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New Hampshire Court's School Choice Decision was Flawed and Unprecedented

By: Jason Bedrick- June 24, 2013

Last week, a New Hampshire trial court declared that the state's nascent scholarship tax credit (STC) program could not fund students attending religious schools. The Granite State's STC program grants tax credits to corporations worth 85 percent of their contributions to nonprofit scholarship organizations that aid low- and middle-income students attending the schools of their choice.

Writing on the Washington Post's Answer Sheet blog, Professor Kevin Welner of the University of Colorado at Boulder mocked supporters of the program who criticized the decision. Welner argues that school choice advocates should have expected this decision, declaring that it was "unsurprising" that the court should find the program (partially) unconstitutional. But what Welner calls unsurprising is actually unprecedented.

Only toward the bottom of his post does Welner reveal that the only high courts to address the issue thus far—the U.S. Supreme Court and the Arizona supreme court—have ruled STC programs constitutional in their entirety. Indeed, though all but two of the remaining ten states with STC programs have similar "Blaine Amendment" provisions in their state constitutions, opponents haven't even bothered to challenge their constitutionality. Additionally, other state courts have ruled on the question of whether tax credits constitute "public money" in a manner consistent with the previous STC cases, demonstrating that the courts' rulings were not the aberrations that Welner imagines them to be.

If school choice supporters had a reason not to be surprised, it was because the ACLU and Americans United for Separation of Church and State shrewdly went judge shopping. That's why they brought their lawsuit in Sullivan County instead of Merrimack County, where the state capital is located. Their strategy seemed to pay off, as the judge's decision relies heavily on the dissenting opinions in the U.S. Supreme Court and Arizona supreme court decisions, and misapplies the limited precedent from New Hampshire. Nevertheless, the final decision rests with the New Hampshire supreme court. As I detail below, logic and precedent suggest that they should overturn the lower court's decision.

Welner claims that the question of constitutionality rests on what he calls the "tax expenditure doctrine":

> This doctrine looks at the practical effect of tax credits and thus treats them as analogous to direct government expenditures (both are charges made against the

> state treasury). In fact, the entire legal appeal of the convoluted [scholarship tax credit] mechanism is built around courts not understanding that doctrine.

In fact, the U.S. Supreme Court spent considerable time in ACSTO v. Winn weighing whether tax credits and deductions are constitutionally equivalent to tax expenditures. The majority concludes that they are not:

> Like contributions that lead to charitable tax deductions, contributions yielding [scholarship] tax credits are not owed to the State and, in fact, pass directly from taxpayers to private organizations. Respondents' contrary position assumes that income should be treated as if it were government property even if it has not come into the tax collector's hands. That premise finds no basis in standing jurisprudence. Private bank accounts cannot be equated with the Arizona State Treasury.

In other words, the Supreme Court clearly understood Welner's argument, and they rejected it. The doctrine Welner presents as settled and obvious is actually quite controversial, and even its proponents are "still debating among themselves how to define tax expenditures—nearly two generations after the concept was introduced."

Welner asserts that there is no "practical" difference between a credit and a direct expenditure. From an accounting perspective, whether the government spends $100 or forgoes $100 in revenue makes no difference. However, this facile understanding of scholarship tax credits fails to capture its full fiscal impact, since there are also corresponding reductions in state spending. The Court spends several pages exploring the various possible fiscal scenarios that could result from a tax credit program, including the possibility that the program would save money (as is the case in Florida). The Court concludes:

> It is easy to see that tax credits and governmental expenditures can have similar economic consequences… Yet tax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities. A dissenter whose tax dollars are "extracted and spent" knows that he has in some small measure been made to contribute to an establishment in violation of conscience… When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment. Any financial injury remains speculative. And awarding some citizens a tax credit allows other citizens to retain control over their own funds in accordance with their own consciences.

Hence the Court rules that though tax credits and direct expenditures may be similar in effect, they are significantly different in design and implementation. This difference is then appropriately reflected in the court's treatment of the laws. While the U.S. Supreme Court's decision is not binding on a New Hampshire court's understanding of the state constitution, the logic of distinguishing between the policies still applies.

Moreover, even if the state court wrongly understood tax credits to be "public money," New Hampshire precedent favored upholding the program. Though New Hampshire's supreme court

has never ruled on the constitutionality of a school choice program, there have been several, sometimes conflicting, non-binding advisory opinions. Based on the precedent, former NH Supreme Court Justice Charles Douglas III has argued that even traditional vouchers would be constitutional because the benefit to religious organizations is indirect and incidental to the choices of parents.

Indeed, the lower court judge even relied on (and misapplied) the test established in a 1955 Opinion of the Court, which declared that it would be constitutional for the state to fund students attending nursing school, even if the school was religiously-affiliated:

> Our state Constitution bars aid to sectarian activities of the schools and institutions of religious sects or denominations. It is our opinion that since secular education serves a public purpose, it may be supported by tax money if sufficient safeguards are provided to prevent more than incidental and indirect benefit to a religious sect or denomination. We are also of the opinion [...] 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. [emphasis added]

When the state sends state funds directly to a private school, that clearly qualifies as "direct" support. Courts have differed when a state grants funding to parents who then to choose where to spend it, with the majority of state courts understanding this as "indirect" and a minority finding it to be "direct." However, until now, no court has ruled that money which never enters the state treasury but instead flows from a corporate donor to a nonprofit to parents to their school is anything but "indirect."

Moreover, like a patient choosing to spend Medicaid funds at a Catholic hospital or a needy individual spending SNAP funds on food for a religious feast, any benefit to a religious institution is only incidental to the choices of the beneficiaries.

The 1955 opinion was reaffirmed in subsequent opinions, though a non-binding opinion in 1969 stands out as a notable exception. The opinion advised that a proposed $50 property tax credit for private schooling would be unconstitutional because it lacked any provision "restricting the aid to secular education." This new test contradicts the court's previous understanding of the constitutional requirements. Had it ever been fully adopted, it would have also adversely impacted other state programs, such as state aid to college students and the longstanding property tax exemptions for houses of worship and religious schools.

In any case, the New Hampshire supreme court does not consider its earlier advisory opinions to be binding because they are not litigated cases in which parties on each side present their strongest arguments. Additionally, the advisory opinions interpreted the state constitution in light of federal First Amendment jurisprudence. If the NH supreme court continues that tradition, then they will uphold the scholarship tax credit program in its entirety.

-Jason Bedrick