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‘Monitor,’ judge wrongly argue your money is the government’s money

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At what point does the money in your private bank account become the government’s money?

In an unprecedented decision last month, a Strafford County judge ruled that parents participating in New Hampshire’s nascent scholarship tax credit program could not choose to send their children to religious schools. The program grants tax credits to corporations worth 85 percent of their eligible donations to nonprofit scholarship organizations that fund low- and middle-income students attending the schools of their choice.

Judge John Lewis ruled that scholarship recipients could still attend secular private schools, out-of-district public schools, and home schools.

However, he forbade the use of scholarships at religious schools as a violation the state Constitution’s historically anti-Catholic “Blaine Amendment” provision, which states that “no money raised by taxation shall ever be granted or applied for use of the schools of institutions of any religious sect or denomination.”

The judge’s decision contradicts the understanding of every high court to address this question thus far. In 2011, the U.S. Supreme Court held that when “taxpayers choose to contribute to (scholarship organizations), they spend their own money, not money the state has collected from . . . other taxpayers.”

But rather than adhere to this precedent, Lewis relied on the dissenting opinion in that case, as well as the dissenting opinion in an Arizona Supreme Court decision, to blur the distinction between tax credits and government spending. But as the Supreme Court explained, the logical flaw in this argument is that it “assumes that income should be treated as if it were government property even if it has not come into the tax collector’s hands. Private bank accounts cannot be equated with the . . . state treasury.”

What about property tax exemption?

On Sunday, a Monitor editorial denounced the U.S. Supreme Court’s view as a “fiction,” a “subterfuge,” and a “cheap trick.” But if the government already owns money that it chooses not to collect, as the Monitor and Lewis believe, then every religious school and house of worship is already directly “funded” by “public money” because they qualify for the longstanding state property tax exemption.

Moreover, this would be a direct "subsidy" to religious institutions, unlike the scholarship tax credit program, which "subsidizes" parents who may or may not choose a religious school. In reality, both the property tax exemption and the scholarship tax credit program are constitutional because tax credits, exemptions and deductions are not public money in any historically accepted sense of the term, and these programs are neutral with respect to religion. It is absurd to believe, as Lewis and the Monitor apparently do, that these programs can only be constitutional if they are actively hostile to religion instead.

1955 precedent

But even under the illogical view that tax credits constitute "public money," the scholarship tax credit program should still be constitutional based on New Hampshire precedent, though it is limited and nonbinding.

A 1955 Opinion of the Court declared that a voucher program for nursing school would be constitutional even if the public funds were used at a religious school because it was indirect (i.e. – the money went to the students, not the schools) and incidental (i.e. – if the money went to a religious school, it was because the recipient chose that school).

The New Hampshire Supreme Court declared that "members of the public are not prohibited from receiving public benefits because of their religious beliefs or because they happen to be attending a parochial school."

While a subsequent nonbinding opinion declared that a $50 property tax credit for private school tuition would be unconstitutional, the logic of that opinion contradicted the court's previous position and it was never fully implemented. New Hampshire continued to grant property tax exemptions to religious schools and even used tax dollars to fund students attending religiously-affiliated colleges.

The scholarship tax credit program is intended to expand educational options for those who need it most. Wealthy families already have school choice. They can afford to live in a district with a high-performing public school or pay for private school. Often, the only choice low-income families have is their assigned district school.

The judge's decision, in violation of precedent and logic, unnecessarily and unconstitutionally limits the educational choices that the scholarship tax credit program would make available to them. Let us hope that the New Hampshire Supreme Court has better judgment.