Court's Ruling Fiercely Un-Madisonian

Alan E Garfield
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What would James Madison think? That question is worth pondering in light of a recent decision issued by the Supreme Court. Before getting to Madison's thoughts, however, let's look at some facts about the case.

Arizona gives a tax credit to people who contribute money to school tuition organizations, or "STOs." The STOs use this money to provide scholarships for students attending private schools, including many religious schools. Single taxpayers get a dollar-for-dollar credit of up to $500; married couples get up to $1,000.

Say, for instance, the couple Bob and Amy gave $1,000 to an STO and the STO gave a student the money for her parochial school tuition. When Bob and Amy pay their Arizona taxes, they will get a $1,000 credit. So if they owe $3,000, they would pay only $2,000.

A group of Arizona taxpayers challenged the tax credit as violating the Establishment Clause in the U.S. Constitution's First Amendment ("Congress shall make no law respecting an establishment of religion"). They said that if the Constitution forbids Arizona from directly paying for religious school tuition — which it almost certainly does — then surely Arizona can't do the same thing indirectly through the STO tax credit program.

Madison's thoughts are relevant because the Supreme Court regards him as the "leading architect" of the Establishment Clause. And there is a revealing history of what he thought about state support of religion.

The story begins in 1785 when the Virginia state legislature was about to renew a tax to provide for "teachers of the Christian religion." Taxpayers could select which Christian sect they wanted their tax payments to support. If they didn't select one, the funds would go to secular "seminaries of learning" (although some commentators say the seminaries could also have been religious).

Madison adamantly opposed the Virginia bill and famously voiced his objections in his "Memorial and Remonstrance Against Religious Assessments." He argued that a true religion did not need government support and that it was wrong to force taxpayers to support religion. He declared that government should not "force a citizen to contribute three pence" — a trivial sum even in 1785 — to support a religious establishment.

Madison's objections carried the day. Virginia dropped the levy and instead adopted the "Virginia Bill for Religious Liberty" that was originally drafted by Thomas Jefferson. The Bill's preamble stated that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."

This history led the Supreme Court to conclude in a landmark decision in 1947 that the Madison-drafted Establishment Clause meant that "no tax in any amount, large or small, can be levied to support any religious activities or institutions."

So what would Madison think about the Arizona tax credit program? That was fiercely debated in the 5-4 decision. Both the majority justices and the dissenters invoked Madison, and both sides claimed fidelity to his legacy.

The precise issue in the case was not the Arizona tax credit's constitutionality but whether the taxpayer plaintiffs had "standing" to even challenge it. Plaintiffs can invoke federal court jurisdiction only if they can allege that a defendant injured them. So the plaintiffs in this case had to allege that Arizona violated their constitutional rights by using their taxpayer money (their "three pence") to pay for religious education.

The Court's five conservative justices said the plaintiffs lacked standing to bring their case. They said that no money for religious education came from state tax revenues. Instead, it came from private parties like Bob and Amy who contributed to STOs. Since Bob and Amy's money never entered the state treasury, taxpayer money was never spent on religious education.

The Court's four liberal justices said this was a distinction without a difference. If the state fully reimburses Bob and Amy for their $1,000 contribution, then the state, in effect, is paying for the religious education. That the money comes through a tax credit and not a state expenditure is inconsequential. It is six of one, half a dozen of the other.

The dissenters said either way Arizona taxpayers were contributing their "three pence" to religious education. At a minimum, the dissenters said, the taxpayers should have standing to present their argument in court.

How do I personally think Madison would react to all of this? My guess is that after reading the majority's opinion, he would take two aspirins, shake his head in disbelief, and marvel at how five justices — including some who claim to follow the Framers' intent — could have gotten it so wrong.

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