

RENEWED DEBATE OVER ALASKA'S ESTABLISHMENT CLAUSE: *HUNT V. KENAI PENINSULA BOROUGH* AND THE CHURCH OF THE FLYING SPAGHETTI MONSTER

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ABSTRACT

In 2019, a pastor of the Church of the Flying Spaghetti Monster, a "Pastafarian," raised concerns about the entanglement of Alaskan local government and religion. His commentary highlighted the need to take a fresh look at Alaska's establishment clause jurisprudence. While Hunt v. Kenai Peninsula Borough addressed legislative prayer, further questions remain open about the limits of public spending on religious institutions, the need to honor Alaska's religious diversity, and the role of religion in everyday Alaskan government. While the Alaska jurisprudence has not changed much since the 1980s, the Pastafarians have demonstrated that establishment clause debates are alive and well. Therefore, Alaska may look to early constitutional debates in other states, like Massachusetts and Virginia, to evaluate its policy choices, balancing the esteemed place of religion in Alaskan society and the deep-seated belief in separation of church and state.

I. INTRODUCTION

The freedom of religion, in all its complexities, is unquestionably a central tenet of American conceptions of liberty and government. However, the First Amendment to the United States Constitution is far from the final word on what it means to guarantee religious freedom. Rather, states have unique historical and theoretical relationships with religious traditions. Those foundational relationships inform each state's approach to the overlap of religion and government. In Alaska, the state

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constitution provides more stringent prohibitions on the overlap of church and state than the U.S. Constitution.¹ While the text of article 1, section 4 of the Alaska Constitution nearly mirrors its federal counterpart, the Alaska courts have often interpreted the clause to protect more religious freedoms and restrict more government support of religious institutions.²

When the founding pastor of the First Lower Peninsula Congregation of Pastafarians gave the invocation at a Kenai Peninsula Borough Council meeting in 2019, establishment clause debates dating back to the Philadelphia Convention of 1787 reared their heads once again, this time in Alaska.³ This Comment will discuss the development of Alaska's establishment clause jurisprudence, tracing arguments from the United States' early constitutional history to modern-day Alaska and the Church of the Flying Spaghetti Monster. The Pastafarians make one thing clear: the threat of religious influence in the halls of government will be taken seriously in Alaska, and even minor infractions will continue to be cause for debate, demonstration, and disappointment. In choosing their establishment policies, Alaskan local governments should therefore take note of these sarcastic dissenters' points and look to the examples of early constitutional debate to develop tailored solutions for the Last Frontier.

Alaska's state and local establishment policies moving forward will largely fall into two buckets. The first includes those policies emphasizing the cultural value of religious diversity and carving out a place for religion alongside government. The second contains policies emphasizing the potential for undue influence (either of religion on government or vice versa) and adhering to a strict separation of government and religious functions. These policy choices are far from novel – other states have long histories concerning the intermingling of religion and government.⁴ Massachusetts and Virginia, for example, both engaged in vigorous establishment clause debates in the first few decades after the American

1. See, e.g., *Sheldon Jackson College v. State*, 599 P.2d 127, 129 (Alaska 1979) (creating a new test for unique establishment-related provisions of the Alaska Constitution).

2. Compare *id.* (establishing a four-part test for aid to private institutions in Alaska), with *Mitchell v. Helms*, 530 U.S. 793, 835–36 (2000) (holding that direct aid to religious schools for secular good was constitutional).

3. Hannah Natanson, *A Pastafarian Opened a Council Meeting Wearing a Spaghetti Strainer. He Says It's About Separation of Church and State*, WASH. POST (Sept. 19, 2019), <https://www.washingtonpost.com/nation/2019/09/20/pastafarian-opened-council-meeting-wearing-spaghetti-strainer-he-says-its-about-separation-church-state/>.

4. See *infra* Part IV.

Revolution, and their case law traces the states' different cultural views of religion.⁵

For Alaska, the choice may be even more poignant than in other states. On the one hand, the Last Frontier boasts incredible religious diversity, contributing to cultural roots across the state.⁶ On the other, the recent debate raised by Barrett Fletcher, the founding pastor of the First Lower Peninsula Congregation of Pastafarians, highlights the state's fiercely independent ethos, unfriendly to the suggestion that any favoritism would be permissible.⁷

This Comment argues that the Pastafarians are right to highlight the potential dangers of minor intrusions of religion on government and attempts to predict the direction Alaska will take. First, Part II details recent events that shed new light on the role of religion in local and state government in Alaska. Next, Part III reviews the (somewhat scarce) jurisprudence on the state establishment clause leading up to the current debate. Then, Part IV contextualizes the Alaskan law in light of the early constitutional debates. Lastly, Part V argues that, at least in the state of Alaska, the Pastafarians have the upper hand in the long-standing establishment debate.

II. SETTING THE SCENE: THE CURRENT STATE OF THE ALASKA ESTABLISHMENT CLAUSE

The Alaska Constitution reads, “[n]o law shall be made respecting the establishment of religion, or prohibiting the free exercise thereof.”⁸ But much like the First Amendment to the U.S. Constitution, the metes and bounds of “establishment” remain an open debate in Alaskan courts, town meetings, and popular discourse.⁹ Just in the last five years,

5. *Id.*

6. For example, Anchorage boasts a wide variety of Christian denominations, including those that have incorporated Alaska Native religions; Jewish congregations; Islamic citizens; a Hindu temple; a hospital that incorporates Alaska Native healing practices; the Ba’hai National Office; and intermittent Buddhist and Sikh communities. See Regina A. Boisclair, *The Spiritual Profile of Greater Anchorage*, ALASKA PAC. UNIV., Nov. 2008, at 1, 2; see also, Angayuqap Oscar Kawagley, *An Alaska Native’s Theory on Events Leading to Spiritual Loss of Life*, ALASKA NATIVE KNOWLEDGE NETWORK, <http://ankn.uaf.edu/Curriculum/Articles/OscarKawagley/AKNativeTheory.html> (last visited Mar. 29, 2022) (discussing the impact of outside influences on Native religions in Alaska).

7. See Natanson, *supra* note 3 (detailing the debate over the Kenai Peninsula Borough Assembly’s use of religious invocations to begin meetings).

8. ALASKA CONST. art. I, § 4.

9. See Natanson, *supra* note 3 (detailing the debate over the Kenai Peninsula Borough Assembly’s use of religious invocations to begin meetings).

concerned citizens and local governments have asked the state courts to weigh in on what “counts” as the establishment of religion:¹⁰ is it the preference for one religion, or set of religions, over another? Or is it the intertwining of government and religion in any degree?¹¹ Moreover, is there reason to think that one reading of the state establishment clause lends itself to better *policy-making* than the other? If a certain reading leads to better policy, what priorities should govern the policy choices between protecting religion and preventing favoritism?

Among the considerations Alaskans face are the importance of religion to the state’s cultural diversity and the threat of undue influence on the government if religion takes an elevated position.¹² These potentially warring priorities underlie the factual and legal scenes, giving rise to the live debate sparked by the Pastafarians and calling on Alaska to revisit establishment clause jurisprudence that has remained largely unchanged since the 1980s.

In *Hunt v. Kenai Peninsula Borough*, the Superior Court¹³ at Anchorage relied on U.S. Supreme Court precedents¹⁴ to find that demonstrating preference for one religion over another violates the establishment clause.¹⁵ There, the court reviewed a challenge to the Kenai Peninsula Borough Assembly’s invocation policy adopted in reaction to controversial invocations at town council meetings, including one that ended with the words “Hail Satan.”¹⁶ The policy required that the invocation speaker be an “authorized leader” of a religious association “with an established presence in the Kenai Peninsula Borough” or a

10. See *id.* (discussing the litigation arising over policies constraining religious invocations).

11. *Hunt v. Kenai Borough Peninsula*, No. 3AN-16-10652 CI, at 3 (Alaska Super. Ct. Oct. 9, 2018) (on file with Alaska ACLU), <https://www.acluak.org/sites/default/files/3an-16-10652ci.pdf>.

12. See Natanson, *supra* note 3 (detailing the Pastafarian position that religious practices like legislative prayer could threaten diversity of ideas. The Pastafarians argue that the invocation of religion at the opening of a government meetings creates this threat by showing favoritism to a certain religion and alienating non-religious individuals.).

13. The Alaska Superior Courts are trial courts of general jurisdiction. *Court System Information*, ALASKA CT. SYS., <http://www.courts.alaska.gov/main/ctinfo.htm#superior> (last visited Apr. 16, 2022).

14. *Hunt*, No. 3AN-16-10652 CI, at 9–14 (first citing *Marsh v. Chambers*, 463 US 783 (1983); and then *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014)). While these precedents focus narrowly on the question of legislative prayer, Alaskan precedents construing the state establishment clause in other contexts are also worth considering. See Steven Keith Green, Note, *Freedom of Religion in Alaska: Interpreting the Alaska Constitution*, 5 ALASKA L. REV. 237 (1988) (reviewing religious freedom caselaw in Alaska).

15. See *Hunt*, No. 3AN-16-10652 CI, at 2.

16. *Id.* at 3.

chaplain serving at one of the “fire departments, law enforcement agencies, hospitals, or other similar organizations in the borough.”¹⁷ The policy denied individuals not qualifying under those standards the opportunity to give the town meeting invocation.¹⁸ The court found that, despite the history of legislative prayer in Alaska and across the United States, the invocation policy violated the establishment clause by excluding minority faiths from the invocation practice.¹⁹ The court took a firm stance, stating that the establishment clause “not only prohibit[s] the establishment of a state religion, it prohibits laws that act as a step towards the establishment of a state religion.”²⁰

However, the court’s decision failed to fully answer whether the establishment clause requires that *non-religious* individuals be given equal opportunity to offer the invocation.²¹ Unfortunately for non-believers, the court only specified that the invocation tradition was intended to promote unity, so that “people of many faiths [or beliefs] may be united in a community of tolerance and devotion.”²² For some, that line simply was not strong enough.

In September 2019, Barrett Fletcher raised the establishment issue once again in Kenai Peninsula Borough.²³ Fletcher, wearing a colander as a hat, opened the town meeting by invoking “the true inebriated creator of the universe, . . . the Great Flying Spaghetti Monster.”²⁴ Meeting attendees chuckled; one turned his back.²⁵ In his invocation, Fletcher noted that “a few of the Assembly members seem to feel that they can’t do [the Assembly’s work] without being overseen by a higher authority.”²⁶ He offered the Flying Spaghetti Monster, the Pastafarian god, as that authority.²⁷ Fletcher ended his invocation with a resounding, “Ramen,” and returned to his seat, colander still in place atop his head.²⁸

While Fletcher claimed to be “there to defend the First Amendment,”

17. *Id.* at 4.

18. *Id.* at 16.

19. *Id.* at 16–17.

20. *Id.* at 7.

21. Charles Truslow & Craig Jones, Comment, *Hunt v. Kenai Peninsula Borough: The Search for Clarity in Legislative Prayer Speaker Selection*, 36 ALASKA L. REV. 119, 129 (2019).

22. *Hunt*, No. 3AN-16-10652 CI at 17.

23. See Natanson, *supra* note 3 (“Fletcher’s delivery of the Pastafarian invocation Tuesday marked the culmination of a years-long legal battle over the Kenai Peninsula Borough Assembly’s habit of holding religious invocations before its meetings.”).

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

his prayer raises perhaps more interesting questions about the *state* establishment clause and the role of religion in state and local government.²⁹ According to Zeba Huq, a Stanford Law School lecturer, the Alaska Superior Court's decision in *Hunt* reflects a position that allows some "mix[ing] of religion with government--as long as all religions are treated equally."³⁰ But Pastafarianism's founding explicitly rejects the mixing of religion and government, as the Church was created to mock organized belief and highlight establishment problems.³¹ Fletcher himself founded the First Lower Peninsula Congregation of Pastafarians in response to the Borough's invocation policy.³² Rather than supporting the Superior Court's vision of a tolerant community, Fletcher's church would eliminate the invocation practice altogether.³³ His stance thus begs the question for the small Alaskan town, and for the state as a whole: what *should* the establishment clause require?

In short, despite the Superior Court's 2018 holding, the establishment debate remains alive and well in Alaska.³⁴ The Pastafarians represent one side of the debate, aligning themselves with the view that "no law . . . respecting the establishment of religion" really means *no* law.³⁵ The Pastafarians, in other words, argue for strict separation, preventing the government from considering religion and religion from influencing the government. The underlying concern for the Pastafarians is that government support of religious institutions alienates non-religious individuals and demonstrates a preference for established or recognized religions.³⁶ On the other side, concerns for Alaska's religious and cultural diversity call for the state to support religion generally, giving it legitimacy through practices like legislative prayer.³⁷ More than seventeen defined faiths are represented in Alaska, including those unique to Alaska Natives, and those faiths contribute to the sociocultural landscape that makes Alaska unique.³⁸ At least for now, however, there

29. *Id.*

30. *Id.* (quoting Zeba Huq on the meaning of *Hunt v. Kenai Borough Peninsula*, No. 3AN-16-10652 CI (Alaska Super. Ct. Oct. 9, 2018) (on file with Alaska ACLU), <https://www.acluak.org/sites/default/files/3an-16-10652ci.pdf>).

31. Pat Bauer, *Flying Spaghetti Monster: Deity of Pastafarian Social Movement*, BRITANNICA (Jan. 31, 2018), <https://www.britannica.com/topic/Flying-Spaghetti-Monster>.

32. Natanson, *supra* note 3.

33. *See id.* (explaining Fletcher's offense at "having God associated with [his] local politics").

34. Truslow & Jones, *supra* note 21.

35. Bauer, *supra* note 31.

36. *See id.*

37. Natanson, *supra* note 3.

38. *See, e.g.,* Kawagley, *supra* note 6 (discussing the impact of outside influences on Native religions in Alaska).

appears to be little consensus on the best course of action for the state.

III. INTERPRETATIVE HISTORY OF ALASKA'S ESTABLISHMENT CLAUSE

The Alaska Constitution contains three relevant sections that define, limit, and contextualize the establishment of religion in the state. First, the establishment clause itself appears in article I, section 4, reading, “[n]o law shall be made respecting the establishment of religion, or prohibiting the free exercise thereof.”³⁹ Next, article VII, section 1 imposes further limits on the role of religion in municipal capacities, stating that, “[s]chools and institutions so established [by general law] shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.”⁴⁰ Lastly, article IX, section 6 reads, “[n]o tax shall be levied, or appropriation of money made, or public property transferred, nor shall the public credit be used, except for a public purpose.”⁴¹ On their face, these provisions seem to eliminate any room for the mixing of religion and government. However, the tradition of legislative prayer, the potentially broad meaning of public purpose, and the diversity of religious background in Alaska⁴² all suggest that religion may still have an important place in the functions of Alaskan government.

Three sources give particularly good insight into the state of the Alaskan establishment clause jurisprudence before the *Hunt* decision. First, Steven Keith Green’s note, *Freedom of Religion in Alaska: Interpreting the Alaska Constitution*, provides an overview of Alaska’s religion clauses generally, summarizing holdings and implications that remain substantively similar today:⁴³ outside of the realm of legislative prayer addressed in *Hunt*, there has been little to no movement in the courts on Alaska’s establishment clause despite the changing religious landscape.⁴⁴ Second and third, *Boujour v. Boujour*⁴⁵ and *Sheldon Jackson College v. State*⁴⁶ form the basis of Alaska’s establishment clause caselaw, laying the foundation for today’s debates.

39. ALASKA CONST. art. I, § 4.

40. *Id.* art. VII, § 1.

41. *Id.* art. IX, § 6.

42. *Adults in Alaska: Religious Composition of Adults in Alaska*, PEW RSCH. CTR., <https://www.pewforum.org/religious-landscape-study/state/alaska/> (last visited Mar. 29, 2022).

43. Green, *supra* note 14.

44. Natanson, *supra* note 3.

45. 592 P.2d 1233 (Alaska 1979).

46. 599 P.2d 127 (Alaska 1979).

A. Green's Freedom of Religion in Alaska: Interpreting the Alaska Constitution

Steven Keith Green's 1988 note provides a helpful overview of the Alaskan religion clauses.⁴⁷ He argues that, "[g]enerally speaking, the Alaska Constitution provides a high degree of protection for the practice of religious beliefs."⁴⁸ In introducing the establishment clause cases specifically, Green notes that the three constitutional provisions listed above combine to create a presumption that no public funds can be used for any religious purpose.⁴⁹ However, the text of those clauses fail to present a clear picture of what "public purpose," "direct benefit," and even "establishment" entail.⁵⁰ As test cases arose quickly to challenge everything from hospital funding to personal religious preference, Alaska's early caselaw began to clarify these points.⁵¹

Green first details the most important state court decisions addressing freedom of religion.⁵² Those cases range in subject from school buses for non-public schools, to leases for parochially-funded hospital buildings, to tuition assistance programs for higher education, to custody disputes considering the child's religious needs.⁵³ Green helpfully pulls rules from each case. From one, he reports that the Alaska court rejected the federal caselaw on provision of secular goods to religious schools, holding instead that such general assistance "did in fact 'aid, encourage, sustain and support' . . . parochial education."⁵⁴ From another, he notes that the court reversed course, finding that a lease of a government-owned hospital to a Catholic charity satisfied the public purpose clause's requirements.⁵⁵ Green then traces the development of the jurisprudence through *Sheldon Jackson College v. State*⁵⁶ and *Bonjour v. Bonjour*,⁵⁷ two influential decisions that will be discussed in detail below.⁵⁸

After reviewing the cases, Green concludes that "it is clear that the court considers the establishment clause to prohibit more than the establishment of a state religion or discrimination among religious

47. Green, *supra* note 14.

48. *Id.* at 238.

49. *Id.* at 239-41, 249-50.

50. *See id.* at 250 (discussing the Alaska Supreme Court's difficulty interpreting "public purpose" and "direct benefit").

51. *See id.* at 250-51 (reviewing early Alaska establishment clause caselaw).

52. *See id.*

53. *See id.* (detailing the Alaska Supreme Court's jurisprudence on the "public purpose" and "direct benefit" clauses).

54. *Id.* at 250 (quoting *Matthews v. Quinton*, 362 P.2d 932, 941 (Alaska 1961)).

55. *Id.* (discussing *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963)).

56. 599 P.2d 127 (Alaska 1979).

57. 592 P.2d 1233 (Alaska 1979).

58. *See infra* Section III.B.

sects.”⁵⁹ Rather, “the establishment clause stands independently as a barrier to government action which favors religion over non-religion.”⁶⁰ Green finds the court’s statement conclusive, leaving no room for “supporting or endorsing” religion generally or in government.⁶¹ He professes that Alaska’s jurisprudence “is what Thomas Jefferson intended,” letting religion grow or recede on its own, neither influencing the government, nor being influenced by the government.⁶² In other words, Green would likely agree with the Pastafarians that Alaska should hold tightly to its strong establishment clause jurisprudence, limiting practices like the public funding of religious institutions and legislative prayer.

However, Green’s review provides no concrete boundaries for the Alaskan establishment clause, and his conclusion does not address the remaining questions in interpreting the freedom of religion in Alaska: What is the relationship between the federal and state establishment clause doctrines?⁶³ Where exactly is the line between public purpose funding and prohibited support for religion?⁶⁴ Moreover, and most importantly for today’s debate, none of these cases address religious influences in state and local government, focusing instead on support and endorsement from government to religion. Should the establishment clause be read to prohibit any interweaving of religion and government, no matter which direction the influence flows?⁶⁵ Specifically, what limits are there on local legislative prayer practices, and what do those limits mean for religious institutions to participate in government? So far, the Alaska Supreme Court has not answered these questions. While Green is probably right to conclude that the “separation of church and state [is] alive and well in Alaska,” thirty years later, these unanswered questions deserve revisiting.⁶⁶

B. Caselaw: *Bonjour, Sheldon Jackson College, and Other Cases*

Two cases from 1979 play pivotal roles in expounding the “No law”

59. Green, *supra* note 14, at 259.

60. *Id.* at 260 (quoting *Bonjour v. Bonjour*, 592 P.2d 1233, 1241 (Alaska 1979)).

61. *Id.*

62. *Id.* at 260–61.

63. *See generally id.* (analyzing state caselaw alongside federal developments in establishment clause jurisprudence).

64. *Compare* *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961) (holding that a statute permitting incidental benefits to nonpublic school students violates the public purpose provision), *with* *Lien v. City of Ketchikan*, 383 P.2d 721 (Alaska 1963) (holding that leasing a hospital built with federal, state, and local funds to a religious corporation did not violate the public purpose provision).

65. *See* Green, *supra* note 14, at 249–61.

66. *See id.* at 261.

provision of article I, section 4 and therefore merit further exploration.

First, in *Bonjour v. Bonjour*,⁶⁷ the Alaska Supreme Court evaluated the role of religion in child custody cases, holding that a court could consider only the *expressed* religious needs of a child in adjudicating a custody dispute.⁶⁸ There, the appellant alleged that the trial court's decision to award her ex-husband custody of their son, in part based on the child's religious needs, violated the free exercise and establishment clauses of the Alaska Constitution.⁶⁹ The trial court had relied on a state statute which included "the physical, emotional, mental, religious and social needs of the child" as factors for determining the best interests of a child.⁷⁰ In doing so, the trial court explicitly considered the boy's religious needs, citing the father's participation in "an organized religious community" as a positive, and the mother's mere "passive interest" in her son's religious development as a neutral.⁷¹

The Supreme Court of Alaska undertook a careful analysis of the line-drawing problem that the custody statute presented.⁷² On one hand, the court noted that "to hold that a court may not consider religious factors under any circumstances would blind courts to important elements bearing on the best interests of the child."⁷³ To avoid that blindness, the court declared that "it [is] constitutionally permissible for a court to take account of the actual religious needs of a child in awarding custody to one parent or another."⁷⁴ On the other hand, the court simultaneously worried that inserting judicial assessment into the value of religion to a particular child approached state preference for religion more generally.⁷⁵ The court therefore carefully limited its ruling, stating that judicial consideration of a child's religious needs must be "properly limited to an examination of a child's *actual* religious needs."⁷⁶ Actual religious needs, according to the court, must be expressed preferences of "the mature child," rather than presumed religious values upheld by judges.⁷⁷ The supreme court thus concluded that the trial court improperly focused on the religious affiliation of the parents without a finding of the child's "actual religious needs."⁷⁸ *Bonjour* therefore

67. 592 P.2d 1233 (Alaska 1979).

68. *Id.* at 1244.

69. *Id.* at 1235.

70. *Id.* at 1236 (citing ALASKA STAT. § 09.55.205 (2021)).

71. *Id.* at 1237.

72. *See id.* at 1238–40.

73. *Id.* at 1238.

74. *Id.* at 1239.

75. *Id.* at 1242–43.

76. *Id.* at 1242 (emphasis added).

77. *Id.* at 1243.

78. *Id.* at 1244.

restricted Alaska courts' judgment because of a concern for the mere appearance of establishing religious preferences.⁷⁹

The court's analysis in *Bonjour* reveals the potential complexities of a state establishment clause, even one as facially restrictive as Alaska's. Most importantly, despite relying on a free-exercise-like justification for allowing a child to express their religious preferences and needs to the court, and for allowing the court to take those statements into consideration, the extensive discussion demonstrates the court's recognition that religion can serve a type of public good—here, through the courts' consideration of individual religious preference—without being “established” by the state.⁸⁰ Outside of the context of schools and taxes, the establishment clause in Alaska clearly does *not* mean that the state government cannot consider religion in its legislative and judicial duties.⁸¹ To the contrary, so long as the court does not pass judgment on the value of a particular religion, it can—and even should—consider the role of religion in individuals' lives, both to their benefit and detriment.⁸² This distinction relaxes the state's view on religion, allowing constitutional thinking, individual liberties, and policy-making to intermingle, stepping back from the absolute terms of Alaska's earlier establishment clause philosophy.⁸³

Second, in *Sheldon Jackson College v. State*,⁸⁴ the Alaska Supreme Court held that tuition grants to private educational institutions must be neutrally granted, secular in purpose, of reasonable magnitude, and not a guise for channeling direct aid to those institutions.⁸⁵ Notably, the court relied on the minutes from the Alaska Constitutional Convention of 1956 to indicate the purpose of the direct benefits provision.⁸⁶ According to the court, at the Convention, the provision was included in part to ensure “separation of church and state” without “executive or judicial inquiry into the sectarian affiliation of particular schools,” thus allowing for

79. *See id.* (warning that an interpretation of the statute allowing a judge to pass judgment on “which . . . religious beliefs are . . . more favorable to the welfare of the child” would take the courts “too far down the path of religious philosophy”).

80. *See id.* at 1240–44 (acknowledging that where a child expressed religious preferences, a court may take those into consideration in custody disputes).

81. *See id.* (recognizing that a judge may consider religious preference in certain circumstances).

82. *See id.* (same).

83. *See generally id.* (leaving room for the consideration of religion in a custody case within delineated boundaries).

84. 599 P.2d 127 (Alaska 1979).

85. *Id.* at 130–31.

86. *Id.* at 129 (citing ALASKA CONST. art. VII, § 1 (“No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.”)).

greater objectivity.⁸⁷ Meanwhile, the purposeful *exclusion* of an *indirect* benefits prohibition reflected the state's commitment to "providing for the health and welfare" of students both inside and outside of the public school system.⁸⁸

The question for the court, given this apparent distinction between types of benefits, was then to determine which benefits crossed the line into direct aid for private schools and therefore represented potential violations of the direct benefits clause *and* the establishment clause.⁸⁹ The court announced a four-part test to evaluate the directness of a government benefit.⁹⁰ According to the court, to be constitutional, a benefit to a private school must be (1) neutrally provided without reference to the school's status and (2) support "essentially secular educational functions."⁹¹ The court must also consider (3) the "magnitude of the benefit" and (4) whether direct aid might be disguised by channeling the benefits through an intermediary.⁹²

In laying out this test, the court cited a variety of sources, all from *outside* the state of Alaska. From the U.S. Constitution⁹³ to the Missouri Constitution,⁹⁴ and from U.S. Supreme Court cases⁹⁵ to a constitutional law treatise,⁹⁶ the court pulled from a wide array of sources, searching for authorities to transform the seemingly "metaphysical" distinction between direct and indirect benefits into a precise one.⁹⁷ While this mishmash of authorities combines to create a fairly clean-cut and easily applicable test, it fails to incorporate the uniqueness of the Alaska Constitution in its discussion.⁹⁸ *Sheldon Jackson College* may be the appropriate test for article VII, section 1 challenges in Alaska, but it falls short of fully addressing the principles behind the constitutional structure, the policy considerations underlying the reinforced establishment clause, or the potential for different interpretations of the

87. *Id.*

88. *Id.*

89. *Id.* at 129-30.

90. *Id.* at 130.

91. *Id.*

92. *Id.* at 130-31.

93. *Id.* at 129 n.13 (citing U.S. CONST. amend. I).

94. *Id.* at 129 n.12 (citing MO. CONST. art. IX, § 8).

95. *Id.* at 129 n.14 (citing first *Wolman v. Walter*, 433 U.S. 229, 250, 254 (1977); then *Meek v. Pittenger*, 421 U.S. 349, 364-65 (1975); and then *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 783 n.39 (1973)).

96. *Id.* at 130 n.15 (citing LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 840 (1978)).

97. *Id.* at 129-30.

98. *See id.* at 129 (noting that "the Alaska Constitution is apparently unique in its express ban only on 'direct' benefits," but failing to account for that uniqueness in shaping its test).

clauses, especially as read together. *Sheldon Jackson College* is, in other words, merely a starting point: it is limited to school funding, makes no reference to religious practices like legislative prayer, and still involves judicial discretion in evaluating the place of religion in Alaskan communities.

A few other notable cases implicate the overlap of religion and law in Alaska. For example, in *Frank v. State*,⁹⁹ the Alaska Supreme Court addressed the impact of hunting regulations on the religious killing of a moose. The court concluded that the law interfered with the Alaska Native Athabascan people's free exercise of religion.¹⁰⁰ But for the purposes of this discussion, the court's most relevant statement was that providing accommodations in generally applicable laws for religious practices *did not* violate the establishment clause.¹⁰¹ Instead, such accommodation "reflects nothing more than the governmental obligation of neutrality" towards religion—no religion can be treated preferentially, but religion should also not be overly burdened by state law.¹⁰² *Frank* therefore clarifies that Alaska's establishment obligations do not require *indifference* to religion, but rather allow the government to carve out exceptions where necessary to protect the free exercise of religion, without violating the establishment clause.

However, more recently, in *Lineker v. State*,¹⁰³ the Alaska Court of Appeals indicated that to qualify for such an accommodation, individuals must demonstrate a sincerely-held belief.¹⁰⁴ The courts, therefore, in balancing impediments to free exercise against worries about favoring religion, cannot—and do not—turn a blind eye to individual religious practice¹⁰⁵ or the benefits that religious charity can provide.¹⁰⁶ In other words, such balancing requires at least some judicial consideration of religion on a case-by-case basis.

Importantly, although *Bonjour* claims to align Alaska's interpretation with the federal *Lemon* test,¹⁰⁷ the incorporation of authorities from other

99. 604 P.2d 1068 (Alaska 1979).

100. *Id.* at 1073.

101. *Id.* at 1074–75

102. *Id.*

103. Nos. A-8957, A-8967, 2010 WL 200014 (Alaska Ct. App. Jan. 20, 2010). This is an unpublished opinion, offering a useful analogy but not creating binding precedent.

104. *See id.* at *3 (Bolger, J. concurring) ("[A] personal philosophy is not equivalent to a religion.").

105. *Bonjour v. Bonjour*, 592 P.2d 1233, 1242 (Alaska 1979).

106. *Sheldon Jackson College v. State*, 599 P.2d 127, 130–31 (Alaska 1979).

107. *Bonjour*, 592 P.2d at 1242 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that a statute "must have a secular legislative purpose," have a "principal or primary effect that neither advances nor inhibits religion," and may not "foster an excessive government entanglement with religion").

states in *Sheldon Jackson College* to generate a new, four-factor analysis¹⁰⁸ and the additional provisions of the Alaska Constitution combine to create a unique recipe for state establishment analysis. Thus, by the end of 1979, Alaska had developed a perspective on the establishment clause that was deeply contextual, in contrast to the more formulaic federal approach.¹⁰⁹ First, the establishment clause could not be read independently of the free exercise concerns reflected in article I, section 4 of the Alaska Constitution.¹¹⁰ Next, external limits in the state constitution, like the direct benefits clause, further constrained the government's ability to support religious endeavors.¹¹¹ And lastly, cultural concerns unique to Alaska's religious diversity demanded that the courts be sensitive to the needs of both individuals and whole communities.¹¹²

These articles and cases shed light on key background for *Hunt v. Kenai Peninsula Borough*. Despite the Superior Court's declaration that the Alaska establishment clause holdings follow their federal counterparts,¹¹³ the Alaska cases demonstrate that the state actually has a unique and complicated jurisprudence surrounding the application of its religion clauses to state statutes and controversies.¹¹⁴ The *Hunt* court therefore oversimplifies the establishment question by narrowing the debate to legislative prayer and hewing exclusively to federal precedent.¹¹⁵ State precedents, by contrast, offer a complex picture of extreme judicial caution towards monetary benefits, alongside recognition of long-standing tradition and respect for the potential good religion can do as a public service.¹¹⁶ *Hunt* fails to fully investigate these concerns in the

108. *Sheldon Jackson College*, 599 P.2d at 130-31.

109. See *Bonjour*, 592 P.2d at 1242 (discussing the relevant factual findings a court can consider in analyzing religious in child custody cases); *Sheldon Jackson College*, 599 P.2d at 130 (identifying the relevant facts to consider in an establishment clause challenge).

110. See *Bonjour*, 592 P.2d at 1242 (noting that examination of a child's actual religious needs can further the best interests of the child).

111. See *Sheldon Jackson College*, 599 P.2d at 130 (analyzing whether public finding for private schools violates the state constitution).

112. See generally *Frank v. State*, 604 P.2d 1068 (Alaska 1979) (discussing the need to consider religious traditions in carving out exceptions to hunting regulations).

113. *Hunt v. Kenai Borough Peninsula*, No. 3AN-16-10652 CI, at 3 (Alaska Super. Ct. Oct. 9, 2018) (on file with Alaska ACLU), <https://www.acluak.org/sites/default/files/3an-16-10652ci.pdf>.

114. *Hunt* reads *Bonjour* as purely aligning the state establishment clause with the federal one, *id.*, but as the rest of the courts' decisions confirm, Alaska's position on religious freedom is much more complicated than simply following federal developments.

115. See *id.* at 2, 8-14 (citing federal legislative prayer cases).

116. See *Green*, *supra* note 14, at 249-51 (discussing the evolution of state court

legislative prayer context.

Therefore, the current debate, ignited by colander-sporting Barrett Fletcher, leaves open questions for Alaska's religious-liberties trajectory. Is it appropriate for local governments to incorporate religion into their daily practice in any capacity? If so, when does traditional accommodation slip into endorsement? How significant must a public purpose be to overcome the anti-establishment bent of the Alaska Constitution? And, perhaps most importantly, what is the best policy for dealing with religious concerns, given the competing incentives underlying over half a century of state decisions?

IV. ANALYZING ALASKA'S ESTABLISHMENT CLAUSE THROUGH EARLY CONSTITUTIONAL PERSPECTIVES

To answer these questions and point Alaska in the right direction toward both protecting religious freedom and recognizing the importance of religion in Alaskan society, this Comment suggests that legislators, town councils, and attorneys look to the early constitutional debates in other states to craft Alaska's solution. Three distinct categories of debate merit discussion. First, Alaska finds itself embroiled in conflicts most often when religious actions serve municipal purposes—a tension the Framers also recognized.¹¹⁷ Second, religious traditions run deep in Alaska, both in the cultural and political landscape, a position parallel to nineteenth century Massachusetts.¹¹⁸ Lastly, the debate stirred up by the Pastafarians raises the specter of religious entanglement and oppression, a core issue concerning early Virginians.¹¹⁹

Decades after the last Alaska Supreme Court establishment clause case, Alaska's establishment clause debate reopened over legislative prayer policies, representing the overlap of municipal and religious purposes.¹²⁰ Even the trial court in *Hunt* noted that the tradition of legislative prayer could serve to unite and refocus a community at the

jurisprudence on the “direct benefits” and “public purpose” clauses); see also *Bonjour v. Bonjour*, 592 P.2d 1233, 1242 (Alaska 1979) (recognizing that religion can be beneficial to a child).

117. See, e.g., Natanson, *supra* note 3 (highlighting the role of religious invocation in a local governing body).

118. See, e.g., *Frank v. State*, 604 P.2d 1068 (Alaska 1979) (discussing how state hunting regulations restricted the cultural and religious traditions of the Alaskan Athabascans).

119. Compare Natanson, *supra* note 3 (discussing the challenges to the role of religion in local government), with James Madison, DETACHED MEMORANDA 144 (1817) (compiled for Jeff Powell, *Constitutional Law II*, LAW 518) (discussing the threat of casual interweaving of religion and government).

120. See Natanson, *supra* note 3 (detailing the debate over legislative prayer practices).

beginning of a government meeting.¹²¹ As such, legislative prayer serves a kind of public purpose; more than simply offering a pulpit for proselytizing, legislative prayer involves community members in the business of government and exposes the attendees to the convictions of their neighbors.¹²² Importantly, legislative prayer is often considered an insignificant intrusion of religion on government, at least compared to historic practices.¹²³ The prayer involves no state expenditure, requires nothing from the audience, and represents only a short overlap of religion and government. In Massachusetts, by contrast, the first state constitution provided that the state legislature and town governments could go so far as to provide for public religious (usually Protestant) teachers via local taxes.¹²⁴ The Massachusetts courts then took on a litany of cases, balancing the recognized public good of religion against the potential for discrimination or impediments to free exercise.¹²⁵

The Massachusetts cases show that, whether in a public meeting house or a legislative prayer, in small communities, religion and local government must functionally coexist.¹²⁶ Importantly, religion can be a powerful unifying force, especially in local government.¹²⁷ It fosters community, collective action, and camaraderie when people understand

121. *Hunt v. Kenai Borough Peninsula*, No. 3AN-16-10652 CI, at 3 (Alaska Super. Ct. Oct. 9, 2018) (on file with Alaska ACLU), <https://www.acluak.org/sites/default/files/3an-16-10652ci.pdf>.

122. See also Truslow & Jones, *supra* note 21, at 129 (quoting *Hunt*, No. 3AN-16-10652 CI, at 17) (“The *Hunt* court accurately tracked the language and spirit of *Greece* by citing the purpose of legislative prayer to be one of uniting people of many faiths in “a community of tolerance and devotion.”).

123. See *id.* at 124–25 (discussing legislative prayer’s long tradition in many states and in Congress as evidence of its minimal impact on establishment clause concerns).

124. *Abrams v. Howe*, 14 Mass. 340, 346 (1817) (citing MASS. CONST. art. III).

125. Most of the early Massachusetts cases fell into two categories: cases about tax exemptions for religious dissenters and cases about government use of church-owned land. See, e.g., *Barnes v. Inhabitants of First Parish in Falmouth*, 6 Mass. 401, 404–05 (Mass. 1810). But see *First Parish in Medford v. Inhabitants of Medford*, 38 Mass. 199 (Mass. 1838). Both categories, however, teach the same basic lesson: while Massachusetts could not force participation in a particular religion, it could certainly choose which ones to support and how to do so. Perhaps this tolerance for state influence was a product of the times (these cases date from 1810 through 1838), but that does not undermine its value in showing the potential breadth of the establishment clause. See, e.g., *Barnes*, 6 Mass. at 404–05 (upholding a state tax where proceeds went to religious ministers).

126. See, e.g., *Inhabitants of First Parish in Medford v. Pratt*, 21 Mass. 222, 234–35 (1826) (“In most of our towns, from time immemorial, meetinghouses have been built as well for the accommodation of the inhabitants at town meetings, as for public worship.”).

127. See *Barnes*, 6 Mass. at 404, 405–06 (discussing the role of religion in “the security and happiness of the citizens” of a free civil government).

their fellow citizens' motivations.¹²⁸ By allowing religion to play a continuing role in town meetings, Alaskan communities like the Kenai Peninsula Borough might not only more efficiently achieve municipal purposes, pooling the resources of various backgrounds and cultures, but also foster greater understanding and tolerance. If at every town meeting the council invites a religious invocation, for all of its divine, cultural, and communicative purposes, community members might come together both to solve problems and to learn from one another. Such is, at least in part, the model of early Massachusetts.

There is, however, a cautionary tale to be told as well. In Virginia, both the state constitution and the cases that followed reveal a deep-seated antagonism towards any intermingling of church and state.¹²⁹ Virginia approached religion as a private matter – between a man and his God, as well as between a church and its property. Virginia law converted church lands into private deeds, rather than state-sponsored benefits to the churches, cleaving the Anglican church from the newly independent state government.¹³⁰

As the Virginian worries highlight, the risk of a rosy-glassed view of religion and government is that favoritism, or even mere majority, may lead one religious view to trounce all others.¹³¹ In allowing even as innocuous a tradition as legislative prayer, Alaska might inadvertently place its thumb on the scale of mainstream religions, and the slippery slope from that point lands the state and local governments with de facto establishment of one sect, group, or family of religions. To follow the Virginia example, then, Alaska might dispense with tradition, favoring safety instead, and close the city hall doors firmly on religion.

But despite Alaska's strongly worded constitution, the state remains steeped in religious tradition. The constitutional convention, held nearly

128. See *id.* (discussing the limitations of the state alone in "oblig[ing] the performance" of moral duties).

129. See, e.g., *Turpin v. Lockett*, 10 Va. (6 Call.) 113 (1804). Virginia sets an example for strong separation and a reading of the establishment clause that leaves little room for blurring the edges of religion's designated box. See, e.g., Act for Establishing Religious Freedom (1785) (as compiled for Jeff Powell, *Constitutional Law II*, LAW 518).

130. See, e.g., *Turpin*, 10 Va. (6 Call.) at 128 (discussing the inheritability of glebe lands between the established church and private individuals).

131. See Madison, *supra* note 119 (discussing the dangers of allowing churches to accumulate property, of designating a chaplain in Congress, and of allowing chaplains in the army and navy as evidence of the encroachment of religion on government and Madison's fears that these institutions would either give undue power to religion generally or establish a preferred religion).

200 years after its Massachusetts¹³² and Virginian counterparts,¹³³ opened with a legislative prayer.¹³⁴ That tradition, carried on today by at least the Kenai Peninsula Borough, demonstrates two key things. First, governmental recognition of the role of religion is baked into the daily functions of Alaskan government, even if it is formally separated by the constitution and the law.¹³⁵ Second, the tradition must serve some purpose because for over fifty years public servants have continued the practice despite loud and varied objections.¹³⁶ Like Massachusetts, therefore, Alaska cannot divorce itself wholly from religion. Nor should it, if it wants to follow the Massachusetts example. Like the early nineteenth century towns striving to serve both religious and civil purposes, the Alaska Constitution embraces the tension between denying the establishment of religion and recognizing that religious people and religious institutions serve great public purposes. Looking to both Massachusetts and Virginia as examples, the fatal mistake would be for Alaska to ignore the role of religion in everyday life.

Lastly, the impassioned Alaskan dissenters, the Pastafarians, bring to the state the ghosts of James Madison and Thomas Jefferson. More than a political debate framed in local disputes and state governance, the Church of the Flying Spaghetti Monster's sarcastic demonstration evokes again the framers' concerns that *any* intermingling of religion and government represents an affront to both values. Both Madison and Jefferson expressed concerns that pure adherence to democracy or tradition would lead their state down a path of tyranny.¹³⁷ While perhaps

132. The first Massachusetts constitutional convention took place between 1779–1780. *John Adams & the Massachusetts Constitution*, MASS.GOV, <https://www.mass.gov/guides/john-adams-the-massachusetts-constitution#:~:text=became%20more%20urgent-,Massachusetts%20Invents%20the%20Constitutional%20Convention,to%20the%20voters%20for%20approval> (last visited Mar. 29, 2022).

133. The first Virginia constitutional convention took place in 1774. *1776 Constitution of Virginia*, VA. PLACES, <http://www.virginiaplaces.org/government/constitution1776.html> (last visited Mar. 29, 2022).

134. Truslow & Jones, *supra* note 21, at 122–23.

135. See ALASKA CONST. art. I, § 4 (“No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.”).

136. See Natanson, *supra* note 3 (highlighting the practice of legislative prayer in local government).

137. See Madison, *supra* note 119 (discussing the pitfalls of creating corporations to avoid state churches, despite democratic incentives to preserve the churches); Act for Establishing Religious Freedom (1785) at 122 (as compiled for Jeff Powell, *Constitutional Law II*, LAW 518) (“Whereas . . . the impious presumption of legislators and rulers . . . have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible . . . be it enacted . . . that no man shall be compelled to frequent or support any religious worship.”).

he did not put it in quite so clear terms, Barrett Fletcher's worry is the same: his offense at involving religion in government seems rooted in a fear that the end of the partnership between religion and government will be the blindness to new ideas or the silence of dissenters.¹³⁸ The Madison/Jefferson line adds a two-sided context to the current debate: not only may government be negatively influenced by religion, but religion might be eroded by government.¹³⁹ According to the framers, then, the Pastafarians' tongue-in-cheek protests are missing half the argument. To fully understand the policy of a strong establishment clause, states should consider the religion-government relationship to be a two-way street.¹⁴⁰

All told, the early constitutional debates clarify that, at a minimum, ignoring religion is not an option for either Alaska or its local governments. Whether viewing religion as a positive to be protected and promoted like Massachusetts, or a creature of private conscience to be assessed with suspicion in the halls of government like Virginia, no part of the peer-states' early histories suggest that separation should mean blindness.¹⁴¹ In other words, government can neither passively accept religious truths as the guideposts for moral duties nor dismiss religion's definitive impact as the concern of private debate alone.¹⁴² The mere fact that this many cases, this many words, and this many remarkable thinkers have been dedicated to assessing the proper relationship between religion and government should assure today's authorities that their time is not wasted when dedicated to the problem of establishment.

V. CONCLUSION: FOR NOW, AT LEAST, THE PASTAFARIANS ARE RIGHT

The establishment threat facing Alaska today appears to be a

138. See Natanson, *supra* note 3 (highlighting Fletcher's concern about religion playing any role in government).

139. See Madison, *supra* note 119, at 145 (warning that, without a strong sense of religious liberty, Americans risked "giving to Caesar what belongs to God").

140. See *id.* (discussing both the ways in which religion could improperly influence government and those in which government could stain religion).

141. Compare, e.g., Barnes v. Inhabitants of First Parish in Falmouth, 6 Mass. 401, 405 (1810) (discussing the benefits of religion with respect to the "moral duties" of citizens), with Turpin v. Lockett, 10 Va. (6 Call.) 113 (1804) (discussing the effect of the American revolution on the legal status of a church).

142. Compare, e.g., Holbrook v. Holbrook, 18 Mass. 248, 260 (1822) ("To compel a man to attend public worship where he is dissatisfied with the minister or teacher is not likely to be profitable either for instruction or moral improvement."), with Terrett v. Taylor, 13 U.S. 43 (1815) (finding that the constitutionally-required free exercise of religion did not permit the state to divest churches of their rightful property).

movement toward the over-inclusion of religion in government. Therefore, for now, the Pastafarians are right. If the Kenai Peninsula Borough's invocation policy is any representation of overall trends in the state, the government has clearly recognized the potential good religion can do for the public. However, the local government has also shown its propensity to exclude small or controversial religions.¹⁴³ Preventing that instinct from growing any further appears to be the very purpose of Alaska's establishment clause.

Therefore, Alaska should look to Virginia, Madison, and Jefferson to avoid allowing religion to overstep its bounds and seep into government. The Virginian example would not require Alaska to ignore religion or devalue it, but rather would prevent the biases of leaders from disadvantaging Alaskan citizens. In fact, by restricting legislative room for religious preference, Alaska might better protect the religious and cultural diversity that it boasts. By disallowing religiously-based regulations and qualifications, Alaska might foster greater discussion and debate among citizens, and ensure that the religious persuasions of leaders do not stamp out the value of the minority.

However, Alaska should be careful not to follow Fletcher and the Pastafarians too far down the trail towards total separation of church and state. Even the early constitutional cases from Virginia still demand a respect for religion and a recognition of its societal significance.¹⁴⁴ If Alaska goes *too* far towards devaluing religion, it risks losing some of its cultural heritage and diversity. Even the tradition of legislative prayer, properly practiced, can expose citizens and communities to new ideas and cultures otherwise pushed to the outskirts. Therefore, while the Pastafarians are right to point out the dangers of the current impulses in Alaskan local government, their suggestion of total, unequivocal separation has costs of its own.

143. See *Hunt v. Kenai Borough Peninsula*, No. 3AN-16-10652 CI, at 3 (Alaska Super. Ct. Oct. 9, 2018) (on file with Alaska ACLU), <https://www.acluak.org/sites/default/files/3an-16-10652ci.pdf> (discussing how the Borough's invocation policy excluded minority faiths).

144. See *supra* Part IV.