted the clause to prohibit government "sponsorship or financial support" of religion and "active involvement" of government in religious activity.[54] The Supreme Court has developed a tripartite test to serve as a guideline in determining the constitutionality of legislation under establishment clause challenge.[55] First, the law must have a secular purpose; second, the law's primary effect must neither inhibit nor advance religion; finally, the law must not lead to excessive entanglement between government and religion, especially through surveillance of religious activity by administrative agencies.[56]

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48. Kansas *ex. rel.* O'Sullivan v. Heart Ministries, Inc., 277 Kan. 244, 607 P.2d 1102, 1111, *appeal dismissed*, 449 U.S. 802 (1980); People's Baptist Brief, *supra* note 15, at 24.

49. *See supra* notes 27-32 and accompanying text.

50. State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692, 696 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985).

51. *See* Esbeck, *supra* note 2, at 5, 9.

52. TEX. PENAL CODE ANN. § 22.04 (Vernon Supp. 1986) (child abuse/neglect); TEX. FAM. CODE ANN. §§ 34.01-.06, 35.01-.03 (Vernon 1975 & Supp. 1986) (reporting child abuse and neglect).

53. *See* Respondent's Brief in Support of Motion for Rehearing at 10-11, State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d (1985) [hereinafter cited as People's Baptist Motion]; People's Baptist Brief, *supra* note 15, at 33-34.

54. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

55. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). The Court's comments in Mueller v. Allen, 463 U.S. 388 (1983), indicate that this test merely serves as a guideline. The Court characterized the tripartite analysis as " 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges." *Id.* at 394 (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)). *See also* Comment, *The* Lemon *Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1187-98 (1984) (discussing recent cases that Supreme Court decided on historical considerations rather than tripartite analysis).

56. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); *see* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982) (quoting *Lemon*, 403 U.S. at 602).

The excessive entanglement prohibition entails two concerns, administrative entanglement and political divisiveness. *Lemon*, 403 U.S. at 621-22; Esbeck, *supra* note 2, at 44. Adminis-

The Child Care Licensing Act raises several establishment clause objections. The most frequent objection involves a claim that the Act and the minimum standards of the DHR violate the excessive entanglement element of the Supreme Court's tripartite test by creating an administrative relationship between churches and the state. The Act authorizes the state, in addition to imposing regulatory measures on a facility, to inspect a child care facility as often as necessary.[57] The DHR may also inspect the records of an institution.[58] A church child care institution must report to the state many detailed aspects of its ministry.[59] Some churches believe that the scheme of inspections and reporting subjects the child care institutions, and thus the church, to on-going administrative surveillance and oversight.[60] The churches assert that this surveillance constitutes excessive entanglement that is forbidden by the establishment clause.[61]

Although religious institutions object to the Child Care Licensing Act on establishment clause grounds, the state has raised its own establishment clause objection to exemption of religious facilities from the Act.[62] The state reasoned that if a court considered establishment clause objections by religious institutions and granted the institutions exemption from licensing and regulation, then the exemption would, in effect, aid religious child care facilities over nonreligious facilities. To aid religious facilities in such a manner violates establishment clause proscriptions against aiding or advancing religion, according to the state.[63]

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trative entanglement includes government surveillance or supervision of religious activity and government involvement in church doctrinal disputes. *See* L. TRIBE, *supra* note 22, at 869-70; Esbeck, *supra* note 37, at 382-89; Note, *supra* note 39, at 935. Commentators have questioned the political entanglement factor of the entanglement test. *See* L. TRIBE, *supra* note 22, at 868-69; Esbeck, *supra* note 2, at 44 n.208; Note, *supra* note 50, at 935 n.92. The Court appears to have limited political entanglement considerations to cases involving direct government subsidies to sectarian institutions. *See* Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983). The political divisiveness element reflects concerns that government involvement with a religious body may cause popular political fragmentation along religious lines to an abnormal degree, threatening normal republican processes. *Lemon*, 403 U.S. at 622-23.

57. TEX. HUM. RES. CODE ANN. § 42.044 (Vernon 1980).

58. *See, e.g.*, Tex. Dep't of Hum. Res., 40 TEX. ADMIN. CODE §§ 83.603, .614, .624, .626 (Shepard's Nov. 1, 1981).

59. Reporting requirements include, for example, submission of an annual budget (*id.* § 83.603) and reporting biographical records of children under care (*id.* §§ 83.624, .626).

60. People's Baptist Brief, *supra* note 15, at 41-43. Note that these establishment clause entanglement objections entail, in essence, free exercise clause claims. *See, e.g.*, L. TRIBE, *supra* note 22, at 815 ("[T]o the extent that the two clauses are understood as reinforcing one another, doctrines developed under one are relevant to the other as well."); Durrant, *Accrediting Church-Related Schools: A First Amendment Analysis*, 38 ARK. L. REV. 598, 626 (1985) ("While [entanglement] purports to be an establishment clause inquiry, it is equally a free exercise clause inquiry."); Esbeck, *supra* note 26, at 420 (church-state entanglements threaten the "free church"); Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195, 1214 (1980) (discussing use of entanglement concerns in the free exercise area).

61. People's Baptist Brief, *supra* note 15, at 41-43.

62. *See* Application for Writ of Error at 7-8, State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985).

63. *Id.*

III. TREATMENT OF FIRST AMENDMENT CHALLENGES TO THE CHILD CARE LICENSING ACT BY TEXAS COURTS

Texas courts have considered some aspects of the first amendment challenges to the Child Care Licensing Act. Texas appellate courts have decided three cases challenging the Act on first amendment grounds.[64] All of the cases have involved child care homes operated in conjunction with the Corpus Christi People's Baptist Church and the late Reverend Lester Roloff.[65] The courts ultimately decided each of the cases in favor of the constitutionality of the Child Care Licensing Act and against the first amendment contentions of the homes.[66]

A. Cases Decided by the Courts of Appeals

The Texas Courts of Appeals decided two cases challenging the Child Care Licensing Act on first amendment grounds. Both of the decisions came from the Austin court of appeals. Each of these cases involved only free exercise clause claims.

In *Roloff Evangelistic Enterprises, Inc. v. State*[67] the state sought a court order to compel the Roloff homes to obtain a license for its child care facilities. At trial the state demonstrated that the Roloff organization operated a child care facility without a license in violation of the Act. The Enterprises asserted an affirmative defense, alleging that the Act violated its right under the free exercise clause of the first amendment to administer the homes according to Biblical teaching. Reverend Roloff and two other Baptist ministers testified that the Bible provided the basis for operation of the homes, that the Child Care Licensing Act conflicted with the Bible, that to allow state control of the child care homes violated the ministers' Christian beliefs, and that many other Christians held similar beliefs.[68] The state moved for summary judgment, although it conceded that Reverend Roloff and his staff

64. State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692, 697 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985); Oxford v. Hill, 558 S.W.2d 557, 561 (Tex. Civ. App.—Austin 1977, writ ref'd); Roloff Evangelistic Enters. v. State, 556 S.W.2d 856, 859 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *appeal dismissed*, 439 U.S. 803 (1978).

65. The Roloff homes serve primarily problem children, teenagers, and adults who are sent to the home for corrective religious teaching. Corpus Christi People's Baptist Church, Inc. v. Texas Dep't of Human Resources, 481 F. Supp. 1101, 1105 (S.D. Tex. 1979). The Roloff Evangelistic Enterprises, Inc. owned the homes until 1979, at which time Corpus Christi People's Baptist Church took over the ownership of the homes. *Id.* Lester Roloff was president of the Roloff Enterprises and pastor of People's Baptist Church until his death in 1982. N.Y. Times, Nov. 3, 1982, at A16, col. 5. For a background of People's Baptist Church and the homes, see Corpus Christi People's Baptist Church, Inc. v. Texas Dep't of Human Resources, 481 F. Supp. at 1103-05.

66. State v. Corpus Christi People's Baptist Church, Inc., 683 S.W.2d 692, 697 (Tex. 1984), *appeal dismissed*, 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985); Oxford v. Hill, 558 S.W.2d 557, 561 (Tex. Civ. App.—Austin 1977, writ ref'd); Roloff Evangelistic Enters. v. State, 556 S.W.2d 856, 859 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *appeal dismissed*, 439 U.S. 803 (1978).

67. 556 S.W.2d 856 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.), *appeal dismissed*, 439 U.S. 803 (1978).

68. 556 S.W.2d at 857-58.

operated the homes in accordance with truly held religious beliefs.[69] The trial court granted the motion and held that the Act did not violate the convictions of Reverend Roloff.[70]

On appeal the Austin court of civil appeals upheld the trial court's judgment.[71] The court held that the Child Care Licensing Act and its requirements did not conflict with or infringe upon the defendant's religious beliefs.[72] The court characterized the defendant's contention that such a conflict existed as merely conclusory and unsupported by any factual evidence.[73] In support of its conclusion that no infringement existed, the court observed that the purpose of the licensing program was only to protect the health and well-being of children in child care facilities and that the Act expressly forbade regulation of religious instruction.[74] The court thus upheld the Child Care Licensing Act.[75]

In *Oxford v. Hill*,[76] decided shortly after *Roloff*, the Austin court of civil appeals again upheld the Child Care Licensing Act against free exercise clause claims.[77] Harmon Oxford, an employee of one of the Roloff homes,[78] initiated the suit for a declaratory judgment that the Act was unconstitutional.[79] The court only briefly addressed the first amendment claims. It noted that the state had a valid interest in regulating the care of children.[80] The court again asserted that the state intended to regulate child care, not religious instruction or inculcation of belief.[81] The court held that since the Act only regulated the conduct of child care and did not attempt to regulate religious belief, then the Act was constitutional.[82]

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69. *Id.* at 858.

70. *Id.*

71. *Id.* at 859.

72. *Id.*

73. *Id.* at 858.

74. *Id.* at 858-59 (citing TEX. HUM. RES. CODE ANN. § 42.001 (Vernon 1980)).

75. 556 S.W.2d at 859.

76. 558 S.W.2d 557 (Tex. Civ. App.—Austin 1977, writ ref'd).

77. *Id.* at 561.

78. Oxford supervised one of the Roloff boys' homes. *Id.* at 558.

79. The doctrine of sovereign immunity prohibits suits by a citizen of a state against his own state government unless the state consents to suit. *See Oxford*, 558 S.W.2d at 560. A person may, however, sue a state official for unlawful actions. *Id.* The courts will refuse to consider the unlawful acts of a state official as acts perpetrated by the state. *Id.* Actions taken by state officials pursuant to an unconstitutional statute or law come within the purview of this exception. *See id.* at 560-61. In *Oxford*, therefore, Oxford instituted the suit, albeit unsuccessfully, against then Attorney General of Texas, John Hill.

80. *Id.* at 559. The court used Prince v. Massachusetts, 321 U.S. 158 (1944), as authority for this proposition. *Prince* involved a first amendment challenge to child labor laws. A Jehovah's Witness parent asserted that religious duty required her child to work despite those laws. The Supreme Court held that the state had the power to limit parental freedom in matters concerning a child's welfare. *Id.* at 167. This authority included, to some extent, the power to limit matters of religious activity. *Id.* The Court refused, however, to condone every state interference in religion done in the name of the health and welfare of children. *See id.* at 171.

81. *Oxford*, 558 S.W.2d at 558-59.

82. *Id.* at 559, 561.

B. *The Case Ultimately Decided by the Texas Supreme Court:* State v. Corpus Christi Baptist Church, Inc.[83]

After the unfavorable decisions at the court of appeals level, the homes underwent several changes in preparation for the next attempt to vindicate their first amendment claims against the Child Care Licensing Act. The ownership of the homes shifted from the Roloff Evangelistic Enterprises to the Corpus Christi People's Baptist Church, of which Reverend Roloff was pastor, in order to put the State of Texas into direct conflict with a traditional church body. The homes believed that this conflict would enhance the free exercise clause claims against the Act.[84]

The homes also attempted to change litigation forums. The Corpus Christi People's Baptist Church instituted a suit in federal district court against the DHR, requesting the court to declare the Child Care Licensing Act unconstitutional as applied to the church and to enjoin enforcement of the Act against the church.[85] People's Baptist Church presented free exercise clause claims and, unlike *Roloff* or *Oxford*, also asserted establishment clause claims. Six days later, however, the state filed suit in a Texas state court seeking to compel the church to comply with the Act and its requirements. The church then moved in the federal court to enjoin the state court proceedings. Because of the pending state suit, the federal court dismissed the church's action.[86] Despite the dismissal the court recognized that the case presented weighty federal constitutional questions due to the involvement of a church in the action and to the newly asserted establishment clause issues.[87]

In the state court action[88] the church again raised both free exercise and establishment clause challenges to the Act. The trial court, sitting without a jury, ruled in favor of the church,[89] and held that the Act was unconstitutional as applied to the church.[90] The court of appeals affirmed the trial

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83. 683 S.W.2d 692 (Tex. 1984), *appeal dismissed* 106 S. Ct. 32, 88 L. Ed. 2d 26 (1985).

84. *See* 683 S.W.2d at 694. The church also retained attorney William Ball as counsel. Attorney Ball was at that time, and still remains, prominent in first amendment religion clause litigation. For example, he represented religious interests in Wisconsin v. Yoder, 406 U.S. 205 (1972) (successful free exercise clause challenge to compulsory school attendance), and State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976) (successful free exercise clause challenge to state regulation of education).

85. Corpus Christi People's Baptist Church, Inc. v. Texas Dep't of Human Resources, 481 F. Supp. 1101, 1103 (S.D. Tex. 1979).

86. *Id.* at 1111. The court based its dismissal upon the reasoning in Younger v. Harris, 401 U.S. 37 (1971). The abstention doctrine espoused in *Younger* requires federal courts to abstain from a suit when the suit is pending in state courts. *Id.* at 53-54; *see* Corpus Christi People's Baptist Church, Inc. v. Texas Dep't of Human Resources, 481 F. Supp. 1101, 1106 (S.D. Tex. 1979).

87. Corpus Christi People's Baptist Church, Inc. v. Texas Dep't of Human Resources, 481 F. Supp. 1101, 1105-06 (S.D. Tex. 1979).

88. State v. Corpus Christi People's Baptist Church, Inc., No. 297, 248 (Dist. Ct. of Travis County, 200th Judicial Dist. of Texas, May 27, 1981).

89. *People's Baptist Church*, 683 S.W.2d at 694.

90. *Id.* The church had not challenged the Act as facially unconstitutional, that is unconstitutional as to anyone against whom the state may enforce the Act. L. TRIBE, *supra* note 22, at 710-11. If a statute is facially unconstitutional, courts will strike down the statute. *Id.* People's Baptist Church only challenged the Act as it applied to their facilities. 683 S.W.2d at

court's decision in an unpublished opinion.[91]

The Texas Supreme Court reversed the lower courts and upheld the child care licensing scheme against the first amendment challenges by People's Baptist Church.[92] The court characterized the case as essentially the same cause as in *Roloff* and *Oxford* with merely a change in ownership of the homes.[93] The court, however, engaged in a more detailed analysis of the first amendment issues than the courts in *Roloff* and *Oxford*.

The supreme court rejected the church's establishment clause argument that the Act engendered excessive government entanglement with the church, labeling the church's reliance on the establishment clause as misplaced.[94] The court noted that establishment clause analysis applies in cases of government aid to religious organizations.[95] Since the case at bar did not concern aid to, but rather regulation of, a church ministry, the court concluded that the three-prong establishment clause analysis should not apply.[96]

The court set forth two reasons to support its position. First, if the court exempted churches from licensing and regulation in reliance upon the third, excessive entanglement prong of establishment clause analysis, then the exemption could violate the second prong of the test by aiding religious child care facilities over nonexempted, nonreligious child care facilities.[97] In the court's view, favorable treatment of religious institutions in effect aided and advanced religion in violation of establishment clause proscriptions.[98]

Second, the court distinguished establishment clause entanglement from the entanglement created by the child care licensing scheme.[99] Under the establishment clause, the court found that entanglement scrutiny focuses on whether government agencies become involved with an organization in an attempt to determine which functions of the organization are religious and which are secular.[100] The agencies become involved in view of the state's authority to aid only secular functions.[101] In the court's view, since the Child Care Licensing Act expressly prohibited regulation of religious instruction or curricula, the establishment clause entanglement concerns were

694. If the Church prevailed, the Act would remain in effect as to all others except People's Baptist Church.

91. 683 S.W.2d at 694.

92. *Id.* at 697. Chief Justice Pope authored the opinion. No dissenting opinions were reported.

93. *Id.* at 694.

94. *Id.* at 695.

95. *Id.* The court cited Mueller v. Allen, 463 U.S. 388 (1983) (establishment clause case involving tax deduction for parents of parochial school children), Lemon v. Kurtzman, 403 U.S. 602 (1971) (establishment clause case involving state aid to sectarian schools), and Walz v. Tax Comm'n, 397 U.S. 664 (1970) (establishment clause case concerning tax exemptions for religious organizations) as examples of typical establishment clause cases.

96. 683 S.W.2d at 695.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* Although the Court did not cite authority, at least one commentator has noted this proposition. *See* Esbeck, *supra* note 26, at 382-85.

101. 683 S.W.2d at 695.

inapposite.[102] The court believed that the DHR would have no need to examine and classify programs as religious or secular; thus, the agency would not become excessively entangled with the church.[103]

The court next considered the free exercise claims of People's Baptist Church. The court found the free exercise compelling interest test to be a more appropriate means of challenging state regulation than establishment clause analysis.[104] Despite the appropriateness of the argument, however, the court upheld the Child Care Licensing Act over the free exercise claims of the church.[105] The court apparently assumed that licensing imposed some degree of infringement on the church's free exercise clause rights and thus satisfied the first prong of the compelling interest test,[106] but noted that the church, as a corporation, voluntarily accepted a business license and complied with business licensing requirements.[107] It also emphasized that the homes were quality facilities that could easily comply with most of the child care licensing requirements.[108]

The supreme court next considered whether the state had a compelling interest in regulating child care facilities, the second prong of the test. The court noted that children in child care institutions depend upon the institutions for every aspect of care.[109] Thus, as a matter of law the court held that the state had a compelling interest in guarding the physical and mental safety of children who reside in child care facilities.[110]

Notwithstanding the state's compelling interest, if the child care licensing and regulation program was not the least restrictive means of enforcing that interest, the Act could not withstand the free exercise challenge.[111] The supreme court reasoned that, if the state exempted religious institutions from the Act, then the state would become powerless to prevent possible abuse and mistreatment of children in those exempted institutions.[112] The court found the information-gathering that is incident to licensing to be necessary

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102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 697.
106. *Id.* at 694.
107. *Id.* People's Baptist Church attempted to distinguish corporate licensing from child care licensing on the ground that the church would exist, albeit as an unincorporated religious society, regardless of whether the church incorporated or not. *See* People's Baptist Motion, *supra* note 53, at 10. Without a license the state could close the church's homes. TEX. HUM. RES. CODE ANN. §§ 42.041, .073 (Vernon 1980). The church also argued that incorporation did not involve extensive regulation of the church as did the child care licensing scheme. People's Baptist Motion, *supra* note 53, at 10; *see also supra* notes 34-48, 57-59 and accompanying text (enumeration of regulations applied to child care facilities).
108. 683 S.W.2d at 696. The court's assertion begs the question of whether the licensing scheme violates the church's first amendment rights.
109. *Id.*
110. *Id.* The court's holding overruled a trial court holding that the state had no compelling interest in this case. *See id.* Possible explanations for the lower court's holding include the excellent quality of child care provided by the homes (*see id.* at 694, 696), in addition to the perceived lack of urgency on the part of the state to enforce the licensing requirements against People's Baptist Church. *See* Answer to Application for Writ of Error at 9-11.
111. *See supra* text accompanying notes 30-32.
112. 683 S.W.2d at 696.

in order for the state to protect children in child care facilities.[113] Thus, the tribunal upheld the child care licensing scheme as the least restrictive means for enforcing that state's interest[114] and directed the trial court to enjoin the operation of the homes until People's Baptist Church obtained a license for the facility.[115]

Several federal courts have considered issues similar to those decided by the Texas Supreme Court in *People's Baptist Church*. In *Forest Hills Early Learning Center, Inc. v. Lukhard*[116] the Fourth Circuit, on an appeal from a summary judgment ruling, examined a provision of the Virginia child care licensing law[117] that generally exempted religious child care facilities from licensing and compliance with some child care regulations. The Virginia law required religious child care facilities to register with the state and to comply with fire, health, and safety regulations.[118] The state could close a facility that failed to comply with regulations.[119] Forest Hills Early Learning Center, Inc. challenged this statutory exemption as unconstitutionally advancing religion.

The Fourth Circuit reasoned that since the Virginia law exempted only sectarian facilities from many areas of child care regulation, then the exemption aided and advanced religious child care facilities over secular child care institutions.[120] The court noted, however, that religious child care facilities should receive an exemption to the extent that the licensing requirements and regulations impermissibly infringed upon the institutions' free exercise clause right as measured by the compelling interest test.[121] The Fourth Circuit, like the Texas Supreme Court in *People's Baptist Church*, considered free exercise clause analysis, rather than establishment clause analysis, to be the proper inquiry in justifying exemption of religious institutions from government regulation.[122] Since no religious child care institutions were parties in the case and only a meager factual record existed, the Fourth Circuit did not reach a decision on the free exercise clause concerns.[123] The court viewed religious child care institutions as the most appropriate litigants to

113. *Id.*; *see also* Kansas *ex. rel.* O'Sullivan v. Heart Ministries, Inc., 227 Kan. 244, 607 P.2d 1102, 1111-12, *appeal dismissed*, 449 U.S. 802 (1980) (court reasoned that without licensing state lacks knowledge essential to performance of its duty to protect children in child care facilities).

114. 683 S.W.2d at 696. The court did not discuss other alternatives to licensing that it may have considered in reaching its conclusion.

115. *Id.* at 697. The court also considered other challenges asserted by the defendants against the Act, including parental rights to provide religious education for their children and children's rights to obtain religious teaching. *Id.*; *see supra* note 33. The court summarily rejected these claims. 683 S.W.2d at 697.

116. 728 F.2d 230 (4th Cir. 1984).

117. VA. CODE §§ 63.1-196.3 (1980).

118. *Id.*; *Forest Hills*, 728 F.2d at 235-39; Esbeck, *supra* note 2, at 27-30.

119. VA. CODE §§ 63.1-196.3 (1980); *Forest Hills*, 728 F.2d at 236; Esbeck, *supra* note 2, at 30.

120. *Forest Hills*, 728 F.2d at 241-42.

121. *Id.* at 241. For the elements of the compelling interest test, see *supra* text accompanying notes 27-32.

122. *Forest Hills*, 728 F.2d at 238 n.6.

123. *See id.* at 245-47.

assert the free exercise clause rights that might justify the Virginia statutory exemption.[124]

Other cases at the federal level have involved establishment clause challenges to regulation of church ministries. Unlike in the *People's Baptist Church* case, however, the courts in these cases have accepted establishment clause challenges to regulation of religious child care facilities, even though the cases did not involve outright government assistance to religious organizations. In *NLRB v. Catholic Bishop*[125] the United States Supreme Court used establishment clause entanglement analysis in refusing to extend NLRB jurisdiction to church-operated schools.[126] The NLRB had asserted jurisdiction over labor and collective bargaining aspects of the schools involved in the case. The Supreme Court found that the NLRB, by asserting jurisdiction, could become involved in labor decisions of the schools and thus infringe upon the management of the schools.[127] The Court characterized the action as church-state entanglement that contravenes first amendment protections.[128] Since NLRB jurisdiction over the schools presented a risk of first amendment infringement, and since Congress had not clearly provided the NLRB with authority over church-operated schools, the Supreme Court declined to construe the National Labor Relations Act to give the NLRB authority over the schools.[129] The Supreme Court, unlike the Texas Supreme Court in *People's Baptist Church*, thus applied excessive entanglement criteria, an establishment clause test, in a case that seemed to involve only free exercise clause issues raised by intrusive government regulations.

The United States Court of Appeals for the First Circuit addressed excessive entanglement concerns in *Surinach v. Pesquera de Busquets*.[130] The *Surinach* court examined an information-gathering and inspection program[131] imposed by Puerto Rico on Catholic Church schools. The First Circuit noted that the program required the schools to supply detailed information to the government and that the program involved on-going governmental surveillance and oversight of the ministry to ensure compliance with program regulations.[132] The court concluded that the program excessively entangled the church and state.[133] Unlike the court in *People's Baptist Church*, the *Surinach* court reached its conclusion even though the entanglement did not involve the state in classifying aspects of school programs as religious or secular, which is essential to the traditional entanglement in-

124. *Id.* The Fourth Circuit remanded the case to give religious child care institutions that would suffer from termination of the exemption a chance to intervene in the case. *Id.* The court noted that the religious institutions would need to demonstrate free exercise clause rights entitled to state accommodation in order to save the statutory exemption. *Id.* The case is still pending.

125. 440 U.S. 490 (1979).

126. *Id.* at 507.

127. *Id.* at 502-04.

128. *Id.* at 503.

129. *Id.* at 507.

130. 604 F.2d 73 (1st Cir. 1979).

131. P.R. LAWS ANN. tit. 3, §§ 341a-341v (1982).

132. *Surinach*, 604 F.2d at 78.

133. *Id.* at 78-79.

quiry.[134] The government could not justify the regulatory program since it failed to prove that a compelling governmental interest existed and that the program was the least restrictive means of enforcing that interest.[135] The *Surinach* court thus utilized excessive entanglement concerns to analyze the infringement element of the free exercise clause compelling interest test.[136]

Thus, both *Catholic Bishop* and *Surinach* applied excessive entanglement concerns as part of the infringement element of the free exercise clause test.[137] The Texas Supreme Court, on the other hand, held in *People's Baptist Church* that excessive entanglement concerns should not apply unless the state participates in identifying or classifying aspects of church ministries as secular or religious. Because the Texas Supreme Court assumed that an infringement existed, however, it applied the second and third elements of the compelling interest test.[138] Thus, all three courts relied primarily upon the compelling interest analysis of the free exercise clause, but disagreed upon the applicability of excessive entanglement concerns. The Texas Supreme Court's analysis is, therefore, generally in accord with federal court analysis, but its holding conflicts with the federal court decisions, which upheld first amendment challenges to government regulatory programs.

IV. THE STATUS OF THE LAW IN TEXAS

The law concerning the constitutionality of the child care licensing scheme in Texas has slowly progressed over the last decade. First, the *Roloff* court held that the Child Care Licensing Act did not infringe upon the first amendment rights of religious child care institutions.[139] Next, the court in *Oxford* moved the law a step beyond infringement considerations, but applied the wrong free exercise clause test to the Child Care Licensing Act. The *Oxford* court upheld the Act since it regulated conduct but not religious belief.[140] That the state may regulate conduct is, to some degree, true.[141] Nevertheless, long before *Oxford* the United States Supreme Court had moved away from the conduct-belief dichotomy to the more realistic three-tier compelling interest test.[142] Under the compelling interest test a state may not justify a regulation by claiming that it merely regulates conduct. The Constitution permits only those infringements on religion that are the least restrictive means of enforcing a compelling state interest.[143]

Finally, the law in Texas progressed another step when the constitutionality of the Child Care Licensing Act reached the Texas Supreme Court in

134. *Id.*
135. *Id.* at 79-80.
136. *See also* Bangor Baptist Church v. Maine, 549 F. Supp. 1208, 1220-22 (D. Me. 1982) (incorporating excessive entanglement considerations into free exercise analysis).
137. *Catholic Bishop*, 440 U.S. at 502-07; *Surinach*, 604 F.2d at 78-80.
138. 683 S.W.2d at 694-96.
139. 556 S.W.2d at 858-59. The court's ruling in *Roloff* may have partially resulted from an inadequate factual record at trial. *See* Esbeck, *supra* note 2, at 13.
140. 558 S.W.2d at 558-61.
141. Sherbert v. Verner, 374 U.S. 398, 403 (1963).
142. *Id.* at 403-07.
143. *See* Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

People's Baptist Church. Despite questionable rejection of establishment clause claims,[144] the supreme court applied the correct free exercise clause test, the compelling state interest test. Unfortunately, the court's compelling interest analysis failed to examine whether child care licensing constituted the least restrictive means of enforcing the state's compelling interest in child care. The court stated that without licensing the state could not gather information necessary to protect children in child care homes and would become powerless to prevent mistreatment of children.[145] Noticeably, the court failed to mention any alternatives to licensing that it may have considered in arriving at its conclusion that licensing is the least restrictive manner of enforcing the state's interest. Commentators have suggested that alternatives exist.[146]

If, as the court suggested, information constitutes a major state concern, then the state should develop a registration scheme. Under a registration scheme church child care institutions register with the state and supply the state with necessary information, such as the facility's location and staff-child ratio.[147] The state would receive the information, but would not issue a license, which suggests that the church ministry exists only at the pleasure of the state.[148] Registration would thus allay churches' fears that the licensing requirement sets the state supreme over God.

Moreover, in the absence of a licensing scheme the state would not become powerless to stop mistreatment of children. Fire, health, and sanitation codes already exert some control over religious child care facilities.[149] The state could develop a scheme whereby religious institutions supply evidence of compliance with the codes to the DHR.[150] Child abuse and neglect laws also exist as further controls upon religious child care institutions.[151] The state could put other major concerns, such as maintenance of adequate staff-child ratios and restrictions on employment of former drug addicts or sex offenders, into statutory form like child abuse and neglect laws. Such a course of action would act to insure the safety, health, and welfare of children in child care institutions.[152] The scheme insures that the major con-

144. *See supra* text accompanying notes 137-38.

145. 683 S.W.2d at 696.

146. *See* Baron, *Licensing: The Myth of Government Protection*, 8 BARRISTER, Winter 1981, at 46, 49-50 (suggesting replacement of most licensing with enforcement system in which states codify standards of conduct so that state officials concentrate on punishment of wrongdoers rather than expending time on those who comply with law); Esbeck, *supra* note 26, at 413-14 & n.399 (listing several states that have adopted nonlicensing child welfare schemes); Esbeck, *supra* note 2, at 53-56 (suggesting registration scheme that enforces major state concerns without licensing).

147. Esbeck, *supra* note 2, at 27-30 (discussing child care registration programs in Alabama, Indiana, Louisiana, South Carolina, and Virginia).

148. *Id.* at 32.

149. *See* Esbeck, *supra* note 2, at 5, 9.

150. *See* Esbeck, *supra* note 2, at 54.

151. TEX. PENAL CODE ANN. § 22.04 (Vernon Supp. 1985); TEX. FAM. CODE ANN. §§ 34.01-.06, 35.01-.03 (Vernon 1975 & Supp. 1986).

152. In order to implement the suggested scheme, the state might exempt religious child care institutions from the Child Care Licensing Act and place the institutions under the registration and enforcement scheme suggested. Exemption, however, is suspect due to establish-

cerns of the current licensing scheme will remain protected without unnecessarily infringing upon the beliefs of religious child care institutions. Furthermore, a registration and enforcement scheme like that suggested may not compromise the actual safety of children in child care facilities since, as one commentator suggests, licensing does not guarantee continuous compliance with regulatory standards.[153] The state discovers noncompliance only during an investigation; a license does not guarantee compliance with regulatory standards in the absence of investigators.[154]

Licensing, therefore, is probably not the least restrictive means of enforcing the state's interest in child care. Thus, the Texas Supreme Court's free exercise clause analysis in *People's Baptist Church* is questionable. The progression in the analysis of first amendment issues raised by child care licensing has, however, stopped with the ruling that licensing is the least restrictive enforcement means. Perhaps the law will eventually progress to a thorough reconsideration of the least restrictive means element of the compelling interest test.

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ment clause concerns raised in *Forest Hills*, 728 F.2d at 241-42. The state should, therefore, consider placing all child care facilities, religious and nonreligious, under a registration and enforcement scheme.

153. Baron, *supra* note 146, at 48-50.

154. *Id.*