

State-by-State Analysis of Cases Cited by Appellees

<p>Alabama – Alabama has both a “compelled support” clause and a “no aid” provision similar to Florida’s. Approving a college scholarship program that permitted their use at religious schools, the Alabama Supreme Court held that the state provisions “are not more restrictive” than the federal Establishment Clause.</p>		
<p><i>Alabama Education Ass’n v. James</i>, 373 So. 2d 1076 (Ala. 1979)</p>	<p>Cited by appellees at p. 41 as example of state supreme court “upholding [a] postsecondary grant program based on [a] finding that none of the recipient colleges were ‘pervasively sectarian’ and that no state funds would be used for sectarian purposes.”</p>	<p>The Alabama court also noted that the purpose of the act under consideration was to benefit the public, not the individual colleges. <i>See id.</i> at 1081.</p>
<p>Alaska – Alaska has both an “establishment clause” which is nearly identical to its federal counterpart and a Blaine Amendment in the “Health, Education, and Welfare” article that forbids aid to any private schools. The Alaska Supreme Court relied on the then-current interpretations of the federal Establishment Clause to strike down a program providing tuition grants exclusively to students attending private schools.</p>		
<p><i>Sheldon Jackson College v. State</i>, 599 P.2d 127 (Alaska 1979)</p>	<p>Cited by appellees at pp. 32, 41, stating that “the Alaska Supreme court held that a tuition grant program was not saved merely because the grants were made to students”.</p>	<p>The Alaska Supreme Court’s overwhelming reliance on federal precedents in making its decision in <i>Sheldon Jackson College</i> suggests that the case might well have been decided differently in the wake of the U.S. Supreme Court’s return to neutrality in its Establishment Clause jurisprudence.</p>
<p>Arizona – Arizona has two “no aid” provisions, one prohibiting the appropriation of public funds for “religious worship, exercise, or instruction”, and the other forbidding the appropriation of public money in aid of any private organization. The Arizona Supreme Court rejected a challenge to a tax-credit-based school choice program in which the plaintiffs argued, as they do in the instant case, that Arizona’s religion provisions were intended to be “much more stringent” than their federal counterparts.</p>		
<p><i>Kotterman v. Killian</i>, 972 P.2d 606 (Ariz. 1999)</p>	<p>Cited by appellees at p. 35 in an attempt to distinguish cases permitting tax credits from cases that involve the use of “public money.”</p>	<p>In <i>Community Council v. Jordan</i>, 432 P.2d 460 (Ariz. 1967), the Arizona court stated: “The ‘aid’ prohibited in the constitution of this state is, in our opinion, assistance in any form whatsoever which would encourage or tend to encourage the preference of one religion over another, or religion per se over no religion.”</p>
<p>California – California has two “no aid” provisions and an “exclusive control” clause. The California Supreme Court has upheld tax exemptions for parochial schools, bus transportation for Catholic school students, and the use of bonds to aid facility construction at private schools, but it has struck down a textbook loan program.</p>		
<p><i>California Ed. Facilities Auth. v. Priest</i>, 526 P.2d 513, 521 (Cal. 1974)</p>	<p>Cited by appellees at p. 23 of their brief, claiming the McKay <i>amicus</i> brief asserted incorrectly that no-aid provisions should only be read to prohibit “uses of public funds motivated by a religious purpose.”</p>	<p>The McKay brief accurately described the position taken by the California Supreme Court in <i>Priest</i> and reiterated in other opinions of that court – that religious institutions are not prohibited by that state’s constitution “from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose.”</p>
<p>Colorado – Colorado has a “compelled support” clause and two other provisions that prohibit appropriations for sectarian institutions, associations, or purposes. The Colorado Supreme Court upheld a program that permitted students to use scholarships at any approved public, private, or religiously-affiliated college or university, reasoning that the “aid [was] designed to assist the student, not the institution.”</p>		
<p><i>Americans United v. State</i>, 648 P.2d 1072 (Colo. 1982)</p>	<p>Cited by appellees at p. 41 as an example of a case in which a state court upheld a “college scholarship program that excluded pervasively sectarian institutions.”</p>	<p>The Court upheld the program because it was intended to achieve a secular purpose in educating the student. Further, the Court stated: “To withhold benefits from students otherwise satisfying statutory criteria for eligibility would be tantamount to withholding a public benefit solely on the basis of an incidental religious affiliation which poses no threat whatever to the constitutionally mandated separation of church and state.” <i>Id.</i> at 1084-85.</p>

<p>Hawaii – Hawaii has a “no aid” clause prohibiting aid to “any sectarian or private educational institution.” The Hawaii Supreme Court struck down a program that would provide students transportation to private schools.</p>		
<p><i>Spears v. Honda</i>, 449 P.2d 130 (Haw. 1968)</p>	<p>Cited by appellees at p. 38 as an example of a state court striking down a program that would “provide sectarian schools with unrestricted funds.”</p>	<p>Hawaii’s no-aid provision is in the Education article of its constitution and forbids the use of public funds for <i>any</i> private school. Because it does not address religion specifically, the provision is simply not relevant.</p>
<p>Idaho – Idaho has both a “compelled support” clause and a “no aid” clause. The Idaho Supreme Court struck down a program that offered scholarships to disabled children attending schools chosen by their parents, and another that provided transportation for all students in a school district.</p>		
<p><i>Doolittle v. Meridian Joint Sch. Dist. No. 2</i>, 919 P.2d 334 (Idaho 1996)</p>	<p>Appellees cite this case on p. 32, noting that the “payment of public funds for [a] handicapped child’s tuition at [a] sectarian school chosen by [his] parents was contrary to Idaho Constitution.”</p>	<p>This case reflects the fact that Idaho’s constitution is more sweeping and restrictive than almost any other in the country. Idaho’s “no aid” clause differs from Florida’s in history, textual setting, wording, and judicial interpretation.</p>
<p>Illinois – Illinois has both a “compelled support” clause and a “no aid” provision. The Illinois Supreme Court has held these provisions to be “identical to those imposed by the first amendment to the constitution of the United States.” Applying then-current federal Establishment Clause cases, the Illinois Supreme Court upheld a statute providing transportation for all schoolchildren, and later struck down programs that provided grants to cover the costs of tuition, textbooks, and auxiliary services for students attending private schools. Illinois appellate courts have recently upheld a tax-credit-based program against state constitutional challenge.</p>		
<p><i>People ex rel. Klinger v. Howlett</i>, 305 N.E. 2d 129 (Ill. 1973)</p>	<p>Cited by appellees at p. 32 because the decision “[struck] down tuition grants to parents sending children to private schools of their choice.”</p>	<p>In <i>Klinger</i>, the Illinois Supreme Court reaffirmed its position that Article X, § 3 “imposes restrictions concerning the establishment of religion that are identical to those imposed by the first amendment to the constitution of the United States.” <i>Id.</i> at 130. In the case upholding Illinois’ tax credit program, the court of appeals rejected the plaintiffs’ attempt to rely on cases from other states, as they have done in the instant case. <i>Toney v. Bower</i>, 744 N.E.2d 351, 357 (2001).</p>
<p>Indiana – Indiana has both a “compelled support” clause and a “no aid” clause. The Indiana Supreme Court upheld the constitutionality of a program that allocated state funds to provide secular educational services to parochial school students who had also enrolled in public school.</p>		
<p><i>Embry v. O’Bannon</i>, 798 N.E. 2d 157 (Ind. 2003)</p>	<p>Cited by appellees at p. 23 to refute the idea that courts interpreting no-aid provisions should “inquire solely into the statute’s purpose,” which they claim was suggested by the McKay <i>amicus</i> brief.</p>	<p>Appellees quote <i>Embry</i> to establish that Indiana courts “prohibit the use of public funds ... when directly used for [religious] institutions’ activities of a religious nature.” But the McKay brief merely cited <i>Embry</i> – accurately – to show the Indiana Supreme Court had interpreted a no-aid provision to permit “indirect, remote, and incidental benefit[s]” to flow to religious institutions where “a statute [has] a secular primary purpose.” <i>Embry</i>, 798 N.E.2d at 167</p>
<p>Minnesota – Minnesota has both a “compelled support” clause and a “no aid” clause. The Minnesota Supreme Court has held that the Minnesota constitution does not “prohibit any indirect or incidental benefit to religiously oriented institutions, even if an institution is so pervasively sectarian that some aid to religion results.”</p>		
<p><i>Minnesota Fed’n of Teachers v. Mammenga</i>, 485 N.W.2d 305 (Minn. Ct. App. 1992)</p>	<p>Cited by appellees at p. 42 as an example of a case in which a state court upheld a “program on finding that most participating colleges were not pervasively sectarian.”</p>	<p>The program upheld in <i>Mammenga</i> paid public funds directly to religious institutions, and the court emphasized that “it is the student’s choice of which college or university to attend that determines the flow of funds from the state to the religiously affiliated college or university.” <i>Id.</i> at 308.</p>

Mississippi – Mississippi has a “no aid” provision. The Mississippi Supreme Court initially struck down educational grants for private school students, but the court later adopted a new understanding of the “no aid” provision and upheld textbook loans to all children in the state, and (under a similar provision) grants to a sectarian hospital.

<p><i>Otken v. Lamkin</i>, 56 Miss. 758 (1879)</p>	<p>Appellees cite this case at p. 32 to note that the Mississippi Supreme Court struck down a “statute that paid students attending private schools their pro rata share of state education funds.”</p>	<p>Appellees disregard the Mississippi Supreme Court’s later decision in <i>Chance v. Miss. St. Textbook Rating and Purchasing Bd.</i>, 200 So. 706 (Miss. 1941), where the Court upheld a textbook loan program, reasoning: “If the pupil may fulfil [sic] its duty to the state by attending a parochial school it is difficult to see why the state may not fulfil [sic] its duty to the pupil by encouraging it ‘by all suitable means.’ The state is under duty to ignore the child's creed, but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think.”</p>
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Missouri – Missouri has two “no aid” clauses and a “compelled support” clause. The Missouri Supreme Court struck down programs that provided bus transportation to all schoolchildren, speech therapy to children in parochial schools, and distributed *federal* funds intended to provide teachers, textbooks, and transportation for parochial school students. The Missouri Supreme Court also upheld a program permitting students to use scholarships at religiously-affiliated institutions of higher education.

<p><i>Americans United v. Rogers</i>, 538 S.W.2d 711 (Mo. 1976)</p>	<p>Appellees cite this case on p. 41 in recognition that several state courts have permitted programs that provide “publicly funded scholarships for study at church-affiliated colleges and universities.”</p>	<p>In this case, the Missouri Supreme Court recognized that, despite its previous holdings interpreting the Missouri constitution as being extremely restrictive, it could not overturn a statute unless it could “with confidence declare that the statutory program ‘clearly and undoubtedly contravenes’ the Constitution of Missouri.” <i>Id.</i> at 721.</p>
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Nebraska – Nebraska has a provision forbidding the “appropriation of public funds... to any school or institution of learning not owned or exclusively controlled by the state.” Under an earlier version of the same provision, the Nebraska Supreme Court struck down a scholarship program intended to aid private colleges. The Court later determined that public funds could go to religious schools as long as any benefit provided was incidental to a public purpose.

<p><i>State ex rel. Rogers v. Swanson</i>, 219 N.W.2d 726 (Neb. 1974)</p>	<p>Cited by appellees at pp. 32, 41 as an example of a case in which a state court struck down under its constitution a program that offered grants for students attending private colleges of their choice.</p>	<p>The Nebraska Supreme Court struck down the program after explicitly noting that the law seemed designed to aid <i>private colleges</i>, not to enable students to attend schools of their choice. <i>See id.</i> at 733. This case should be compared to this court’s later decisions, <i>Lenstrom v. Thone</i>, 311 N.W.2d 884 (Neb. 1981) (college scholarship program upheld), and <i>State ex rel. Creighton Univ. v. Smith</i>, 353 NW.2d 267 (Neb. 1984) (research grant to religious school upheld).</p>
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New Hampshire – New Hampshire has a “compelled support” clause and a “no aid” clause. The New Hampshire Supreme Court has not been called on to resolve an actual controversy over the extent to which its constitution limits the use of public funds in relation to religious institutions.

<p><i>Opinion of the Justices</i>, 616 A.2d 478 (N.H. 1992)</p>	<p>Cited by appellees at p. 32, noting that the New Hampshire Supreme Court advised the Senate that it would be “unconstitutional for school districts to pay partial tuition for parents who sent students to private schools of their choice.”</p>	<p>The persuasiveness of this opinion is undercut by the fact that it was decided under the “compelled support” clause rather than the “no aid” clause. Moreover, as an advisory opinion, it is of only limited authority in <i>New Hampshire</i>, much less in Florida.</p>
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New York – New York has a “no aid” provision very similar to Florida’s. The New York Court of Appeals initially struck down a program that provided transportation to students attending parochial schools, but later explicitly rejected that holding and upheld a textbook loan program.

<p><i>Bd. of Educ. v. Allen</i>, 228 N.E.2d 791 (N.Y. 1967)</p>	<p>Cited by appellees at p. 23, stating: “[Allen’s] holding was that the state could supply secular textbooks to students attending sectarian schools – a position, incidentally, with which many other courts disagree.”</p>	<p><i>Allen</i> is particularly instructive because New York’s no-aid language mirrors very closely the language of Florida’s provision – even including the “directly or indirectly” phrasing.</p>
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Oregon – Oregon has a “no aid” provision. The Oregon Supreme Court struck down a textbook loan program, but later explicitly adopted the U.S. Supreme Court’s <i>Lemon</i> test as the proper standard to assess programs’ constitutionality under the “no aid” provision.		
<i>Dickman v. School Dist. No. 62C</i> , 919 P.2d 334 (Or. 1961)	Appellees cite this case on p. 38 as an example of a state court striking down a program (textbook loans) that would “provide sectarian schools with unrestricted funds.”	The Oregon Supreme Court’s later decision to adopt the federal <i>Lemon</i> test as the proper mechanism by which to analyze programs under its state constitution significantly undercuts the relevance of <i>Dickman</i> . <i>Eugene Sand & Gravel v. City of Eugene</i> , 558 P.2d 338, 342 (Or. 1976).

South Carolina – South Carolina formerly had a “no aid” provision very similar to Florida’s, though it also prohibited aid to private educational institutions. Under this provision, the South Carolina Supreme Court struck down a scholarship program designed to benefit only private schools, but upheld a student loan program that did not distinguish between public, private, or religious schools.		
<i>Hartness v. Patterson</i> , 179 S.E.2d 907, 909 (S.C. 1971)	Cited by appellees at p. 27 for the idea that tuition revenue paid to schools by states “constitutes aid to the institution that receives it,” and cited again at pp. 32, 41 as an example of a case in which a state court struck down a tuition grant program even though the grants were made to students rather than institutions.	While it is true that the South Carolina Supreme Court found in that case a violation of the state’s “no aid” provision, the court made clear that “the record, in our opinion, demonstrates that the tuition grants <i>were intended as aid to the institution.</i> ” <i>Id.</i> at 909. The very next year, in <i>Durham v. McLeod</i> (below), the court distinguished a similar program on the basis that “the loan is to the student, and all eligible institutions are as free to compete for his attendance as though it had been made by a commercial bank.”
<i>Durham v. McLeod</i> , 192 S.E.2d 202 (S.C. 1972)	Cited by appellees at p. 35 in an effort to distinguish the case because the bonds at issue “involved no ‘public money or credit.’”	The paragraph from which the appellees drew their cited quotation makes clear that the <i>Durham</i> Court’s decision is based on the fact that “the emphasis is on aid to the student rather than to any institution or class of institutions.” The court expressly added: “Even if it were conceded that the loan fund is public money within the meaning of [the “no aid” provision], it would require a strained construction to hold that students attending [private universities], as well as those attending [public universities], offends this constitutional restriction” <i>Id.</i> at 203-04.

South Dakota – South Dakota has a “compelled support” clause and a “no aid” provision. The South Dakota Supreme Court has struck down payments for the training of teachers at sectarian schools and textbook loan programs, but has upheld the constitutionality of tax exemptions for religious schools.		
<i>In re Certification of Question</i> , 372 N.W.2d 113 (S.D. 1985)	Cited by appellees at pp. 35, 38 as an example of a case in which a state supreme court distinguished between impermissible expenditures “in aid” of sectarian schools and tax exemptions, which did not constitute “aid.”	South Dakota has consistently held that its constitution is more restrictive than the Federal First Amendment.

Vermont – Vermont has a “compelled support” clause. The Vermont Supreme Court initially interpreted the provision to be <i>less</i> restrictive than the federal First Amendment, permitting reimbursement of parents for tuition paid to sectarian schools and allowing the state to arrange financing for buildings at a religious school. In a recent decision, however, the Court used the compelled support clause to strike down a tuition reimbursement program that lacked restrictions as to religious schools.		
<i>Chittenden Town Sch. Dist. v. Vermont Dep’t of Educ.</i> , 738 A.2d 539, 563 (Vt. 1999)	Cited by appellees at p. 31 for the proposition that, under Vermont’s constitution, the state’s taxpayers cannot be forced to support religious education through a school choice program.	While the Vermont Supreme Court seems to have significantly altered its interpretation of the compelled support clause in <i>Chittenden</i> , it added that the compelled support clause “is not offended by mere support for a place of worship unless the compelled support is for the ‘worship’ itself.” <i>Id.</i> at 550.

<p>Virginia – Virginia has an unusually extensive “compelled support” clause and two separate provisions prohibiting appropriations to any organization not owned or controlled by the state. The Virginia Supreme Court struck down a program that provided scholarships for the orphans of soldiers, sailors and marines.</p>		
<p><i>Almond v. Day</i>, 89 S.E.2d 851 (Va. 1955)</p>	<p>Cited by appellees at p. 27 for the proposition that tuition revenue paid to schools by states “constitutes aid to the institution that receives it.” Cited again by appellees at p. 31 to confirm that some states forbid even payments that do not run directly to religious institutions if their “underlying purpose and effect” is to aid the schools (p. 856).</p>	<p><i>Almond’s</i> interpretation of the first of its two “exclusive control” provisions was based at least in part on the court’s mistaken assumption that “tuition paid for the benefit of a child attending a <i>sectarian</i> school would undoubtedly violate the 1st Amendment of the Constitution of the United States.” <i>Id.</i> at 857.</p>

<p>Washington – Washington has a “no aid” clause and a separate provision mandating that “all schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.” Under these provisions, the Washington Supreme Court has forbidden public school teachers to distribute information about a released time program, struck down a scholarship program for “needy and disadvantaged elementary and secondary pupils,” and struck down a financial aid program for students with disabilities. The court has also upheld a scholarship program for college students and the use of revenue bonds for religious health facilities.</p>		
<p><i>Weiss v. Bruno</i>, 509 P.2d 973 (Wash. 1973)</p>	<p>Cited by appellees at p. 27 for the idea that tuition revenue paid to schools by states “constitutes aid to the institution that receives it.”</p>	<p>Appellees fail to note that the Court’s analysis in <i>Weiss</i> (and other Washington cases) has been called into question by <i>Gallwey</i>, as discussed below. <i>See Gallwey</i>, 48 P.3d at 284. (“In reaching our decision, we... overrule <i>Weiss</i> and <i>Graham</i> to the extent that they conflict with our analysis here. Nothing in today’s decision is intended to disturb this court’s holding in <i>Weiss</i> as it relates to common school.”)</p>
<p><i>State ex rel. Gallwey v. Grimm</i>, 48 P.3d 274 (Wash. 2002)</p>	<p>Cited by appellees at p. 27 for the idea that tuition revenue paid to schools by states “constitutes aid to the institution that receives it.” Appellees cite the case again at p. 42 to note that the program prohibited the use of funds for programs which “include[d] any religious worship, exercise, or instruction.”</p>	<p>In <i>Gallwey</i>, the Washington Supreme Court <i>upheld</i> a program that provided funding for certain students to attend colleges or universities, including those affiliated with or operated by a religious group. The Court held that under Article I, section 11 – a provision similar to Florida’s Article I, section 3 – the courts were <i>not</i> to focus primarily on the “ultimate utilization” of public funds by a recipient organization, but rather were to treat “a religious purpose [as] the key” part of the constitutional test. “[T]he appropriation of money, or application of property, to effectuate any objective other than religious worship, exercise, instruction, or religious establishment is not within the prohibition [of Article I, section 11.]” <i>Id.</i> at 285.</p>

<p>Wisconsin – Wisconsin has a “compelled support” clause and a “no aid” clause. The Wisconsin Supreme Court twice upheld a school choice program similar to Opportunity Scholarships, applying a version of the incidental benefit/primary purpose analysis.</p>		
<p><i>Davis v. Grover</i>, 480 N.W.2d 460 (Wis. 1992)</p>	<p>Appellees cited this case on p. 15, noting that Justice Abrahamson’s dissent expressed the opinion that school choice programs amounted to a “wholesale substitution of private schools for public schools,” which “supplants the educational programs the constitution requires the legislature to provide in public schools.”</p>	<p>No other justice joined Justice Abrahamson’s dissenting opinion.</p>
<p><i>Jackson v. Benson</i>, 578 N.W.2d 602 (Wis. 1998)</p>	<p>Appellees cite this case on p. 37, noting that the district court distinguished it based on differences in “constitutional language” between Wisconsin and Florida.</p>	<p>Appellees fail to explain why differences in the text of the Wisconsin constitution render it less relevant to this case than provisions of other state constitutions that are even more different, but that they have nevertheless cited in support of their position.</p>