FREEDOM OF RELIGION IN ALASKA: INTERPRETING THE ALASKA CONSTITUTION

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I. INTRODUCTION

Travelers who spend any time in Dillingham, a fishing village on Alaska's southwest coast, notice the large number of churches in the small community. Several churches dot the "downtown" area and the roads leading out of town. In addition to Russian Orthodox, Catholic, and Baptist churches, Dillingham boasts congregations of Moravians, Seventh-Day Adventists, Jehovah's Witnesses, Mormons, Bahias, as well as several pentecostal groups.[1] The town, however, lacks branches of the more mainline denominations, such as Methodists, Presbyterians, Lutherans, Congregationalists, or Episcopalians. As a result, the Baptist congregation serves as the town's only mainline Protestant church and, by default, as its most liberal.

While the situation in Dillingham is hardly representative of church affiliation in Alaska, it is indicative of the religious diversity that exists throughout the state. If diversity in belief and practice is a fair indicator of the extent of religious liberty that exists under a particular government, Alaskans have much to be thankful for. James Madison, the author of the first amendment to the United States Constitution,[2] would be proud, for, as he maintained, diversity of religious

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1. While Native religion continues to exist in Alaska, it is most commonly found in conjunction with Moravian and Russian Orthodox beliefs. For a general discussion on the resiliency of Native American beliefs within white churches, see H. BOWDEN, AMERICAN INDIANS AND CHRISTIAN MISSIONS, 207-20 (1981), and C. STARKLOFF, THE PEOPLE OF THE CENTER: AMERICAN INDIAN RELIGION AND CHRISTIANITY (1974).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

belief not only ensures the liberty to believe, but also serves as the basis for all civil rights.[3]

Are religious beliefs and practices protected sufficiently in Alaska? Is the freedom to believe or not believe "protected absolutely" as the Alaska Supreme Court has asserted?[4] Are Alaskans provided any greater protection under the state constitution than under the federal Constitution, or must they rely on the Bill of Rights for the preservation of what Madison considered to be our most important right?[5] To what extent are church and state truly separate in Alaska, and how would Alaska courts handle troubling issues such as prayer in public schools or financial aid to parochial institutions?

This article will review the Alaska decisions concerning the free exercise and establishment of religion. The status of religious liberty in Alaska will be explored and compared to the current federal protections. The Alaska standards for free exercise and establishment claims will be examined separately,[6] to be followed by a review of those cases and statutes covering religious tax exemption.

Generally speaking, the Alaska Constitution provides a high degree of protection for the practice of religious beliefs.[7] The Alaska Supreme Court has required exceptions to neutral legislation that only incidentally infringed upon religious practice.[8] Compared to the recent interpretations of the federal religious clauses by the United States Supreme Court,[9] the Alaska Constitution provides greater protection for religious exercise.

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3. "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects. The degree of security in both cases will depend on the number of interests and sects. . . ." THE FEDERALIST NO. 51, at 324 (J. Madison) (C. Rossiter ed. 1961).

4. Frank v. State, 604 P.2d 1068, 1070 (Alaska 1979).

5. ALASKA CONST., art. I, § 4. *See* Messerli v. State, 626 P.2d 81, 83 (Alaska 1980) (noting several instances where the Alaska Constitution provides broader protection of rights of Alaskans than does the United States Constitution).

6. Any separation of issues for the sake of analysis is always artificial. Church and state cases often involve a combination of free exercise and establishment claims. *See* Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979), discussed *infra* note 76. For an analysis of the conflict inherent between the two religious clauses, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1166-69 (2d ed. 1988).

7. *Frank*, 604 P.2d at 1070.

8. Wondzell v. Alaska Wood Prod., 601 P.2d 584 (Alaska 1979).

9. Lyng v. Northwest Indian Cemetery Protection Ass'n, — U.S. —, 108 S. Ct. 1319 (1988) (first amendment did not prevent logging of American Indian religious burial ground); O'Lone v. Shabazz, — U.S. —, 107 S. Ct. 2400 (1987) (first amendment did not prevent prison officials from denying Islamic prisoners special worship privileges).

The Alaska Supreme Court interprets the state's establishment clause more strictly than its federal counterpart interprets the first amendment.[10] The court disallows incidental benefits to religion that the United States Supreme Court held constitutional,[11] and it narrowly construes religious tax exemptions, emphasizing that the burden of maintaining government "should be fairly apportioned on the property of all. . . ."[12] Considered together, the Alaska court's decisions on free exercise, establishment, and tax exemption indicate a concern for maintaining a clear separation between church and state. This article will serve both as a review of Alaska's constitutional standards and as a guide for attorneys faced with claims raising religious issues.

II. CONSTITUTIONAL PROVISIONS

The Alaska provision governing religious freedom is found in article I, section 4, of the state constitution:

> Freedom of Religion. No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof.[13]

The language of section 4 is taken almost verbatim from the religion clauses of the first amendment to the United States Constitution.[14] On its face, the provision suggests nothing more nor less than the federal constitutional requirements. Like its federal counterpart, section 4 prohibits any law "respecting" the establishment of religion, not simply laws that would establish a state religion.[15] In addition, the clause provides that the government may not pass laws that "prohibit" the exercise of religion, thereby leaving room for less obtrusive abridgements.[16] Indeed, freedom of speech in Alaska appears to be more absolutely protected, as every person is entitled to "freely speak, write,

10. Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979).

11. *Compare* Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979) and Matthews v. Quinton, 362 P.2d 932 (Alaska 1961) *with* Mueller v. Allen, 463 U.S. 388 (1983) (tuition tax exemptions to parents of students attending private and parochial schools is constitutional) and Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97 (E.D. Tenn. 1976), *aff'd mem.* 434 U.S. 803 (1977) (state tuition remission to students attending religious colleges does not violate the establishment clause).

12. Greater Anchorage Area Borough v. Sisters of Charity, 553 P.2d 467, 469 (Alaska 1976).

13. ALASKA CONST., art. I, § 4.

14. *See supra* note 2.

15. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947). However, there are those, including Chief Justice Rehnquist, who maintain the first amendment was intended to do no more than forbid the establishment of a national church or prohibit preferences among religions. *See* Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting).

16. *See supra* note 13 and accompanying text.

and publish on all subjects. . . ."[17] This distinction, however, is similar to that found in the first amendment, which prohibits *abridgements* of speech and the press, a protection much broader than that afforded religious exercises.[18] A government can do much to infringe upon a right short of an outright prohibition.[19]

In addition to article I, section 4, the Alaska Constitution contains two provisions that come into play in situations involving establishment claims. Article VII, section 1, deals with public education and makes several references to religion:

> The legislature shall by a general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established 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.[20]

Similarly, article IX, section 6, provides:

> No tax shall be levied, or appropriation of public money made, or public property transferred, nor shall the public credit be used, except for a public purpose.[21]

The above provisions are not unique to the Alaska Constitution. By the early twentieth century, most states had adopted similar constitutional provisions to prevent public appropriations for religious purposes.[22] But similar prohibitions against the expenditure of public monies for private or parochial education have not prevented legislatures in other states from appropriating funds to aid religious enterprises.[23] The terms "public purpose"[24] and "direct benefit"[25] are

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17. ALASKA CONST., art. I, § 5. *See* Messerli v. State, 626 P.2d 81, 83 (Alaska 1980).

18. For over 100 years, the United States Supreme Court has consistently held that government can restrict religious practice without actually prohibiting the free exercise of beliefs. Reynolds v. United States, 98 U.S. 145 (1879) (upholding a law prohibiting polygamy). *See also* Pack v. Tennessee ex rel. Swann, 424 U.S. 954 (1976) (upholding a state court decision enjoining a pentecostal group from handling poisonous snakes and consuming strychnine, even though the church members participated voluntarily and they maintained that their faith required such practices).

19. *See also* ALASKA CONST., art. I, § 3 (providing that "[n]o person is to be denied the enjoyment of any civil or political right because of race, color, sex, or national origin . . .," suggesting a greater level of protection as well as a broader cause of action).

20. ALASKA CONST. art. VII, § 1.

21. ALASKA CONST. art. IX, § 6.

22. W. BLAKELY, AMERICAN STATE PAPERS 523-55 (1911).

23. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding New York law requiring local public school officials to lend textbooks free of charge to all students including those attending parochial and private schools); Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding New Jersey law providing free public transportation for public *and* parochial schools).

24. *See supra* note 20 and accompanying text.

necessarily vague, thereby providing ample opportunity for legislative and judicial interpretation.[26]

Finally, article IX, section 4, deals with exceptions to assessments for property taxation.[27] It states in pertinent part:

> All, or any portion of, property used exclusively for non-profit religious, charitable, cemetery, or educational purposes, as defined by law, shall be exempt from taxation. Other exemptions of like or different kind may be granted by general law.[28]

The definition of "property used for religious purposes" is found in Alaska's Municipal Taxation Statute and includes church buildings and schools, ministerial residences, administrative offices, and parking lots relatively close thereto.[29] The Alaska Supreme Court had the opportunity on several occasions to interpret the meaning of article IX, section 4, and the Municipal Taxation Statute. These cases are discussed in part V, below.

III. FREE EXERCISE OF RELIGION

United States Supreme Court Justice William O. Douglas wrote that the free exercise clause embraces two aspects. First, it protects "the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths."[30] Second, the free exercise clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship."[31] The

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25. *See supra* note 19 and accompanying text.

26. Sheldon Jackson College v. State, 599 P.2d 127, 129 (Alaska 1979).

27. The Alaska Constitution contains one further reference of a religious nature. In an apparent contradiction to the above provisions (and to itself), the preamble contains the following reference:

> We the people of Alaska, *grateful to God* and to those who founded our nation and pioneered this great land, in order to secure and transmit to succeeding generations our heritage of political, civil, and *religious liberty* within the Union of States, do ordain and establish this constitution for the State of Alaska.

ALASKA CONST. preamble (emphasis added).

28. ALASKA CONST. art. IX, § 4.

29. ALASKA STAT. § 29.45.030(b). In subsection (a) of this section, "property used exclusively for religious purposes" includes the following property owned by a religious organization:

> (1) the residence of a bishop, pastor, priest, rabbi, minister, or religious order of a recognized religious organization;
> (2) a structure, its furniture, and its fixtures used solely for public worship, charitable purposes, religious administrative offices, religious education, or a non-profit hospital;
> (3) lots required by local ordinance for parking near a structure defined in (2) of this subsection.

ALASKA STAT. § 29.45.030(b) (1986).

30. United States v. Ballard, 322 U.S. 78, 86 (1944).

31. *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).

Alaska Supreme Court followed the lead of the federal Court in setting standards for determining government infringements of the right to freely exercise one's religious beliefs.[32] This is due in part to the supremacy clause of the federal Constitution.[33] The United States Constitution, and the Supreme Court's interpretation of it vis-a-vis judicial review, represents the supreme law of the land and serves as the minimum standard for state actions affecting fundamental rights. But this deference is also due to the fact that Alaska did not become a state until 1959, well after the Supreme Court had decided several important church and state cases.[34] Therefore, unlike most states, old interpretations of the religion clauses did not have to be adjusted in Alaska to meet the stricter federal standards.[35]

The current standard for free exercise claims raised under article I, section 4, of the Alaska Constitution is found in the case of *Frank v. State.*[36] In *Frank,* the defendant was convicted of violating fish and game regulations by taking a moose out of season. At trial, Frank claimed he was entitled to an exemption from the regulations because of his religious beliefs. The trial court found that the moose had been killed for an Athabascan funeral potlach. The court noted testimony that the potlach was an "integral part of the cultural religious belief of the central Alaska Athabascan Indian."[37] Still, the trial court rejected the defendant's claim that his action had been religiously protected and convicted Frank.

On appeal, the supreme court reversed the conviction, holding that Frank was entitled to an exemption from the fish and game regulations on account of his religious beliefs.[38] First, the court asserted

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32. *Id.*

33. U.S. CONST., art. IV, § 2 (providing in pertinent part: "This Constitution, and the laws of the United States which shall be made in the pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby . . . .").

34. Zorach v. Clauson, 343 U.S. 306 (1952) (upholding release time for attending religious classes); Everson v. Board of Educ., 330 U.S. 1 (1947) (nationalizing the establishment clause); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (recognizing religious exemptions from participating in patriotic exercises); Cantwell v. Connecticut, 310 U.S. 296 (1940) (nationalizing the free exercise clause and establishing the substantial state interest standard).

35. In fact, because of its territorial status until 1959, the protections of the federal Constitution applied to all governmental actions in Alaska. *See* Rassmussen v. United States, 197 U.S. 516 (1905) (holding that Alaska was incorporated into the United States and that its citizens were entitled to the protections of the Bill of Rights). Therefore, the cases nationalizing the religious clauses to the states (*Cantwell,* 310 U.S. 296, and *Everson,* 330 U.S. 1) did not apply in Alaska until statehoood. Before 1959, the first amendment applied directly to Alaska.

36. 604 P.2d 1068 (Alaska 1979).

37. *Id.* at 1069.

38. *Id.* at 1075 (4-1 decision) (Connor, J., dissenting).

that freedom of religious belief is "protected absolutely" in Alaska.[39] "No value has a higher place in our constitutional system of government than that of religious freedom."[40] The court held that the freedom to practice those beliefs is also protected, although religious actions may be subjected to limited governmental regulation. The government can regulate religiously motivated actions only where its interests are "of the highest order."[41] By so holding, the court adopted the federal "compelling governmental interest" standard: that laws which indirectly infringe upon religious beliefs and practices can be upheld only where they present the least restrictive means of accomplishing a compelling governmental objective.[42]

The court set out a three-step process for determining whether religious claims are entitled to the higher level of constitutional protection. To invoke the protections of the free exercise clause, and thereby force the government to show a compelling interest for its regulation or action, (1) religion must be involved, (2) the conduct in question must be religiously based, and (3) the claimant must be "sincere."[43] The three steps, while appearing straightforward, deserve brief analysis.

In *Frank,* the court accepted the lower court's finding that the defendant had presented a religious claim; therefore, the court found it unnecessary to expand on how lower courts should arrive at the first step of the test.[44] While the religious basis for a claim may appear obvious in many situations, in others the "religious" nature may be less clear. Historically, courts have been hesitant to define religion,

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39. *Id.* at 1070.

40. *Id.*

41. *Id.*

> Because of the close relationship between conduct and belief and because of the high value we assign to religious beliefs, religiously impelled actions can be forbidden only where they pose "some substantial threat to public safety, peace or order," . . . or where there are competing governmental interests that are "of the highest order and . . . [are] not otherwise served."

Id. at 1070 (quoting Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

Interestingly, Justice Matthews also quoted approvingly from Justice Brennan's concurring opinion in McDaniel v. Paty, 435 U.S. 618 (1978), where Brennan questioned the ability of courts to draw distinctions between beliefs and actions. The adoption of such a position, that action is so intertwined with religious belief that any attempt to regulate the former will limit the latter, would significantly broaden those actions considered to be religiously protected.

42. *Id.* at 1070. *See* Thomas v. Review Board, 450 U.S. 707 (1981); Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S. 398 (1963).

43. 604 P.2d at 1071.

44. *Id.* at 1071-72.

usually opting for a functional, as opposed to a substantive, definition.[45] While the Alaska Supreme Court has never specifically adopted a functional definition of religion in a constitutional context, it came close to doing so through the interpretation of an Alaska statute prohibiting labor discrimination on the basis of religious beliefs.[46] In *Wondzell v. Alaska Wood Products, Inc.* ("Wondzell I"), the court recognized this statute as "accord[ing] the same privileges to all sincere conscientious beliefs, whether or not they are accompanied by a belief in a supreme being."[47] Therefore, a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption" comes within the statutory definition of religion.[48] Whether this broad, functional definition of religion can be translated to free exercise claims is unclear, but the court implied there existed a constitutional basis for its interpretation of the statute.[49]

Once a religious claim has been established, the claimant must show that the conduct in question is religiously based. In *Frank,* however, the court rejected the lower court's ruling that the conduct must be "essential" to the religious belief to be protected. According to the court, so long as the practice is "deeply rooted in the religious belief" it will receive the protection of the free exercise clause.[50] A showing that the conduct is absolutely necessary to the religious belief is not required.

Finally, a claim will come within the ambit of the free exercise clause upon a showing that the claimant is sincere in his beliefs. Technically, the claimant carries this burden.[51] In practice, sincerity can be inferred from a showing under the first two steps, as occurred in *Frank,* and the government will then have the burden to disprove

45. Gillette v. United States, 401 U.S. 437, 449 (1971); Welsh v. United States, 398 U.S. 333, 339 (1970); United States v. Seeger, 380 U.S. 163, 165, 176 (1965); Africa v. Pennsylvania, 662 F.2d 1025, 1031 (3d Cir. 1982), *cert. denied,* 456 U.S. 908 (1982); Malnak v. Yogi, 592 F.2d 197, 207 (3d Cir. 1979); Choper, *Defining "Religion" in the First Amendment,* 1982 U. ILL. L. REV. 579; Note, *The Sacred and the Profane: A First Amendment Definition of Religion,* 61 TEX L. REV. 139 (1982); Note, *Toward a Constitutional Definition of Religion,* 91 HARV. L. REV. 1056 (1978).

46. ALASKA STAT. § 18.80.220 (1986).

47. 583 P.2d 860, 866 n.12 (Alaska 1978), *vacated,* 601 P.2d 584 (Alaska 1979). Even though the court later vacated this decision, the above statement apparently continues to represent the opinion of the majority of the court.

48. *Id.* (quoting United States v. Seeger, 380 U.S. 163, 176 (1965)).

49. In order to avoid danger of unconstitutionality we would interpret AS 18.80.220 to accord the same privileges to all sincere conscientious beliefs, whether or not they are accompanied by a belief in a supreme being.

Id. at 866 n.12.

50. 604 P.2d at 1072-73.

51. U.S. v. Seeger, 380 U.S. 163, 185 (1965); Africa v. Pennsylvania, 662 F.2d 1025, 1030 (3d Cir. 1982). *See also* L. TRIBE, *supra* note 6, at 1242-46.

sincerity.[52] This step is derived from the case of *United States v. Ballard,* where the United States Supreme Court held that secular courts lacked the power to judge the truth of religious allegations.[53] At this stage the only issue open for courts is whether the asserted religious belief is sincerely held.

Once the claimant has satisfied the three-part test, the burden shifts to the government to prove that it has a compelling interest in the regulation to justify the infringement upon the religiously based conduct. But even a compelling interest will not save the law's application if the state could have provided an exemption for the protected conduct. The issue "is whether that interest, or any other, will suffer if an exemption is granted to accommodate the religious practice. . . ."[54] Thus, in *Frank,* the court found that even though the state had a compelling interest in the uniform application of the game regulations, it would suffer only minimal hardship in granting an exemption to the defendant.[55]

Frank is significant because the court upheld the religious claim in spite of an important governmental interest that only indirectly burdened the religious practice. Even though *Frank* presented a unique set of circumstances, there is no indication that the court has retreated from its position. Recently, in *Herning v. Eason,*[56] the court affirmed the standard in *Frank* as well as its ultimate holding.

Free exercise claims have also arisen in the area of employment discrimination. In *Wondzell I,*[57] the court interpreted a state statute prohibiting employment discrimination on the basis of race, alienage, sex, or religion as requiring reasonable accommodation of religious beliefs.[58] *Wondzell* involved a Jehovah's Witness who was threatened with dismissal from employment when he refused to join a union. In an opinion drafted by Justice Connor, the court held that the employer had reasonably accommodated the employee's religious beliefs by providing an exemption from union membership while still requiring the

52. L. TRIBE, *supra* note 6, at 1245-51.

53. 322 U.S. 78 (1944).

54. *Frank,* 604 P.2d at 1073.

55. *Id.* at 1073-74. The court also rejected the argument that the state's granting of an exemption would amount to an establishment of religion. The accommodation of religious beliefs and practices does not equate with an establishment of religion. The exemption, stated the court, "reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. . . ." *Id.* at 1075 (quoting Wisconsin v. Yoder, 406 U.S. 205, 234 n.22 (1972)).

56. 739 P.2d 167, 169 (Alaska 1987).

57. 583 P.2d 860 (Alaska 1978).

58. ALASKA STAT. § 18.80.220 (1986).

payment of dues.[59] On reconsideration, the court, in a new opinion by Justice Matthews ("Wondzell II"), reversed its earlier decision and held that the statute required an exemption from dues as well as membership.[60] The claimant was allowed to pay an amount equal to dues to a charity, which was consistent with his religious beliefs. The court also held that the burden of proving undue hardship resulting from an exemption would lie with the employer and the union.[61]

Statutes and ordinances that indirectly infringe upon the right of free exercise may also be attacked on grounds of vagueness and overbreadth.[62] Laws, such as anti-solicitation or disorderly conduct ordinances, can be challenged as void for vagueness or overbroad in their application if they significantly impair protected first amendment expressions while not substantially furthering a strong governmental interest.[63]

While the Alaska Supreme Court has not considered a vagueness or overbreadth challenge through a free exercise claim, it has addressed such issues in other free expression contexts. In *Marks v. City of Anchorage,* the court declared that a vaguely worded disorderly conduct ordinance infringed upon rights of free speech and assembly, rendering it unconstitutional.[64] Two years later the court reaffirmed the *Marks* doctrine in *Stock v. State.*[65] The court held that a statute, although neutral on its face, may be unconstitutionally vague if it can be construed in such a manner so as to restrict the exercise of first

59. 583 P.2d at 867.

60. 601 P.2d 584, 585 (Alaska 1979).

61. *Id.* at 586. The most recent employment discrimination case raising a religious claim, Borkowski v. Snowden, 665 P.2d 22 (Alaska 1983), was reversed on procedural grounds without the religious issues being addressed.

62. *See* Village of Schamburg v. Citizens for Better Environment, 444 U.S. 620 (1980); Martin v. City of Struthers, 319 U.S. 141 (1943) (Murphy, J., concurring).

63. *Id.*

64. 500 P.2d 644 (Alaska 1972).

> [A] statute violates the [overbreadth] doctrine when constitutionally-protected conduct as well as conduct which the state can legitimatly regulate are included within the ambit of the statute's prohibition. By contrast, specific constitutional guarantees are not necessarily implicated when a statute is declared void for vagueness. The latter doctrine comes into play when the statutory language is so indefinite that the perimeters of the prohibited zone of conduct are unclear; a statute may be unconstitutionally vague even though no activities specifically protected by the Constitution are outlawed. A vague statute violates the due process clause both because it fails to give adequate notice to the ordinary citizen of what is prohibited and because its indefinite contours confer unbridled discretion on government officials and thereby raise the possibility of uneven and discriminatory enforcement.

Id. at 646 (footnotes omitted).

65. 526 P.2d 3 (Alaska 1974).

amendment rights.[66] These cases, read in conjunction with *Frank,* indicate that Alaska courts will closely scrutinize laws that indirectly infringe upon the rights to free religious expression and overturn them if they are vague or overbroad.

Just as laws cannot criminalize religious expression without a showing of a compelling state interest,[67] the free exercise clause also prevents the government from placing individuals at a disadvantage because of their religious beliefs. In *Flores v. State,*[68] the court ruled that belief in a supreme being was not a prerequisite for a witness' competency to testify at a trial. The court held that even though the witness had admitted that he did not believe in God after he had sworn to tell the truth, stating "so help me God," the opposing party could not attack his credibility.[69] Similarly, in *Johnson v. Johnson,*[70] a child custody case, the court rejected a father's contention that the trial court abused its discretion in awarding custody to the children's mother because of her membership in the Jehovah's Witnesses.[71] Despite the father's claim that the mother's religious beliefs would restrict the children's educational and cultural development, the court held that the consideration of her religious beliefs would violate her free exercise rights.[72] Religious belief alone cannot be the cause of a detriment before the law.

Still, the right to religious practice in Alaska is not absolute.[73] All religious practices are subject to neutral laws that impose reasonable restrictions on the time, place, and manner in which the rights are exercised. In *Seward Chapel, Inc. v. City of Seward,*[74] a church sought declaratory and injunctive relief against the enforcement of a city zoning ordinance that forbade the operation of a school on the church property. The court affirmed the trial court's denial of the petition

66. *Id.* at 7. In addition, the courts must consider whether the statute provides adequate notice to the ordinary citizen and whether it gives undue discretion to authorities in determining what constitutes a violation. "A statute may not create a threat of criminal penalties which [might] inhibit the exercise of those [basic] rights so essential to our form of government[,] such as freedom of speech, press, religion and to assemble peaceably." *Id.* at 7.

67. Frank v. State, 604 P.2d 1068 (Alaska 1979); Stock v. State, 526 P.2d 3 (Alaska 1974); Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972).

68. 443 P.2d 73, 77-78 (Alaska 1968); *accord,* Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that a belief in God cannot be a prerequisite for holding public office).

69. 443 P.2d at 77-78.

70. 564 P.2d 71 (Alaska 1977), *cert. denied,* 434 U.S. 1048 (1978).

71. *Id.* at 76.

72. *Id.* "Certainly, we cannot use [the mother's] continued membership in the Jehovah's Witnesses as a basis for directing the trial court to award the children to [the father]. To do so would be violative of her right to [freedom of religion] under the First Amendment. . . ." *Id.*

73. Frank v. State, 604 P.2d 1068, 1070 (Alaska 1979).

74. 655 P.2d 1293 (Alaska 1982).

and held that the church was not entitled to an exemption from the facially neutral law.[75]

Crucial to the court's holding was the fact that the operation of the school at the contested location was not a religious tenet or belief of the church members. The church merely sought the variance for the sake of convenience and economy.[76] Furthermore, the zoning ordinance did not prohibit the operation of parochial schools throughout the city, but only in the subdivision where the church was located. This distinction, between an outright ban and a regulation which took into account the impact of a school on the neighborhood, was one of "constitutional significance" for the court.[77] The accommodation requirement set forth in *Frank* did not control; the zoning ordinance placed a reasonable time, place, and manner restriction on the exercise of religious action.

Two additional cases that raised free exercise issues deserve brief analysis. First, in *Bonjour v. Bonjour,*[78] a child custody case also involving establishment clause issues, the court implied that parents may lack standing to raise free exercise claims for their children.[79] In *Bonjour,* the mother had contended that the award of custody to the father had violated both her and her son's rights to freely exercise their religious beliefs. Because the court reversed under the establishment clause, it found it unnecessary to address the free exercise claims. In passing on the issue, however, the court specifically questioned the mother's standing to raise the issue for her son.[80] Such a holding, if followed in future cases, would be highly significant, especially in light of recent cases where parents have claimed that school districts have violated their children's free exercise rights through the teaching of "secular humanism."[81] Unless children are of sufficient age to state

75. *Id.* at 1301-02.

76. *Id.* The church also had notice of the zoning restriction prior to the purchase of the church property. The court did, however, hear testimony that education of children in a "Christian school" was "an integral aspect of the church members' religious beliefs." *Id.* at 1299.

77. *Id.* at 1301. Interestingly, the court, in a footnote, stated its willingness to extend the accommodation requirement to the above situation. The court felt bound, however, to follow the clear holding of the United States Supreme Court that such zoning restrictions are constitutionally permissible. *Id.* at 1300 n.25.

78. 592 P.2d 1233 (Alaska 1979).

79. *Id.*

80. *Id.* at 1241 n.15. The court did acknowledge, however, a parent's right to challenge on appeal any determination by a court of what is in the best interest of the child with regard to the child's free exercise rights.

81. *See, e.g.,* Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd,* 827 F.2d 1058 (6th Cir. 1987), *cert. denied,* — U.S. —, 108 S. Ct. 1029 (1988).

their own preferences, courts will be required to dismiss such causes of action.

The most recent case involving a free exercise issue is *Herning v. Eason.*[82] On its face, *Herning* appears troubling. The case involved a dispute within the First Baptist Church of Fairbanks over the tenure of its minister. The issue focused on whether the church could be forced to accept proxy voting at church business meetings in the absence of a contrary provision in its bylaws. The court held that the Alaska Nonprofit Corporation Act,[83] which recognizes proxy voting, applied to the church business meetings, in spite of a church claim that such a ruling would involve the courts in an inner-church dispute and violate the free exercise clause.[84]

Upon closer examination, it is clear that the court so ruled because the church had failed to present sufficient supporting evidence that proxy voting was contrary to the tenets and practices of the Baptist church. In the absence of such evidence or a contrary provision in the bylaws, the court held the Nonprofit Act applied. Although the court made no reference in its decision, it apparently followed the "neutral principles approach" of resolving church disputes as set out by the United States Supreme Court in *Jones v. Wolf.*[85] While civil courts are prohibited from reviewing matters of religious practice and doctrine, they are permitted to apply neutral principles of law where necessary and appropriate to settle church property disputes.[86]

IV. THE ESTABLISHMENT CLAUSE

As with the free exercise clause, issues raising establishment clause claims come up in several contexts. A primary area for establishment clause disputes involves governmental appropriation to sectarian institutions (aid to parochial schools or colleges). A second area of litigation involves laws or practices that favor or confer a benefit to one religion to the detriment of other religions (or to non-believers).[87] The Alaska Supreme Court considered cases in both areas.

As referred to above, the Alaska Constitution contains two provisions that appear on their face to prohibit the appropriation of public

82. 739 P.2d 167 (Alaska 1987).

83. ALASKA STAT. § 10.20.005-.725 (1986).

84. 739 P.2d at 168-69.

85. 443 U.S. 595 (1979).

86. *Id.* at 602-03. *See also* Presbyterian Church v. Hull Memorial Presbyterian Church, 393 U.S. 440, 450-51 (1969).

87. *See* ALASKA STAT. § 14.03.090 (1966) (prohibiting the introduction of sectarian or denominational doctrine into the public schools); *cf.* Frank v. State, 604 P.2d 1068, 1074-75 (Alaska 1979) (accommodation of an individual's religious beliefs, however, while appearing to indicate favoritism, is constitutional).

monies for religious purposes.[88] Early on, the court struggled with what constitutes a "public purpose" or a "direct benefit" to a religion. The first two cases to consider the issue produced somewhat contradictory results. *Matthews v. Quinton*[89] involved a challenge to a territorial statute, not repealed by the legislature, that provided for the free transportation of children to non-public schools.[90] The court held that the statute violated both the direct benefit provision of article VII, section 1, and the public purpose provision of article IX, section 6.[91]

The court's decision, written by Justice Arend, specifically rejected the "child benefit" theory used by the United States Supreme Court in *Everson v. Board of Education*[92] to uphold public transportation for parochial students.[93] Following the lead of Justice Rutledge's dissent in *Everson,* Justice Arend stated that free transportation did in fact "aid, encourage, sustain and support," the religious purpose of parochial education. "Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials."[94] The transportation directly benefited the parochial school while it failed to meet a required public purpose for appropriations.

Two years after *Matthews,* the court took a step back from its strict interpretation of the two constitutional provisions. *Lien v. Ketchikan*[95] involved a challenge to a lease of a hospital building, built with a combination of federal, state, and local funds, to a non-profit religious corporation.[96] In a decision by Justice Dimond (who had dissented in *Matthews*) the court held the lease constitutional. The court approached the lease, which was for a ten-year period at a rate of $1.00 per year, as simply an agreement with a charitable corporation designed to serve a public purpose. The court stated that it was of "no consequence" that the corporation was controlled by a religious order. "[T]he test of whether a public purpose is being served does not

88. ALASKA CONST. art. VII, § 1, art. IX, § 6.

89. 362 P.2d 932 (Alaska 1961), *cert. denied,* 368 U.S. 517 (1962).

90. *Id.* The petitioner, a student attending Fairbanks' Immaculate Conception Elementary, sought to enforce the application of the statute after school district officials refused to continue with the practice of free transportation. *Id.* at 933-34.

91. *Id.* at 943.

92. 330 U.S. 1 (1947).

93. 362 P.2d at 940-41. *See Everson,* 330 U.S. at 17-18. *See also* Cochran v. Louisiana State Board of Educ., 281 U.S. 370 (1930) ("child benefit" theory originated when Court decided to look only to the benefits conferred on the school children, not to the advantage provided the parochial school).

94. 362 P.2d at 941 (quoting *Everson,* 330 U.S. at 48 (Rutledge, J., dissenting)).

95. 383 P.2d 721 (Alaska 1963).

96. The lease was to the Catholic Sisters of St. Joseph of Newark. Only article IX, section 6, the public purpose clause, was in issue.

depend on the religious or non-religious nature of the agency that will operate the leased property, but upon the character of the use to which the property will be put."[97] Therefore, the court saw nothing in the agreement to indicate that public funds were being used for anything other than a public purpose.

As *Lien* had only concerned the public purpose clause of article IX, section 6, and not the direct benefit clause of article VII, section 1, as in *Matthews,* it was unclear whether *Lien* overturned the earlier holding. *Lien* clearly suggested a more accommodating approach to government support of religious enterprises.[98] But any hope that *Lien* represented a move toward a more accommodating view of separation of church and state lost ground with the 1979 case of *Sheldon Jackson College v. State.*[99] The *Sheldon Jackson College* case, written by Justice Matthews, the author of *Frank* and *Wondzell II,* attempted to clear up any confusion left by *Matthews* and *Lien.* The result was a stricter interpretation of the public purpose and direct benefit provisions than announced in *Lien,* but not a return to the strict separationist language of *Matthews.*[100]

Sheldon Jackson College concerned the validity of a tuition grant program for state residents attending private colleges in Alaska. Initially, the court asserted that the constitution did not prohibit indirect or incidental benefits to religious schools.[101] Because the line between direct and indirect benefits often is hazy, the court designed a four-part test by which to measure programs that benefit religious institutions. First, the judiciary must examine the breadth of the class to which the statutory benefits are to be directed. Second, the courts must scrutinize the nature of the use to which the funds are put. Third, the courts must consider the magnitude of the benefit conferred on the religious institution. Finally, the courts must look to see whether the program merely channels the funds through an intermediary to an otherwise prohibited recipient.[102]

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97. 383 P.2d at 722. The court also found nothing in the corporation's articles of incorporation to indicate that its objective was to "further [the] religious beliefs or dogmas of the Catholic Church." However, if such objectives were to manifest, the courts could intervene. *Id.* at 724.

98. The holding in *Lien* has been favorably cited as recently as December 31, 1985, in Comtec, Inc. v. Municipality of Anchorage, 710 P.2d 1004, 1005 (Alaska 1985). *See also* 1966 Alaska Op. Att'y Gen. No. 3 (Apr. 22, 1966).

99. 599 P.2d 127 (Alaska 1979).

100. *Id.* at 130 n.20. The court specifically refused to rely on *Matthews* in reaching its decision. While it questioned the continued authority of the case, the court declined to overrule it.

101. *Id.* at 129-30. For example, the state may provide for the health, safety, and welfare of individual students attending private schools.

102. *Id.* at 130.

The court found the program in *Sheldon Jackson College* failed all four parts of the test. First, the court found the program benefited a narrow class, since only students attending private colleges qualified for the grants.[103] Furthermore, the nature of the funds expended and the magnitude of the benefits bestowed indicated to the court nothing less than a subsidy to the college, without which the college faced severe financial hardship.[104] Finally, even though the grants were given directly to the students, the court found that the students served merely as conduits for the transmission of the funds to the college. Therefore, the program constituted a direct benefit to private educational institutions, including religious institutions, and violated article VII, section 1, of the Alaska Constitution.[105] *Sheldon Jackson College* suggests that the court will closely scrutinize such programs through a broad interpretation of the direct benefit prohibition.

The second common area of claims raising establishment issues involves laws that confer a benefit to or impose a detriment on a particular religious belief or practice.[106] Despite language in the preamble suggesting the preeminence of God (and by implication, a theistic belief system), the court has sought to ensure that laws in Alaska have a secular foundation. In *Harris v. State,*[107] the court upheld a conviction for sodomy, refusing to recognize that "a rule of morality is necessarily a rule of law."[108] The court said that the legislature could "delimit and proscribe" specific acts of sexual conduct which have a harmful effect on society without appealing to Judeo-Christian morality.[109]

Interestingly, it has been within the context of child custody disputes that the court has most clearly addressed the issue of whether a law benefited a particular religious belief and therefore violated the establishment clause. *Bonjour v. Bonjour,*[110] mentioned above in the

103. *Id.* at 131. The court found that the program acted as an incentive to attend private colleges. The court suggested, however, that a comparable subsidy to all students might pass constitutional scrutiny. *See id.* n.25.

104. *Id.* at 131-32. The 1976-77 grants were for $2500.

105. *Id.* at 132. Even though the court did not decide whether the program satisfied the public purpose requirement, the court identified a close interrelation between the two provisions. *Id.* at 129. *See* Contec, Inc. v. Municipality of Anchorage, 710 P.2d 1004, 1005 (Alaska 1985) (citing *Lien,* 383 P.2d 721 (Alaska 1963), as authority under the public purpose provision, article IX, section 6). As the court resolved the case under article VII, section 1, it did not reach the narrower issue of whether the program also violated the establishment clause.

106. *See* Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). *Accord,* Wallace v. Jaffree, 472 U.S. 38, 55-56 (1985).

107. 457 P.2d 638 (Alaska 1969).

108. *Id.* at 645.

109. *Id.* at 647.

110. 592 P.2d 1233 (Alaksa 1979).

free exercise context,[111] involved a challenge to an Alaska statute which required the courts to consider the religious needs of a child, as well as the abilities of the separate parents to address those needs, in awarding custody.[112] At trial, the court found that both parents were equally qualified to meet the secular needs of their son but awarded custody to the father because of his religious beliefs.[113] The supreme court, while upholding the constitutionality of the statute, reversed and remanded the case, holding that religious beliefs alone could not constitute the sole determinant in awarding custody.[114]

Initially, the court construed the statute to require courts to take into account the *actual* religious needs of the child, as opposed to the religious needs presumed from the parents' beliefs. The actual religious needs should be considered as only one factor that reflects on the child's best interests.[115] If the child has expressed no religious preference or is too young to do so, then the court is freed from such considerations.[116] The court insisted that a trial court can not "substitute its own preferences, either for or against a particular type of religious observance," but must remain strictly neutral in determining a child's religious needs.[117]

The court then turned to the question of whether its narrow interpretation of the statute was constitutional. Applying the three-pronged "*Lemon*" test announced by the United States Supreme Court for determining whether a law violates the establishment clause, the court found that the statute satisfies the test.[118] As quoted by the court, the test provides the following:

> In order to pass muster, a statute [1] must have a secular legislative purpose, [2] must have a principal or primary effect that neither

111. *See supra* notes 76-78 and accompanying text.

112. The statute, ALASKA STAT. § 09.55.205 (1977) (current version at ALASKA STAT. § 25.24.150 (1983)), provided in pertinent part:

> In determining the best interests of the child the court shall consider all relevant factors including:
>
> (1) the physical, emotional, mental, religious, and social needs of the child;
>
> (2) the capability and desire of each parent to meet these needs. . . .

113. 592 P.2d at 1236-37.

114. *Id.* at 1239, 1244.

115. *Id.* at 1239-40. The court defined actual religious needs as "the expressed preference of a child mature enough to make a choice between a form of religion or the lack of it." *Id.* at 1240.

116. *Id.* The court suggested that children aged seven and under lack sufficient maturity to form any serious religious preference.

117. *Id. Accord,* Frank v. State, 604 P.2d 1068, 1073 ("The determination of religious orthodoxy is not the business of a secular court.").

118. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

> advances nor inhibits religion, and [3] must not foster an excessive government entanglement with religion.[119]

Consideration of a child's actual religious needs serves a secular purpose in that it furthers the best interests of the child. Similarly, a court's accommodation of a child's religious preference does not advance or inhibit religion but in fact satisfies the requirement that courts remain neutral in religious matters. Finally, by focusing on the child's actual religious needs, rather than those presumed needs, courts avoid the entanglement that came from determining which parents' religious beliefs are more favorable to the best interests of the child.[120] In *Bonjour,* however, the trial court's reliance on the religious beliefs of the parties, instead of the child's, failed both the primary effect and entanglement prongs of the test and, thereby, required that the case be remanded.[121]

Bonjour stands as the court's best statement on the establishment clause, aligning Alaska with the federal standard on establishment issues by utilizing the *Lemon* test, which seeks to draw a line between strict separation and outright accommodation. While several members of the United States Supreme Court have recently criticized the *Lemon* test,[122] the Alaska court continues to adhere to its principles.

V. RELIGIOUS TAX EXEMPTION

Unlike the federal Constitution and several state constitutions, the Alaska Constitution mandates an exemption from taxation for religious property.[123] In spite of this constitutional guarantee, issues involving tax exemption of church property rarely raise questions of constitutional significance.[124] Article IX, section 4, of the Alaska Constitution grants broad powers to the legislature to define exempt enterprises; therefore, most claims involve issues of statutory construction. The cases in this area reveal that the Alaska Supreme Court reads both the constitutional mandate and the statutory provisions

119. 592 P.2d at 1242 (quoting Wolman v. Walter, 433 U.S. 229, 236 (1977)).

120. *Id.* at 1242-43.

121. *Id.* at 1244. The trial court's action also violated the secular purpose prong, but less clearly than the other two prongs.

122. *See* Edwards v. Aguillard, — U.S. —, 107 S. Ct. 2573, 2605 (1987) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 111-12 (1985) (Rehnquist, J., dissenting).

123. ALASKA CONST. art. IX, § 4. Religious property is only one of several types of property receiving an exemption. *See* D. KELLEY, WHY CHURCHES SHOULD NOT PAY TAXES (1977), for a well-written argument in favor of religious tax exemption.

124. In Waltz v. Tax Comm'n, 397 U.S. 664 (1970), the Supreme Court rejected arguments that tax exemptions for religious enterprises violate the establishment clause. As both tax exemptions and the establishment clause are found in the Alaska Constitution, the Alaska Supreme Court would be compelled to read each in conformity with the other.

narrowly; tax exemptions are strictly construed. "All property is benefited by the security and protection furnished by the State, and it is only just and equitable that expenses incurred in the operation and maintenance of government should be fairly apportioned upon the property of all. . . ."[125]

In 1964, the court considered its first religion tax exemption case. *Evangelical Covenant Church of America v. Nome*[126] concerned the interpretation of the statutory phrase "property used exclusively for religious purposes."[127] In a narrow interpretation of the statute, the court held that a church-owned radio station that sold commercial air time did not fit within the definition of property used exclusively for religious purposes. According to the court, it was irrelevant that only part of the radio time was sold or that the profits derived from the sale were used to further the church's mission. The radio station had not been used *exclusively* for religious purposes, and it was thereby subject to ad valorem taxes.[128] The parsonage of an assistant pastor or lay minister, however, was found to be within the exemption as "other property of the organization not used for business, rent, or profit."[129]

In *Greater Anchorage Area Borough v. Sisters of Charity,*[130] the court reaffirmed the strict statutory requirement that exempt property must be used exclusively for religious or charitable purposes.[131] In *Sisters of Charity,* the court held that a building owned by a non-profit religious organization but not used exclusively for non-profit hospital purposes did not qualify for exemption from ad valorem taxes.[132] *Sisters of Charity* set the standard for other courts to use in determining exemptions. First, courts must narrowly construe statutes granting exemptions. In addition, exemptions should not be issued automatically; the taxpayer claiming the exemption has the burden of showing

125. Greater Anchorage Area Borough v. Sisters of Charity, 553 P.2d 467, 469 (Alaska 1976) (quoting Animal Rescue League v. Assessors of Bourne, 310 Mass. 330, 332, 37 N.E.2d 1019, 1021 (1914)).

126. 394 P.2d 882 (Alaska 1964).

127. ALASKA STAT. § 29.10.336 (1957) provides that "all property used exclusively for religious, educational, or charitable purposes . . . is exempt," and that "the term 'property used for religious purposes' includes the residence of the pastor, priest, or minister of a religious organization, and other property of the organization not used for business, rent, or profit."

128. 394 P.2d at 885.

129. *Id.* at 885-86. Following the case, the state legislature amended the statute and removed the "other property" provision. In Harmon v. North Pacific Union Conference Ass'n of Seventh Day Adventists, 462 P.2d 432, 436-39 (Alaska 1969), the court held that the legislature's action repealing the clause narrowed the scope of the exemption and that the residences of church administrators, teachers, and clergy not committed exclusively to local congregations did not qualify.

130. 553 P.2d 467 (Alaska 1976).

131. *Id.*

132. *Id.* at 472.

that the property is not eligible for taxation. Finally, the courts must look at the actual use of a building, as well as the owner's use, in determining whether the building is used exclusively for religious purposes.[133] The court reaffirmed its strict standard for granting exemptions in *Sisters of Providence in Washington v. Municipality of Anchorage.*[134]

The court's most complete statement on tax exemption of religious property is found in *City of Nome v. Catholic Bishop of Northern Alaska.*[135] The case presents a detailed list of exemptions under a statute similar to the current law.[136]

Catholic Bishop reaffirmed the standards set forth in the *Sisters of Charity*[137] and *Sisters of Providence*[138] cases. First, the taxpayer claiming an exemption bears the burden of producing sufficient evidence to prove the property's eligibility for an exemption.[139] Furthermore, the statutes granting exemptions are to be narrowly construed against the applicant.[140] Finally, the term "exclusive use" requires that all uses of the property be for the "direct and primary" exempt

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133. *Id.* at 469-70.

134. 672 P.2d 446, 451-52 (Alaska 1983) (holding that private property leased by a nonprofit hospital was not exempt as the lessor made a profit from the lease).

135. 707 P.2d 870 (Alaska 1985).

136. The claims were brought under ALASKA STAT. § 29.53.020 (1984) (current version at ALASKA STAT. § 29.45.030) (1988)), which provides in part:

> Required exemptions. (a) The following property is exempt from general taxation:
>
> . . .
>
> (3) property used exclusively for nonprofit religious, charitable, cemetery, hospital or educational purposes;
>
> . . .
>
> (b) "Property used exclusively for religious purposes" includes the following property owned by a religious organization:
>
> (1) the residence of a bishop, pastor, priest, rabbi, minister or religious order of a recognized religious organization;
>
> (2) a structure, its furniture and its fixtures used solely for public worship, charitable purposes, religious administrative offices, religious education or a nonprofit hospital;
>
> (3) lots supporting and adjacent to a structure or residence mentioned in (1) or (2) of this subsection which are necessary to convenient use;
>
> (4) lots required by local ordinance for parking near a structure defined in (2) of this subsection.

In all, the court had to decide the exemption status of more than 46 items/holdings. A summary is found following the *Catholic Bishop* decision at page 895. A thorough reading of the case is recommended to interested persons seeking detailed information on specific exemptions.

137. 553 P.2d 467 (Alaska 1976). *See supra* notes 127-30 and accompanying text.

138. 672 P.2d 446 (Alaska 1983). *See supra* note 130.

139. 707 P.2d at 878.

140. *Id.* at 878-79. Still, the requirement of strict statutory construction should be "an aid to, not a substitute for, [reasonable] statutory interpretation." *Id.* at 879.

purpose. Property "occasionally used for a nonexempt purpose is not exempt since the property must be used exclusively for exempt purposes."[141]

After reaffirming its standard, the court went on to recognize two exceptions to the exclusive use rule. First, "occasional use of true minor import or a *de minimis* use will not defeat" the exclusive use requirement.[142] In addition, "property used for purposes directly incidental to and vitally necessary for the exempt use of other property" will also be entitled to a tax exemption.[143] This latter exception to the exclusive use rule also applies to property used part-time for religiously exempt purposes, so long as it remains directly incidental and vitally necessary for the use of other exempt property.[144]

From there, the court considered whether a series of structures and items qualified for exemptions. In the only additional departure from previous cases, the court found that the legislature had broadened the exemption for residences of spiritual leaders to include residences of individuals not exclusively engaged as ministers in a local congregation.[145] The court also allowed an exemption for a church-owned radio station that was able to show a combination of religious, charitable, and educational uses, thereby clarifying its decision in *Evangelical Covenant Church.*[146] Overall, however, *Catholic Bishop* reaffirmed the court's position that exemptions are to be narrowly construed.

VI. CONCLUSION

The cases discussed above indicate that the Alaska Supreme Court has committed itself to a broad reading of the free exercise clause. In light of more recent pronouncements by the United States Supreme Court, the Alaska court's approach to free exercise issues appears to be in line with the decisions of the Warren and early Burger Courts. This is not to suggest that the Alaska court comes down on one side or the other of the liberal-conservative spectrum. Religious

141. *Id.* The property, however, "need not be devoted exclusively to a single exempt purpose to meet the 'exclusive use' requirement. If the property is used exclusively for any combination of religious, charitable or educational purposes, [the statute] is satisfied." *Id.* at 880.

142. *Id.*

143. *Id.*

144. *Id.* at 881. The court also held that under the exclusive use rule, property could not be apportioned by time into exempt and nonexempt uses. Spacial apportionment of property and structures, however, is allowable.

145. *Id.* at 883-84.

146. *Id.* at 889-90. *See supra* notes 123-26 and accompanying text.

liberty issues do not easily fit into ideological categories.[147] But, when compared to the recent decisions of its federal counterpart, the Alaska court has been more willing to protect free exercise claims against government infringement.[148]

Frank[149] suggests a broad protection for religiously motivated conduct.[150] Even with a showing of a compelling governmental interest, the state will be required in certain instances to create exceptions for religious practices. Chief Justice Matthews, the author of the *Frank* and *Wondzell II* decisions, questions whether it is possible for the courts to make a clear distinction between religious belief and action.[151] If such a ruling were applied to Justice Connor's statement in *Wondzell I,* that all conscientious believers may be constitutionally entitled to the same benefits as those who believe in a supreme being, the realm of protected religious action would be greatly expanded. Even

147. One can debate whether restricting the freedom of religious groups whose actions present a threat to public health and safety is conservative or liberal. *See* Pack v. Tennessee ex rel. Swann, 424 U.S. 954 (1977) (upholding a law that forbade snake handling and the consumption of poison by pentecostals).

148. *See* O'Lone v. Shabazz, — U.S. —, 107 S. Ct. 2400 (1987) (state prison officials did not violate first amendment free exercise of religion clause in precluding Islamic prisoners from attending services held during work hours as policy was related to legitimate security and rehabilitation concerns and alternative means of exercising various other religious practices available); Bowen v. Roy, 476 U.S. 693 (1986) (statutory requirement that state agency use social security numbers in the administration of the federal food stamp and Aid to Families with Dependent Children (AFDC) programs does not violate the free exercise clause, notwithstanding the beliefs of parents of a Native American child, who believed use of the number would harm the child's spirit and prevent her from attaining greater spiritual power); Goldman v. Weinberger, 475 U.S. 503, (1986) (first amendment did not prohibit application of Air Force regulation which prevented wearing visible religious apparel while on duty and in uniform to orthodox Jews desiring to wear a yarmulke). In all three cases, Court majorities took a more limited view of the reach of the free exercise clause. In *Goldman* and *O'Lone,* involving free exercise claims in the military and in prison, respectively, the Court employed a more deferential standard of review (reasonableness) than it had employed in earlier free exercise cases (strict scrutiny). While both cases can be explained by the special contexts within which they arose, the same cannot be said for *Bowen.* In *Bowen,* a plurality of the majority argued for a different standard of review for situations that merely involve the less obtrusive placing of "conditions" on belief as opposed to situations where religious belief is restricted through governmental "compulsion." *Bowen,* 476 U.S. at 706-08.

149. 604 P.2d 1068 (Alaska 1979).

150. It is unclear whether the court would provide a similar exception to all religious claimants. Alaska Natives may present a unique case, as did the Amish in Wisconsin v. Yoder, 406 U.S. 205, 235-36 (1972), where the Supreme Court found the Amish presented a compelling set of facts that few other religious groups could duplicate. The Supreme Court has recently refused to extend the *Yoder* exemption to fundamentalists. *See* Mozert v. Hawkins County Public Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd,* 827 F.2d 1058 (6th Cir. 1987), *cert. denied,* — U.S. —, 108 S. Ct. 1029 (1988).

151. *Frank,* 604 P.2d at 1070 n.4.

as it now stands, the Alaska Constitution provides greater protection for the free exercise of one's religious beliefs than that presently afforded under the first amendment.[152]

The establishment clause developed in a somewhat different fashion. Instead of continuing to read the clause expansively, thereby overturning most laws and programs that benefit religion, the court has backed away from its earlier interpretation in *Matthews,*[153] which can be said to represent the extreme reach of strict separation of church and state in Alaska. *Lien*[154] and *Sheldon Jackson College*[155] suggest a more moderate approach to government programs that may incidentally assist religion. Still, Alaska appears less willing than many states with large, powerful religious blocks (such as Catholics in the East and evangelicals in the South) to enact programs which financially assist religious enterprises. While the standard in *Sheldon Jackson College*[156] is less strict than before, the court will continue to closely scrutinize programs to see whether they directly benefit religions or appropriate monies for something other than a public purpose.

Furthermore, with *Bonjour,*[157] the court aligned Alaska with the federal standard for reviewing establishment clause claims. Therefore, even if a program can survive the court's "direct benefit" and "public purpose" analysis, it may fail the three-pronged *Lemon* test.[158] The court's decisions indicate that cases that do not involve public appropriations, but rather merely confer a benefit or impose a detriment because of religious belief, will also be subject to careful scrutiny.

Taken as a whole, it is clear that the court considers the establishment clause to prohibit more than the establishment of a state religion or discrimination among religious sects.[159] The government may not appropriate funds that directly benefit any religious enterprise,[160] may not authorize religious activities in schools,[161] may not question the

152. *Id. See also Wondzell I,* 583 P.2d 860, 866 n.12 (Alaska 1978).

153. 362 P.2d 932 (Alaska 1961), *cert. denied,* 368 U.S. 517 (1962).

154. 383 P.2d 721 (Alaska 1963).

155. 599 P.2d 127 (Alaska 1979).

156. *Id.*

157. 592 P.2d 1233 (Alaska 1979).

158. 403 U.S. 602 (1971). *See supra* notes 115-16 and accompanying text.

159. *See* Wallace v. Jaffree, 472 U.S. at 92-113 (Rehnquist, J., dissenting) (providing an overview of the court's past establishment clause decisions); Fisher v. Fairbanks North Star Borough School Dist., 704 P.2d 213 (Alaska 1985) (school board's attempt to design a curriculum to favor a particular religion is a violation of the first amendment and curriculum furthering racial bias or partisan political preference is constitutionally suspect).

160. Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979).

161. Fisher v. Fairbanks North Star Borough School, 704 P.2d 213 (Alaska 1985).

orthodoxy of any particular religious belief,[162] and may not pass legislation that favors the tenets or adherents of any religion or of religion over non-religion.[163] The court eloquently stated the purposes of the clause:

> [T]he establishment clause stands independently as a barrier to government action which favors religion over non-religion. The establishment clause protects the right not to believe in any religion. It protects the right not to be punished for not believing, or simply not caring.[164]

Finally, with regard to tax exemption for religious property, the standard is set in *Catholic Bishop*.[165] The state legislature has great leeway in defining exemptions, and the court will narrowly construe those statutes granting exemptions. This approach is consistent with the court's analysis under the establishment clause and the direct benefit and public purpose provisions of the constitution.

At the beginning of his decision in *Frank,* Justice Matthews wrote that "[n]o value has a higher place in our constitutional system of government than that of religious freedom."[166] From all indications, the court takes this pronouncement seriously. The Alaska court has been willing to provide religious exemptions from statutes that are otherwise neutral toward religious belief.[167] The court also held that people cannot incur a legal burden solely because of their religious beliefs.[168] Moreover, the court has ensured that the line between church and state is maintained by striking down laws that lack a public purpose or that provide a direct benefit to religion.[169]

Through these decisions, the Alaska court has guaranteed the right of people to practice their beliefs, religious or otherwise, free from government intrusion or oversight. Religious organizations are free to proselytize while disbelievers are spared the burden of adhering to a particular system of belief. Furthermore, by abstaining from supporting or endorsing religion, government allows religion to flourish on its own. This is what Thomas Jefferson intended when he wrote that "religion is a matter which lies solely between man and his

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162. Frank v. State, 604 P.2d 1068 (Alaska 1979).

163. Bonjour v. Bonjour, 592 P.2d 1233 (Alaska 1979).

164. *Id.* at 1241.

165. 707 P.2d 870 (Alaska 1985).

166. 604 P.2d at 1070.

167. *Id.* at 1075; Wondzell v. Alaska Wood Prod., Inc., 601 P.2d 584 (Alaska 1979).

168. Flores v. State, 443 P.2d 73 (Alaska 1968); Johnson v. Johnson, 564 P.2d 71 (Alaska 1977), *cert. denied,* 434 U.S. 1048 (1978).

169. Fisher v. Fairbanks North Star Borough School, 704 P.2d 213, 217 (Alaska 1985) (school "board may not design a curriculum to favor a particular religion"); Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979).

God."[170] In essence, the more that religion and government are kept separate, the greater the freedom afforded believer and non-believer alike. As a result of the Alaska court's interpretations of the state's constitution, religious liberty and separation of church and state are alive and well in Alaska.

170. Reply to the Danbury Baptist Association, Jan. 1, 1802, *quoted in* J. SEMONCHE, RELIGION AND CONSTITUTIONAL GOVERNMENT 135 (1985).