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# Changing Boundaries: Child Abuse, Public Health, and Separation of Church and State

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# CHANGING BOUNDARIES: CHILD ABUSE, PUBLIC HEALTH, AND SEPARATION OF CHURCH AND STATE

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## INTRODUCTION

The public and private boundaries for health care are often fuzzy. Public health responsibilities are often provided by private organizations. In turn, these private organizations frequently rely on public funds and are regulated by the government. We argue that changes in the legal doctrines separating church and state will have an important impact on these fuzzy boundaries for public health. In this article, we consider the question of whether the provision of services to abused children by a religious-based, state-funded organizational provider is constitutional. The answer to this question has far-reaching implications for the American welfare state. Perhaps more important, trying to answer this question will

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shake and perhaps dismantle fundamental assumptions on which the American welfare state and separation of church and state were built. This question speaks to contemporary proposals for Charitable Choice as well as current Charitable Choice policy.[1] Answering this question will force policymakers and officers of the legal system to evaluate the rights and protections that contemporary U.S. society provides to its children, particularly its most vulnerable children.

This article is divided into five parts. The first part marshals evidence to contend that child abuse is a public health issue. The second part describes the organization of services to child-abuse victims, suggesting that, although child abuse is a public health issue, providers of child-abuse services are often private. The third part considers whether provision of services to abused children by a religious-based, state-funded organizational provider is constitutional. The fourth part considers some legal standards to which religious organizations providing welfare services may be held. In the fifth part, we conclude with a review of public health's relationship to religious organizations, the direction in which this relationship is headed, and implications for whether the state can adequately protect the interests and rights of abused children.

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[1] Charitable Choice legislation instructs the federal government not to discriminate against faith-based organizations in awarding government contracts that support beneficiaries in making the transition from welfare to work. This legislation also allows faith-based organizations to witness their religious beliefs, but prohibits faith-based organizations from discriminating against a program beneficiary on the basis of the beneficiary's religion or forcing the beneficiary to participate in worship activities. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104, 110 Stat. 2105 (1996). The Bush Charitable Choice policy will potentially apply to all kinds of social services.

## CHILD ABUSE: A PUBLIC HEALTH ISSUE ?

The first question we confront is whether child abuse is a public issue. We accept the definition of public health offered by the World Health Organization (WHO), which is the "physical, mental and environmental health concerns of communities and populations at risk for disease and injury."[2] The mission of public health is to "fulfill society's interest in assuring conditions in which people can be healthy."[3] According to the U.S. Institute of Medicine, public health has three core functions:

> (1) assessment and monitoring of the health of communities and populations at risk to identify health problems and priorities; (2) formulating public policies, in collaboration with community and government leaders, designed to solve identified local and national health problems and priorities; [and] (3) assuring that all populations have access to appropriate and cost-effective care, including health promotion and disease prevention services.[4]

Is child abuse a public health issue? According to the WHO, child abuse is a public health problem and should be approached as a public health issue. Child abuse is widespread in the United States. Children who face abuse often suffer both physical and mental injuries and are at risk for abuse in the future.[5]

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2 Ass'n of Sch. of Pub. Health, *at* http:www.asph.org/aa_section.cfm/3 (last visited Oct. 5, 2002).

3 INST. OF MED., COMM. FOR THE STUDY OF THE FUTURE OF PUB. HEALTH, THE FUTURE OF PUBLIC HEALTH 7 (National Academy Press) (1988).

4 *Id.* at 145.

5 U.S. Dep't of Health and Human Servs., Admin. on Children, Youth and Families: Child Maltreatment 1999, *at*

According to data from the Administration on Children and Families, there were an estimated 2,974,000 referrals of child abuse or neglect to relevant state or local agencies in 1999.[6] These referrals resulted in an estimated 826,000 confirmed victims of maltreatment, a rate of 11.8 per 1,000 children nationwide.[7] Beyond the disturbing number of child abuse victims is the kind of abuse these victims suffer. Of the 826,000 victims in 1999, 11.3 percent suffered sexual abuse, 21.3 percent suffered physical abuse, and 58.4 percent suffered neglect. Of these victims, 35.9 percent were victims of more than one type of maltreatment.[8] Of course, child abuse can be fatal: approximately 1,100 children died of abuse or neglect in 1998, a rate of 1.6 deaths per 100,000 children. Within all forms of abuse, about 75 percent of the perpetrators were parents.[9]

Across the United States, an estimated 143,000 child victims were placed in foster care in 1998. Another 33,000 children were placed in the care and supervision of child welfare agencies, either in protective supervision or for a time during investigation. Victims from families with financial problems, prior victims, and victims of multiple incidents of maltreatment were

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http://www.acf.hhs.gov/programs/cb/publications/cm99/cpt2.htm (last visited Sept. 4, 2002).

6 *See* U.S. Dep't of Health and Human Servs., Admin. on Children, Youth and Families: Child Maltreatment 1999, *at* http://www.acf.hhs.gov/programs/cb/publications/cm99/high.htm (last visited Sept. 4, 2002); *see* Douglas Besharov, *Protecting Children from Abuse and Neglect, in* FOUR COMMENTARIES: HOW WE CAN BETTER PROTECT CHILDREN FROM ABUSE AND NEGLECT 8 (1998) (explaining that 65 percent of child abuse reports in 1995 were "unfounded").

7 *Compare* The Nat'l Crime Victimization Survey, Rape Victimization Rates from the Bureau of Justice Statistics 2002, *at* http://www.ojp.usdoj.gov/bjs/glance/rape.htm (last visited Oct. 5, 2002) (explaining that 1 person per 1,000 U.S. residents age 12 and older was raped in the United States in 1998).

8 Besharov, *supra* note 6.

9 *Id.*

more likely to receive services than were victims without these characteristics.[10]

It seems beyond disagreement that child abuse has serious consequences, with enormous implications for victims as well as the societies in which the victims live. For victims, the effects of child abuse are both immediate and long-term. If a child's life is not extinguished by abuse, he or she will hopefully receive treatment and care, perhaps for an extensive period. The larger society loses out on potential contributions made by victims as well as resources needed to treat the victims and their families and friends. Of course, resources are employed by the criminal justice and health care systems to penalize and treat the perpetrators.[11] One estimate of the costs of child abuse is over $94 billion dollars per year.[12] In comparison, Head Start, the federal program that provides services to low-income families and their children, costs approximately $4.658 billion in 1999, while Medicaid costs $19.3 billion.[13]

## PRIVATE PROVISION OF PUBLIC HEALTH

U.S. society frequently relies on "private" providers to treat child abuse victims. Many state governments do not directly provide treatment to child abuse victims. Instead, state governments fund private providers. Researchers contend that

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10 U.S. Dep't of Health and Human Servs., Admin. on Children, Youth and Families: Admin. On Children, Youth and Families, Children's Bureau 1999, *Child Welfare Outcomes 1999: Annual Report*, *at* http://www.acf.hhs.gov/programs/cb/publications/cwo99/index.html (last visited Sept. 4, 2002).

11 Total Estimated Costs of Child Abuse and Neglect in the United States, *at* http://www.preventchildabuse.org/learn_more/research.html (last visited Oct 5, 2002).

12 *Id.*

13 COMM. ON WAYS AND MEANS, 106TH CONG., 2000 GREEN BOOK 930, 973 (U.S. GOV'T PRINTING OFFICE).

most providers of child abuse services are private but funded by state contracts.[14] One survey done by Stephen Monsma indicated that 90 percent of child service agencies are in a service contract relationship with the government.[15] It is reasonable to believe that many child abuse victims receive help from private providers.[16] For instance, the Kentucky Baptist Homes for Children (KBHC) is the largest private childcare provider in Kentucky for children who have been abused, neglected or whose families are in crisis. The agency assists more than 3,800 children and adults each year.[17]

This anecdote indicates that child abuse services, while typically considered a responsibility of state government, are often provided by private organizations. To be more clear, child abuse services are an example of public health services provided by private organizations. This instance is a good example of when the boundary separating the public and private sectors for U.S. social policy is fuzzy. Public health is considered a government responsibility, yet many state governments do not provide services to abused children. Instead, a state government enters a contract with a private organization to provide services to abused children. This fuzziness, as we will explain, may become a problem in the future.

## PRIVATE PROVIDERS ARE RELIGIOUS INSTITUTIONS

This fuzzy boundary separating the public and private sectors for U.S. social policy may assume more religious overtones in the future. The Bush administration has promoted the

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14 *See generally* STEPHEN V. MONSMA, WHEN SACRED AND SECULAR MIX (1996).

15 *Id.* at 65.

16 Telephone Interview with William G. Steiner, National Program Director, Childhelp USA (Feb. 1, 2002).

17 Kentucky Baptist Homes for Children, *at* http://www.kbhc.org/acluhist.htm (last visited Mar. 12, 2003).

Faith-Based Initiative as a way to "strengthen and expand grassroots and faith-based services."[18] The Office of Faith-Based and Community Initiatives "works with federal agencies, Congress, and state and local governments to promote policy, legal, and regulatory changes. It also works with private philanthropies, the nonprofit sector, businesses, America's many faith communities, and neighborhood groups to encourage, inform, and strengthen a renewed commitment to community service."[19] At the heart of President Bush's Faith-Based Initiative is Charitable Choice, the direct government funding of religious organizations for the purpose of carrying out government programs.

Charitable Choice is not new. In 1996, then Senator John Ashcroft proposed Charitable Choice legislation, which became part of the welfare reform legislation.[20] Similar legislation was recently passed affecting drug treatment and prevention programs.[21] This legislation has five important components relevant to this article:

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[18] The Faith-Based Initiative is an effort to ensure that faith-based and community organizations can compete for federal funds to provide social services in an effective manner. White House Office of Faith-Based and Community Initiatives, *at* http://www.whitehouse.gov/government/fbci/four_page_ofbci.pdf (last visited Oct. 5, 2002).

[19] *Rallying the Armies of Compassion* 14, *at* http://www.whitehouse.gov/news/Reports/faithbased.pdf (last visited Jan. 2, 2001).

[20] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104, 110 Stat. 2105 (1996).

[21] Consolidated Appropriations Act, Pub. L. No. 106-554, §107, 114 Stat. 2763 (2001).

1. The government cannot discriminate against a nonprofit on the basis of its religious character.
2. Congregational grantees cannot discriminate against a program beneficiary on the basis of religion.
3. Congregational grantees cannot force a program beneficiary to participate in worship activities.
4. Accessible secular alternatives must be made available to beneficiaries who object to participation in the congregation's program.
5. The government cannot exercise control over the religious beliefs of the congregational provider.[22]

The Bush administration's conception of Charitable Choice, however, is distinct in at least one important way. Government officials associated with the Faith-Based Initiative have indicated that, under the Bush Charitable Choice Policy, a religious organization can require a program beneficiary to participate in worship activities. The Bush Charitable Choice Policy will also clearly shift the burden onto program beneficiaries to object to placement in a religious based program.

Some "private providers" of child-abuse services are religious institutions. Of the private agencies surveyed by Monsma, many have a basis in religious faith. Monsma found that 63 percent of the agencies reported that more than 20 percent of their budget is from government funds.[23] Many religious providers

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[22] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104(d)(1), 110 Stat. 2105 (1996).

[23] Monsma, supra note 14, at 64-65, 68; Brian K. Gran, *Charitable Choice Policy and Abused Children: The Benefits and Harms of Going Beyond Public-Private Dichotomy,* INT'L J. OF SOCIOLOGY AND SOC. POL'Y (forthcoming 2003) (manuscript on file with the author). Gran is undertaking research on the different forms of relationships between government and social service agencies that provide services to abused children. He has examined completed IRS form 990s available through the National Center for Charitable Statistics of the Urban Institute. Of the

receive and use state and federal funding to provide services to abused children. In 1998, 57 percent KBHC's budget was from the Kentucky government.[24] The relationship between the Kentucky state government and KBHC, already in existence, is an example of the kind of relationships the Bush administration's Charitable Choice Policy seeks to encourage.

## CHARITABLE CHOICE: A VIOLATION OF CHURCH AND STATE ?

The receipt of public funds by religious organizations as envisioned in Charitable Choice Policy not only is a debate of constitutional law, the consequences of the Charitable Choice Policy for the relationship between religious organizations and government may be unanticipated. Many legal scholars contend the receipt of public funds by religious organizations violates the Establishment Clause of the U.S. Constitution. Can religious organizations receive public funds to provide social services without violating the First Amendment's Establishment Clause?

Although some legal scholars have considered these questions, legal cases have not directly posed this question for a court to consider and decide, until *Pedreira v. Kentucky Baptist Homes for Children.*[25] In *Pedreira,* Alicia Pedreira and other plaintiffs are suing KBHC and other defendants for her termination from employment with KBHC.

KBHC is managed on the basis of Baptist beliefs and principles. It requires employees to exhibit values and conduct, a lifestyle consistent with its "Christian" mission. Pedreira was hired and worked as a therapist of boys and young men who had

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seventy-one social service organizations providing services to abused children analyzed by his research, seventeen of them are faith-based organizations.

[24] Eyal Press, *Faith-Based Furor,* N.Y. TIMES, Apr. 1, 2001, at 62.

[25] 186 F. Supp. 2d 757 (W.D. Ky. 2001).

been abused. At the time Pedreira was hired, she informed her immediate supervisor, the same person who hired her, that she was a lesbian and did not want to take the job if she would be later terminated because of her sexual orientation. Her immediate supervisor suggested that Pedreira take a "don't ask, don't tell approach." Between her hiring and termination, Pedreira's job performance was satisfactory and she received increases in pay. Later, Pedreira's picture was taken by a photographer during a gay rights parade. In the picture, Pedreira was embraced by her then-lover and wore a T-shirt that said "Isle of Lesbos." This photographer entered the picture in a photographic competition at the Kentucky State Fair. A KBHC board member saw the picture during the competition, recognized Pedreira, and sought her dismissal. KBHC eventually fired Pedreira, stating that Pedreira's sexual orientation conflicted with KBHC's beliefs and principles despite her satisfactory job performance.[26]

A core issue in the lawsuit, however, was whether KBHC was a private or public entity. Nearly 60 percent of KBHC's budget is from the Kentucky state government. As of the writing of this article, parts of *Pedreira* have been dismissed by the Western District Court of Kentucky and are under appeal before the Sixth Circuit Court of Appeals.[27] The District Court dismissed plaintiffs' claims alleging religious discrimination in employment and denied the motion to dismiss the Establishment Clause claim.[28]

*Pedreira* is a test case for the Bush Charitable Choice Policy. If receipt of public funds by religious organizations is declared unconstitutional, not only will the constitutional validity of the Bush Charitable Choice Policy be questioned, but the loss of public funds may strongly hinder, even prevent, religious organizations from providing welfare services. This loss may

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[26] *See generally id.* at 759-60.

[27] Pedreira v. Kentucky Baptist Homes for Children, Inc., Nos. 016475 and 016509 (6th Cir.).

[28] *Pedreira*, 186 F. Supp. 2d at 762, 766.

require either direct provision of some kinds of welfare services by state governments or the deterioration of those welfare services. These complications are especially troubling given how Charitable Choice Policy is expected to work in practice. The burden of objecting to placement with a faith-based program will be placed on the shoulders of the client, who in the case of child abuse services, is the child and his or her advocate.

For the remainder of this article, we will first consider whether the receipt of public funds by a religious organization violates the Establishment Clause, which requires a brief review of some relevant Supreme Court cases in the convoluted area of separation of church and state. We will also consider the direction in which legal arguments are headed when trying to decide whether religious organizations can receive public funds to provide religious services.

## THE ESTABLISHMENT CLAUSE

An important question confronting a religious organization wanting to receive or already receiving public funds is whether that receipt violates the Establishment Clause of the U.S. Constitution. Different constitutional tests are applied to determine whether the Establishment Clause has been violated. The Establishment Clause is found in the First Amendment, which reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[29]

For the purposes of this article, we will examine contemporary tests for determining whether an actor or organization has violated the Establishment Clause. These tests

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[29] U.S. CONST amend. I.

include the *Lemon v. Kurtzman*[30] test, the Endorsement test, and the Coercion test. We will then consider the implications of these tests for the *Pedreira* lawsuit.

The dominant test for determining whether the government has violated the Establishment Clause is the *Lemon* test. The *Lemon* test requires that: (1) the law must have a secular purpose; (2) the law's "principal or primary effect must be one that neither advances nor inhibits religion";[31] and (3) the law "must not foster 'an excessive government entanglement with religion.'"[32] *Lemon* considered whether a parochial school could

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30 403 U.S. 602, 612 (1971).

31 *Id.* at 612 (citing Bd. of Educ. *v.* Allen, 392 U.S. 236, 243 (1968)). *Bd. of Educ.* is the source of the second prong. As discussed below, the third prong appears to have been folded into the second prong in the Supreme Court's current *Lemon* test articulated in Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

32 *Lemon*, 403 U.S. at 612-13 (citing Walz v. Tax Comm., 397 U.S. 664, 674 (1970)). Since *Lemon* was decided, the test explained therein has undergone changes. Important cases relevant to these changes are discussed in this article and include *Zelman*, 536 U.S. 639 (discussed below); Mitchell v. Helms, 530 U.S. 793 (2000) (discussed below); Agostini v. Felton, 521 U.S. 203 (1997) (explaining factors evaluated to determine excessive entanglement are similar to factors evaluated to determine whether effect advances or inhibits religion); Lee v. Weisman, 505 U.S. 577 (1992) (discussed below); County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (discussed below); Bowen v. Kendrick, 487 U.S. 589 (1988) (discussed below); Edwards v. Aguillard, 482 U.S. 578 (1987) (discussed below); Witters v. Washington Dep't of Services for Blind, 474 U.S. 481 (1986) (Government aid recipient who privately chose to use aid by attending religious school did not advance religion); Wallace v. Jaffree, 472 U.S. 38 (1985) (Louisiana statute authorizing one-minute period of silence in public schools did not have a secular purpose); Mueller v. Allen, 463 U.S. 388 (1983) (Minnesota statute allowing parents to use government aid to send their children to parochial school by permitting parents to claim tax deduction for sending children to school did not violated the Establishment Clause); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (New York statute provided for government to reimburse nonpublic school for administering state-prescribed examinations and for grading two exams ruled constitutional).

receive public funding. Public funds paid part of the teachers' salaries and assisted with the purchase of textbooks and teaching supplies. The *Lemon* court found that parochial teachers are agents of a religion. To ensure that the teachers do not play an ideological role, the state would have to become excessively entangled in religion to maintain the separation of church and state. The Supreme Court (the "Court") found that students are young children, who are impressionable and perhaps incapable of distinguishing the state from the church, to be significant. The age of the observers of possible church-state entanglement has remained a critical factor in the Court's and other courts' analyses of whether the disputed state activity is constitutional.

The Court has given its most recent interpretation of the *Lemon* test in two decisions, *Mitchell v. Helms*[33] and *Zelman v. Simmons-Harris*.[34] After reviewing each prong of the *Lemon* test, this article will contrast the *Mitchell* and *Zelman* cases to discuss the relevance of the *Lemon* test for *Pedreira* and to consider its status. In *Mitchell,* the Court provided the following test for determining whether the government violated the Establishment Clause by providing funding to a religious organization. Governmental funding is unconstitutional if:

1. It lacks a secular purpose;
2. It advances or inhibits religion in principal or primary effect, which is demonstrated by
   (a) funding that results in governmental indoctrination; and,
   (b) defining its recipients by reference to religion; or,
3. The funding creates excessive entanglement between government and religion.[35]

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[33] 530 U.S. 793 (2000).

[34] 122 S. Ct. 2460 (2002).

[35] *Mitchell*, 530 U.S. at 807-08.

The *Mitchell* plurality modified the *Lemon* test through the addition of 2 (a) and (b), which is the statement of the *Lemon* test in *Agostini v. Felton.*[36] The *Lemon* test treated excessive entanglement as a separate criterion, but in *Agostini* and *Mitchell*, criterion three is part of the test to determine whether governmental funding advances or inhibits religion.[37]

In *Mitchell*, the Court considered the constitutionality of Chapter 2 of the Education Consolidation and Improvement Act of 1981.[38] Under this law, the federal government was allowed to distribute funds to state and local agencies. These agencies could then lend educational materials and equipment to public and private schools. The number of students enrolled in the school determined the amount of Chapter 2 funds that the school received. Each year approximately 30 percent of the Chapter 2 funds were distributed to private schools.[39] Many of these private schools were religiously affiliated.

Justice Thomas, writing for a plurality of four justices, first noted that Chapter 2 aid was distributed on the basis of neutral and secular criteria.[40] He then noted that because the statute contained a provision preventing federal funds from replacing non-federal funds, the second criterion of advancing or inhibiting religion was not violated.[41] The third part of the test was not violated because Chapter 2 funds did not go directly to a religious school's funds.[42]

To determine whether indoctrination can be attributed to the government, the plurality noted that the Court has consistently

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36 521 U.S. 203, 232 (1997). Agostini merged prongs two and three of the *Lemon* test. As discussed below, despite their merger, an analysis of *Pedreira* benefits from separate consideration of prongs two and three.

37 *Mitchell*, 530 U.S. at 808; *Agostini*, 521 U.S. at 234.

38 *Mitchell*, 530 U.S. at 801-02.

39 *Id.* at 203.

40 *Id.* at 829.

41 *Id.* at 830.

42 *Id.*

turned to the neutrality principle.[43] The neutrality principle requires the Court to uphold:

> [state] aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.[44]

To determine whether governmental funding defines its recipients by reference to a religion, the Court asked "whether the criteria for allocating the aid 'create[s] a financial incentive to undertake religious indoctrination.'"[45] Justice Thomas turned to the rule set out in *Agostini*:

> This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.[46]

In her concurring opinion in *Mitchell*, Justice O'Connor explained that the Court has recognized the dangers of the Establishment Clause where the government makes direct money payments to sectarian institutions.[47] "To be sure, the plurality does

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[43] *Id.* at 829.
[44] *Id.* at 809.
[45] *Id.* at 813 (quoting *Agostini*, 521 U.S. at 231).
[46] *Id.*
[47] *Id.* at 840.

not actually hold that its theory extends to direct money payments."[48] Justice O'Connor distinguished between direct and indirect aid, "a per-capita-aid program and a true private-choice program when considering aid that consists of direct monetary subsidies."[49] The key to whether the government is advancing religion is whether the student receives aid and then applies it to his education. "The fact that aid flows to the religious school and is used for the advancement of religion is therefore *wholly* dependent on the student's private decision."[50] In addition, Justice O'Connor stated that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," but "neutrality is not alone sufficient to qualify the aid as constitutional."[51]

Based on *Marks v. United States*,[52] Justice O'Connor's concurrence in *Mitchell* probably states the law of the case since her concurrence is more narrow, but this issue will be discussed further when examining the *Zelman* case below. The Sixth Circuit concluded that Justice O'Connor's opinion is the narrower of the plurality and consequently considered the Court's holding in *Mitchell*.

The Court's decisions since *Lemon* have elaborated on each component of the *Lemon* test. In *Edwards v. Aguillard*,[53] the Court articulated the test for determining whether governmental funding lacks a secular purpose. This test is whether the primary purpose of the law "is to advance a particular religious belief."[54] In *Edwards*, the Court found that the State of Louisiana had not intended to fulfill a secular purpose based on the law's statutory history.[55] More recently, in *Santa Fe Independent School District*

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48 *Id.* at 844 (citing at 818-20 of the plurality's decision).
49 *Id.* at 842.
50 *Id.* at 842.
51 *Id.* at 840.
52 430 U.S. 188, 193 (1977).
53 482 U.S. 578 (1987).
54 *Id.* at 593.
55 *Id.* at 586-87.

*v. Doe*,[56] the Supreme Court identified the law to endorse school prayer where the Santa Fe Independent School District allowed students to decide electorally whether to hold invocations at football games.[57] The Court found that the invocation generally advanced religion, which violated the *Lemon* test's second prong.[58]

In *Bowen v. Kendrick*,[59] the Court enunciated a test to determine whether governmental funding advances or inhibits religion in principal or primary effect. Governmental funding advances or inhibits religion when it: (a) results in governmental indoctrination;[60] or, (b) defines its recipients by reference to religion.[61] The Court stated that the plaintiff must show that aid is used for "specifically religious activities," the use or creation of materials with "explicitly religious content," the use or creation of materials "designed to inculcate the views of particular faith," or the teaching of "religious doctrines of a particular sect" for aid, otherwise it is unconstitutional.[62]

*Bowen* included both "facial" and "applied" constitutional challenges to the Adolescent Family Life Act. Under the Act, grants were awarded to religious and other institutions that offered counseling on teenage sexuality.[63] A "facial" challenge seeks to determine whether the law is constitutional on its face. An "applied" challenge asks whether the application of the law is constitutional. The Court held that the act was "facially valid," but remanded the case to the District Court for the District of Columbia for further deliberation on how

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56 530 U.S. 290 (2000).
57 *Id.* at 296.
58 *Id.* at 315.
59 487 U.S. 589 (1988).
60 *Id.* at 612.
61 *Id.* at 608.
62 *Id.* at 613, 621-22.
63 *Id.* at 593.

the Act was administered.[64] The District Court had identified certain instances of impermissible behavior by grantees, but had not evaluated to the satisfaction of the Court whether grant money had been used to fund specifically religious activities or whether secular purposes and religious missions of some organizations were inextricably intertwined.

*Bowen* indicates that an unconstitutional finding will not be made merely if government funding is made to a religious institution, but whether governmental funding is used for religious activities. The Court held that the government must determine whether governmental funded materials have an explicitly religious content or are meant to inculcate a specific faith's views. Finally, if views are exhorted on a question, it is not sufficient to show a primary effect of advancing religion if those views coincide with that faith's views. This last component of the Court's holding seems circular and thus problematic. It seems possible, for instance, that individuals could fail to differentiate those religious views from broader views that dominate the community in which they live, despite those community views having a religious basis.

To determine whether the government has become excessively entangled in religion, the Court has asked whether the government supervises funding to ensure that a secular purpose is met and the secular effect does not too heavily involve state authorities.[65] As described above, the question is whether funds are strictly used for secular purposes and whether funding restrictions can be effectively imposed.[66]

In 2002, the Court decided *Zelman*. In that case, an Ohio state pilot program provided assistance to parents of children in specific public schools. The program provided tuition assistance that allowed parents to select among participating public and private schools for the education of their children who attended

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64 *Id.* at 622.

65 *See generally Lemon*, 403 U.S. 602.

66 Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

kindergarten through third grade. The program also provided tutor assistance for children who were enrolled in public schools.[67] The Court noted that any private school within specified geographic boundaries may participate in this program.

The Court also stated that "[t]he Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion."[68] The Court found that no party disputed the secular purpose of the program.

The remaining question was whether the program had the effect of advancing or inhibiting religion.[69] To answer this question, the Court's decisions have distinguished between programs that directly provide aid to religious schools and programs of "true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."[70] This component of *Zelman* further indicates the importance of the difference between "a per-capita-aid program and a true-private-choice program" described by Justice O'Connor in *Mitchell*.[71] The Court concluded that the Ohio program permitted individuals "to exercise genuine choice among options public and private, secular and religious. The program [was] therefore a program of true private choice."[72] The majority also noted that the Cleveland program was neutral and available to secular and religious beneficiaries in accordance with Justice O'Connor's concurrence.[73] Consequently, the Court held that the Ohio program did not violate the Establishment Clause.

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67 *Zelman*, 122 S. Ct. at 2460.
68 *Id.* at 2463 (citing *Agostini*, 521 U.S. at 222-23).
69 *Id.* at 2465.
70 *Id.*
71 *Mitchell*, 530 U.S. at 842.
72 *Zelman*, 122 S. Ct. at 2473.
73 *Id.*

Not once does the Court's *Zelman* opinion mention *Lemon* or refer to the *Lemon* test. Perhaps the omission is meaningless or only symbolic, but Justice O'Connor's concurrence highlights it by insisting the majority's opinion is not "a major departure from this Court's prior Establishment Clause jurisprudence."[74] Justice O'Connor maintains that the Court continues to rely on the *Lemon* test, with the *Zelman* decision modestly modifying the *Lemon* test.[75]

In sum, to determine the constitutionality of governmental financial support of a religious organization, the Court typically applies the *Lemon* test. Each component of the *Lemon* test has been elaborated in subsequent decisions. More recently, in *Zelman*, the Court asserted its examination of the Establishment Clause that focuses on whether the legislation at issue has the purpose or effect of advancing or inhibiting religion.[76] Here, we will consider each component of the two tests, the *Lemon* test and the *Zelman* test, for the *Pedreira* case. The District Court for the Western District of Kentucky has ruled on a motion for summary judgment made by the *Pedreira* defendants. Summary judgment is granted when no material or factual issue is contested and when the moving party prevails as a matter of law.[77]

Considering the motion for summary judgment, the District Court stated that Kentucky provided direct monetary assistance to KBHC. The District Court noted that the plaintiffs contend that federal funds are reaching the coffers of KBHC, KBHC is using these federal funds for religious activities, and that KBHC is a pervasively sectarian institution. The plaintiffs conceded that the funding program under which KBHC receives its funds goes to both secular and sectarian institutions.

In deciding the motion for summary judgment, the District Court stated that *Mitchell* does not apply to *Pedreira* because

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74 *Id.* at 2476.
75 *Id.* at 2473
76 *Id.* at 2465.
77 BLACK'S LAW DICTIONARY 1449 (7th ed. 1999).

Kentucky provides direct monetary assistance to KBHC. Further, the Kentucky state government asserted that its allocation of funds was neutral. The District Court, however, noted that the *Mitchell* plurality opinion does not state a majority opinion. Instead, the District Court relied on Justice O'Connor's concurrence in *Mitchell*, which states that "neutrality is not alone sufficient to qualify the aid as constitutional."[78]

The District Court also asserted that *Bowen* was relevant because both facial and applied challenges to the constitutionality of the Adolescent Family Life Act were made in that case. The Supreme Court in *Bowen* said that the District Court must evaluate whether "grant money had been used to fund specifically religious activities, or whether secular purposes and religious mission of certain organizations were inextricably intertwined."[79]

The District Court highlighted two factors that distinguished *Bowen* from *Pedreira.* First, KBHC directly receives funds from the Kentucky state government, which is an important distinction according to the criteria of the *Lemon* test. Second, these funds allegedly are used for religious activities. Plaintiffs allege that public funds were being "expended on care and services infused with the teachings of the Baptist faith."[80] In *Pedreira*, the plaintiffs concede that the funding program had a secular purpose and acknowledge that funding was provided to both secular and sectarian institutions. The plaintiffs further allege that public funds were spent on activities that advanced religion.[81] The District Court concluded that the allegations in the

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78 *Mitchell*, 530 U.S. at 840. As discussed above, reliance on Justice O'Connor's concurrence is supported by *Marks*, 430 U.S. at 193.

79 *Pedreira*, 186 F. Supp. 2d at 763 (citing *Bowen*, 487 U.S. at 621).

80 *Id.*

81 In regards to advancing religion to make its decision for *Pedreira*, the District Court will probably consider *Bd. of Educ.*, 392 U.S. at 236, *Agostini*, 521 U.S. at 203, and *Mitchell*, 530 U.S. at 793. As noted above, the first and second prongs have remained the same since *Lemon.*

complaint were sufficient to state a claim upon which relief may be granted and denied the motion for summary judgment.

It is unclear what impact *Zelman* will have on *Pedreira.* Nevertheless, the District Court will most likely consider *Zelman* in its decisions. It is important to note that *Zelman* is distinguishable from the *Pedreira* in that the state government of Kentucky directly provided aid to KBHC, while *Zelman* deals with indirect aid to a service provider. *Zelman* basically directs the District Court to focus on whether the funded program has the purpose or effect of advancing or inhibiting religion. The District Court, as described above, has denied a motion for summary judgment on the issue of advancing religion.

## ENDORSEMENT TEST

The Endorsement Test addresses whether the government violates the Establishment Clause by endorsing a religion. In *Allegheny v. American Civil Liberties Union, Pittsburgh Chapter,*[82] the Court stated that the government unconstitutionally endorses a religion if the practice conveys a message that religion is "favored," "preferred," or "promoted" over other beliefs.

The government of Allegheny County, Pennsylvania, allowed a religious organization to display a nativity representation inside the main part of the courthouse. The nativity representation bore a plaque indicating the donor, the Holy Name Society, which was a Roman Catholic group.[83] Christmas carols and other songs were sung by participants of the nativity representation from December 3 to December 23, 1986, with programs sometimes lasting two hours.[84] The county government publicly announced and identified itself as the sponsor of the choral program.[85]

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82 492 U.S. 573 (1989).
83 *Id.* at 579.
84 *Id.* at 581.
85 *Id.*

A separate representation, outside an office building owned by the city of Pittsburgh and Allegheny County consisted of (1) a 45-foot Christmas tree, (2) an 18-foot menorah, and (3) a sign bearing a message that the city salutes liberty during the holiday season. The tree was erected on November 17, 1986. The sign was placed at the tree's base a few days later, and the menorah was erected next to the tree on December 22, 1986.[86] All were removed on January 13, 1987.[87]

The majority held that the county violated the Establishment Clause by endorsing and associating itself with the nativity representation. The violation resulted from a plaque indicating the donor, the nativity representation being in the county courthouse, and the choral programs being held next to the nativity representation and publicly announced as being sponsored by the county.[88] On the other hand, the Court did not agree with the opinion regarding the menorah, but six justices agreed that it did not violate the Establishment Clause.[89]

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[86] *Id.* at 581-82.
[87] *Id.* at 587.
[88] *Id.* at 599-602.
[89] *Id.* at 621.

Justice O'Connor held different views on these questions, concurring in part.[90] Justice O'Connor stated that since the nativity representation was on public property and included traditional Christian symbols, it effectively conveyed the government's endorsement of Christianity.[91] In contrast, the menorah display was not the government's endorsement of Judaism.[92] Considering its physical setting, the menorah conveyed a message of pluralism and freedom of belief.[93] Joined by Justices Brennan and Stevens, Justice O'Connor stated that the Endorsement Test should not be replaced by a test that "prohibits only 'coercive' practices or overt efforts at government proselytization."[94] That is, the Court should question whether the government has established a religion through endorsement resulting from direct as well as indirect, subtle "favoritism."[95]

The majority in *Allegheny* seemed to indicate that the Allegheny government had taken a position with regard to religion, thereby endorsing it. The majority stated that the Establishment Clause "prohibits [the] government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[96] In cases before *Allegheny*, the Court has said it will examine a religion or religious practice to determine if the government's endorsement of it conveys that religion is "favored" or "preferred."[97]

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90 *Id.* at 623.

91 *Id.* at 625-26.

92 *Id.* at 634.

93 *Id.* at 635.

94 *Id.* at 627.

95 *Id.* at 627-28.

96 *Id.* at 594 (citing Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

97 An important case leading to *Allegheny* is Wallace v. Jaffree, 472 U.S. 38, 70 (1984) (O'Connor, J., concurring in judgment). Justice O'Connor wrote a concurring opinion in *Wallace* stating that the Endorsement Test "does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred." 472

The distinction between direct financial support of a service provider and the beneficiary (or his guardian) choosing how to use the aid appears to be connected to whether the government is perceived as endorsing a specific religion or religion in general. In *Mueller v. Allen*,[98] the Court suggested that the choice of an individual "does not 'confer any imprimatur of State approval.'" Instead, if aid is neutrally available and the beneficiary chooses how to use that aid, the government has not provided any "support of religion."[99]

Although *Zelman* does not directly apply to an analysis of the Endorsement Test, Justice O'Connor pointed to the distinction between providing direct aid to a service provider and allowing the beneficiary of governmental aid to choose the provider on whom to spend the assistance. She stated that the public perception of governmental endorsement is "meaningfully" different when the government provides direct aid to the service provider as opposed to the beneficiary who decides how to use it.

The Endorsement Test should be considered in *Pedreira*. It is reasonable to take the perspective of the child who is receiving services from KBHC. Does the child view the state of Kentucky as taking a position on Christian (Baptist) beliefs because of its financial support of KBHC? Beyond financial support, does the child view the state of Kentucky as taking a position on Christian beliefs because the state places the child with KBHC for services? It is unclear whether the Court would accept the perspective of the child or a "reasonable person," or how the court may distinguish between a child's perspective or a "reasonable person."

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U.S. at 70. The *Allegheny* Court referred to O'Connor's concurrence in *Wallace* when reviewing advancement of religion and, in particular, governmental endorsement of religion or religious belief.

98 Mueller v. Allen, 463 U.S. 388, 397 (1983) (citing Widmar v. Vincent, 454 U.S. 263, 275 (1981)).

99 Witters v. Wash. Dep't of Servs. for Blind, 474 U.S. 481, 489 (1986); *Mitchell*, 530 U.S. at 795.

Nevertheless, some cases have considered whether children are subject to coercion. Therefore, we now turn to the Coercion Test.

## THE COERCION TEST

The Coercion Test addresses whether the government violates the Establishment Clause by coercing religious beliefs. *Lee v. Weisman*[100] deals with the issue of prayer offered in a public school's graduation ceremony. In *Lee*, the Court stated that unconstitutional coercion occurs when the government directs a formal religious exercise in such a way as to oblige the participation of objectors.[101]

The School Committee of Providence, Rhode Island, allowed public high school and middle school principals to invite clergy members to lead prayers as part of schools' graduation ceremonies. A rabbi was invited by a principal to lead a prayer in such a ceremony.[102] The rabbi was given a pamphlet that suggested public prayers for nonsectarian civic ceremonies be composed with inclusiveness and sensitivity. The principal also recommended to the rabbi that the invocation and benediction be nonsectarian. A graduating student's father filed a lawsuit in which he asked the court to prevent school officials from including an invocation or a benediction as part of the graduation ceremony. The Court, in an opinion written by Justice Kennedy and joined by Justices Blackmun, Stevens, O'Connor, and Souter, held that the Establishment Clause forbids a prayer led by a clergy member at a public secondary school graduation where state officials direct the performance of such a formal religious exercise and the state practically requires attendance and participation.

The *Lee* court was concerned over subjecting adolescents to religious exercise. It noted that "adolescents are often susceptible to pressure from their peers towards conformity, and

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[100] Lee v. Weisman, 505 U.S. 577 (1992).
[101] *Id.* at 586.
[102] *Id.* at 581.

that the influence is strongest in matters of social convention."[103] In *Santa Fe Independent School District v. Doe*,[104] the Court held that a prayer given at a high school football game violated the Establishment Clause. It noted that prayer forces students to choose between attending the game and staying away to affirm their personal convictions.[105]

*Lee* is distinguishable from *Pedreira* because the latter does not involve a public school. Given that the Charitable Choice Policy will influence social services for abused children, the issues involving the Coercion Test are reasonable to consider. It seems relevant to ask, considering the Bush Charitable Choice Policy, whether public officials violate the Coercion Test if they place a child in an organization that provides child abuse services while sponsoring formal and informal religious exercises. In addition, the court would be concerned about the beneficiaries of KBHC's services, and the abused children because they are vulnerable to pressures from their peers and KBHC officials.

The issue is whether children are especially susceptible to coercion. The Court in *Santa Fe Independent School District* stated "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention."[106]

## SEPARATION OF THE PUBLIC AND PRIVATE SECTORS ?

Another concern to evaluate is the fuzzy boundary separating the public and private sectors. For purposes of this study, an important question to consider is under what conditions does a private organization become similar to a public

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[103] *Id.* at 593.
[104] 530 U.S. 290, 312 (2000).
[105] *Id.* at 312.
[106] *Id.* at 311-312 (citing *Lee*, 505 U.S. at 593).

organization? If sufficiently similar, will a private organization be held to standards applied to a public organization? Questions that must be answered are whether a religious provider that receives public funds to provide a social service to abused children is a state actor and at what point does an organization become a state actor. The answer to these questions raises separate issues and provides a distinct perspective for *Pedreira* and the Bush Charitable Choice Policy.

A private actor becoming a state actor can be analyzed from different perspectives. For the purposes of this article, we will examine "public trust" and "public function." What is a public trust? The Claims Court states that "transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct."[107] Is the receipt of public funds and their use in providing social services to abused children a public trust? Robert Destro suggests that a public trust can be a situation in which a religious organization enters a contract with the government to fulfill some objectives like providing welfare services to abused children.[108]

The notion of public trust is important because of its role in the Test Clause. The Test Clause is part of Article VI of the Constitution, which states that:

> All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be

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[107] Refine Constr. Co., Inc. v. U.S., 12 Cl. Ct. 56, 63 (1987).

[108] Robert Destro, *Equal Treatment: Implications for Nonprofit Organizations, in* EQUAL TREATMENT OF RELIGION IN A PLURALISTIC SOCIETY 101-35 (Stephen V. Monsma and Christopher Soper eds. 1998).

> the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.
>
> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.[109]

The Test Clause is the portion of Article VI that reads: "[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

The Test Clause has not received much attention by the Court or other courts.[110] Consequently, lawyers and academics have little foundation on which to analyze the Test Clause to direct public funds to religious organizations that offer welfare services. To determine whether it is relevant to this question, the Test Clause can be broken into three separate elements: (1) no religious test shall ever be required, (2) as a qualification, and (3) to any office or public trust.

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[109] U.S. CONST. art. VI.

[110] *See, e.g.,* Robert A. Destro, *The Structure of the Religious Liberty Guarantee,* 11 J. L. & RELIGION 355 n. 59 (1995). Robert Destro contends that "it is arguable that the explicit non-discrimination norm of the Test Clause applies not only to federal employment, but also to federal contracting and grant eligibility considerations as well." *Id.*

If we accept the components of the Test Clause, then the first question is what is a religious test? According to Destro, a religious test is "any device that operates to screen out persons whose religious beliefs or practices, including the taking of oaths, are thought, for reasons of policy or prejudice, to make them unfit to hold a public office or become the custodian of a public trust."[111] If a government grant or contract recipient is the holder of a public trust either under the United States or the law of any state with a similar provision, the test clause not only is relevant but may be controlling.[112] As Destro points out, the "qualification" component does not apply to an organization because it cannot hold office.[113] Can a religious organization hold a public trust? Destro goes on to suggest that a policy precluding a religious organization from holding a public trust would be "illegitimate."[114]

In the context of *Pedreira* as well as the Bush Charitable Choice Policy, it is reasonable to ask whether a religious organization like KBHC must meet "the highest degree of public trust." The idea of public trust seems to apply to KBHC because it received government funds to provide services to one of the most vulnerable social groups in the United States, abused children. It is unclear what standards a private, religious organization must meet in fulfilling a public trust.

Another important question is whether a private religious organization is fulfilling its public function. There are two reasons that the receipt of public funds to provide social services to abused children are complex in the context of public function. First, the state collects funds and contracts with private organizations to provide social services to abused children. What responsibility has the state assumed by collecting tax revenue for the purpose of providing these services? What responsibility has

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[111] *Id.*

[112] Town of Fallsburg v. U.S., 22 Cl. Ct. 633 (1991).

[113] Destro, *supra* note 110, at 120.

[114] *Id.* at 121.

the private religious organization assumed by contracting to provide these services? What would happen if these private organizations decided to "quit" and no longer contracted to provide social services to abused children? Would the state be expected to provide these social services? In turn, it is unlikely that a state government could force a religious organization like KBHC to continue to provide social services to abused children if that religious organization decided to quit. In addition to its collection and distribution of tax revenue, the state is also responsible for addressing child abuse as a public health issue, which is a governmental responsibility.[115]

It is unclear as to when the activity of a private actor becomes state action. In *Brentwood Academy v. Tennessee Secondary School Athletic Association*,[116] the Court examined whether the Tennessee Secondary School Athletic Association (TSSAA) was a state actor. To determine whether TSSAA was a state actor, the Court of Appeals for the Sixth Circuit had employed this test:

1. Whether the TSSAA had a symbiotic relationship with the state;
2. Whether the TSSAA was engaging in a traditional and exclusive public function; and,
3. Whether the TSSAA was responding to state compulsion.[117]

However, the Court overturned the Sixth Circuit's decision. Five justices formed the majority, with Justice Souter

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[115] *See generally* DOROTHY PORTER, HEALTH, CIVILIZATION AND THE STATE: A HISTORY OF PUBLIC HEALTH FROM ANCIENT TO MODERN TIMES (1999).

[116] 531 U.S. 288 (2001).

[117] Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 180 F.3d 758 (1999).

writing the majority's opinion. The purpose of the test was to determine if TSSAA was a state actor:

1. Whether the state was pervasively entwined with TSSAA's structure; and
2. Whether there was a substantial reason to claim unfairness in applying constitutional standards to the TSSAA.

Four justices strongly dissented with the majority's opinion. The dissenting opinion, written by Justice Thomas, indicated that:

1. Entwinement by itself does not constitute state action;
2. Instead, state action by a private organization is evident when it:
   (a) performs a public function;
   (b) is created, coerced, or encouraged by the government; or,
   (c) acts in a symbiotic relationship with the government.

Indeed, the majority's notion of entwinement appears to be an innovation in determining whether a private organization is acting as the state. In *Rendell-Baker v. Kohn*,[118] the Court articulated a similar test to the TSSAA dissent:

1. Whether the private actor is compelled or influenced by state regulation; and
2. Whether there is a symbiotic relationship between the private actor and the state.

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[118] 457 U.S. 830 1982).

In *Rendell-Baker,* the Court stated that it will not only look at whether a private actor is serving a public function, but whether the state has the exclusive prerogative over it. The *Rendell-Baker* Court, however, described other holdings that articulated different tests of whether a private actor can be considered the state. For instance, in a footnote in *Adickes v. S.H. Kress & Company,*[119] the Court explained that a private actor who conspired with a state actor, a sheriff, to deprive an individual of her rights, had acted under the color of state law.

An important case described by the *Rendell-Baker* Court is *Flagg Brothers, Inc. v. Brooks,*[120] which articulates the standard of whether the action was taken in concert with a state actor. In *Flagg Brothers*, the Court found that no state actor was involved, so the private organization could not be considered a state actor. The Court mentioned in dicta that it was possible to find a private actor acting as a state actor if the private actor acted pursuant to state law and consequently appeared to be coerced by it.

The *Rendell-Baker* Court also reviewed *Blum v. Yaretsky.*[121] The test articulated in the *Blum* was whether the state exercised coercive power or provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state. The Court considered the facts of *Blum* noting that nursing homes depended on the state for funds. The state subsidized the operating and capital costs of the nursing homes and paid the medical expenses of more than 90 percent of the patients. The Court explicitly stated that dependence on state funds did not make the decisions of the nursing homes to discharge the patients acts of the state. Further, the Court stated, "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."

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[119] 398 U.S. 144 (1970).
[120] 436 U.S. 149 (1978).
[121] 457 U.S. 991 (1982).

The second factor considered in *Blum* was the extensive regulation of the nursing homes by the state. In *Blum*, the Court said the decision to discharge the patients was not compelled or even influenced by any state regulation. The third factor was whether the private actor performs a public function. The Court said the question is not whether the private actor is serving a "public function," but whether the function has been "traditionally the exclusive prerogative of the State."[122] The Court said that education of "maladjusted high school students" is a public function, but that conclusion is only the first step in the inquiry. The fourth factor is whether a symbiotic relationship exists between the private actor and the state, which was found in *Burton v. Wilmington Parking Authority*.[123] In *Burton*, the Court found that a restaurant was located on public property and that rent from the restaurant contributed to the support of the state.

## DISCUSSION AND CONCLUSION

In this article, we have sought to describe an instance in which the boundary separating the public and private sectors is fuzzy. As various commentators have noted, including Destro, "[I]n the modern administrative state, the dividing lines between public and private endeavor have been blurred."[124] This article has analyzed the intersection of public health and separation of church and state. Child abuse is a public health matter, yet throughout the United States, child abuse services are frequently provided by private providers. Often these providers are religious organizations.

*Pedreira* raises important questions for the provision of child abuse services and separation of church and state. This lawsuit, in turn, is useful for understanding the impact and future of Charitable Choice Policy. Together, *Pedreira* and Charitable

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[122] *Id.* at 1011 (citing Jackson v. Metro. Edison Co., 419 U.S. 345 (1974)).
[123] 665 U.S. 715 (1961).
[124] Destro, *supra* note 110, at 101-35.

Choice Policy have important implications for the future of public health and separation of church and state. Will public health responsibilities increasingly become responsibilities of private organizations, in particular religious organizations, with the state as the silent partner? To what standards can taxpayers hold religious organizations as partners of the government?

*Pedreira* shines a light on current Charitable Choice Policy and the Bush Charitable Choice Policy. Children and particularly abused children often are vulnerable because they are without full legal rights and must rely on others for protection. Given the association shared by religious organizations with public health organizations appears essential to providing services to abused children in the United States, it is fair to ask whether abused children are and will be placed in circumstances that other individuals and social groups are not placed in. Is the relationship between public health and religious organizations failing to close holes in the safety net for vulnerable children? Indeed, we must go further and ask whether public health organizations and Charitable Choice Policy are devising a social service structure for abused children that we would not and could not impose on individuals capable of full social, economic, and political participation in U.S. society.