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PROTECTING ISLAM'S GARDEN FROM THE WILDERNESS: HALAL FRAUD STATUTES AND THE FIRST AMENDMENT

Elijah L. Milne[*]

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I. INTRODUCTION

Like all religions, Islam needs protection from governmental encroachment. As early as 1644, Roger Williams, the founder of Rhode Island, recognized that state involvement in religious matters defiles religion.[1] "When they have opened a gap in the hedge or wall of separation between the garden of [religion] and the wilderness of the world," wrote Williams, "God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness . . . ."[2] Although Williams was mostly concerned about the government's impact on Christianity, his oft-quoted metaphor applies equally to the government's influence on Islam. This Article will discuss one facet of that influence–state regulation of the halal food industry.

Halal food, as opposed to *haram* food,[3] is food that is "ritually fit for use" because it has been "sanctioned by Islamic law."[4] The Qur'an[5] forbids Muslims from eating anything except food defined as being *halal*.[6] The problem exists in that "Muslims are not yet in agreement with one another" as to the definition of *halal*.[7] Because

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1. *See* Stephen L. Carter, *Reflections on the Separation of Church and State*, 44 ARIZ. L. REV. 293, 296 (2002) ("Williams coined the metaphor of the garden and the wilderness to describe the relationship between [church and state] . . . . [S]eparating the wilderness from the garden, was a high hedge wall, constructed to protect . . . the garden . . . . The hedge wall existed to keep the wilderness out, not to keep . . . the garden hemmed in.").

2. Roger Williams, *Cotton's Letter Examined* (1644), *reprinted in* 1 COMPLETE WRITINGS OF ROGER WILLIAMS 313, 319 (1963).

3. *See infra* note 65 & accompanying text.

4. *See* MOHAMMAD MAZHAR HUSSAINI, ISLAMIC DIETARY CONCEPTS AND PRACTICES 25-26 (1993); MERRIAM-WEBSTER UNABRIDGED, *available at* http://unabridged.merriam-webster.com (last visited May 18, 2006). The Prophet Muhammad has been recorded as saying: "The halal is that which Allah has made lawful in His Book and the haram is that which He has forbidden, and that concerning which He is silent, He has permitted as a favor to you." *See* HUSSAINI, *supra* note 4, at 22 (internal quotation marks omitted).

5. The Qur'an is the holy book of Islam and constitutes the word of Allah (God) as revealed to the Prophet Muhammad. *See* MSN Encarta, *at* http://Encarta.msn.com/encyclopedia_761557364/Qur%E2%80%99an.html (last visited May 18, 2006).

6. *See* THE HOLY QUR'AN 5:90-91 (Abdullah Yusuf Ali trans., 1987).

7. AHMAD H. SAKR, UNDERSTANDING HALAL FOODS: FALLACIES AND FACTS 3 (1996); *see also* Mariam Jukaku, *A Growing, Confusing Market for Halal Food*, WASH. POST, Mar. 18, 2006, at B09, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/03/17/AR2006031701632.html?referrer=emailarticle

of America's great ethnic and national diversity, disagreement over the meaning of *halal* is especially acute in the United States.[8] Despite the widespread disagreement among and within Islamic "schools of thought" over halal food, various individual states in the United States have attempted to define, by legislative edict, this inherently religious term.[9] The stated purpose behind such legislative definitions of *halal* is to prevent the fraudulent representation of food as being halal. The constitutionality of these government-enacted definitions of *halal* is uncertain.

In order to help dissipate this uncertainty, this Article will analyze the constitutionality of halal fraud statutes under the Establishment and Free Exercise Clauses of the First Amendment to the United States Constitution.[10] Because the advent of halal fraud statutes is relatively recent, analysis of the constitutionality of halal fraud laws will be conducted by comparing them with the more antiquated kosher fraud regulations,[11] which have been enacted in

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(recognizing that "different interpretations of what Muslims consider halal, or religiously sanctioned, has led to confusion, misunderstanding, and even fraud").

8. *Id.* at 4 (stating that division among Muslims over meaning of *halal* has resulted in "a chaos and a confusion").

9. *See, e.g.*, CAL. PENAL CODE § 383c (West 2005); 410 ILL. COMP. STAT. 637/5 (2005) ("Halal Food Act"); MICH. COMP. LAWS § 750.297f (2005); MINN. STAT. §§ 31.658, 31.661 (2005); N.J. STAT. ANN. §§ 56:8-98 (2005); TEX. BUS. & COM. CODE ANN. § 17.881 (Vernon 2005).

10. Consideration of the constitutionality of halal fraud regulations under the Equal Protection Clause of the Fourteenth Amendment is beyond the scope of this paper. *But see* Benjamin Pi-wei Liu, Comment, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. REV. 1151, 1176 (2004) (stating that equal protection claim exists where "state circumscribes a religious practice in the context of one religion but not another"); Rain Levy Minns, Note, *Food Fights: Redefining the Current Boundaries of the Government's Positive Obligation to Provide Halal*, 17 J.L. & POL. 713, 737-38 (2001) (same).

11. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-941 (2005); ARK. CODE ANN. § 20-57-401 (2005); CAL. PENAL CODE § 383b (West 2005); CONN. GEN. STAT. § 53-317 (2005); GA. CODE ANN. § 26-2-330 (2005); 410 ILL. COMP. STAT. 645/1 (2005); KY. REV. STAT. ANN. § 367.850 (West 2005); LA. REV. STAT. ANN. § 608.2 (2005); MD. CODE ANN., COM. LAW § 14-901 (West 2005); MASS. GEN. LAWS ch. 94, § 156 (2005); MICH. COMP. LAWS § 750.297e (2005); MINN. STAT. §§ 31.651, 31.661 (2005); MO. REV. STAT. § 196.165 (2005); N.J. STAT. ANN. § 2C:21-7.2 (West 2005); N.Y. AGRIC. & MKTS. LAW § 201-c (McKinney 2005); OHIO REV. CODE ANN. § 1329.29 (West 2005); PA. CONS. STAT. ANN. § 4107.1 (West 2005); R.I. GEN. LAWS §§ 21-16-1 to 21-16-4 (2005); TEX. BUS. & COM. CODE ANN. § 17.821 (Vernon 2005); VA. CODE ANN. § 18.2-236 (2005); WASH. REV. CODE § 69.90.010 (2005); WIS. STAT. § 97.56 (2005). Tennessee and the District of Columbia once had kosher fraud laws. *See* D.C. CODE § 22-5204 to 22-5206 (repealed 2001); TENN. CODE ANN. § 53-6-101, *repealed by* 1983 Tenn. Pub. Acts, ch. 373, § 1.

many states.[12] This analysis will lead to the conclusion that halal fraud statutes are violative of both the Establishment and Free Exercise Clauses, but that valid means of protecting consumers of halal food from fraud can be instated constitutionally.

In order to set the stage for this analysis, Section II of this Article will provide background information about Jewish and Islamic dietary laws. Subsequently, Section III will give a brief synopsis of First Amendment jurisprudence and will discuss the constitutionality of halal fraud statutes. As noted, this discussion will conclude that halal statutes are unconstitutional as presently constructed. In order to remedy these constitutional defects with halal statutes, Section IV will offer suggestions that legislatures throughout the country should consider.

II. BACKGROUND

To conduct any analysis of the constitutionality of statutes regulating the halal food industry, it is first necessary to develop a rudimentary understanding of Islamic dietary laws. Only after developing such an understanding can one adequately appreciate the inherent religiosity of the term *halal*. However, because halal fraud statutes in the United States are so new, it is unclear how courts will decide constitutional challenges brought under the First Amendment's Religion Clauses.[13] Nevertheless, in light of the similarities between halal and kosher fraud regulations, courts determining the constitutionality of halal regulations will probably resort to the many judicial opinions and scholarly comments regarding kosher regulations for guidance.[14] This is because, unlike halal regulations, kosher regulations have been tried and tested in this country for nearly a century.[15] Thus, in addition to developing an understanding of Is-

12. Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509, 590-91 (2004) (suggesting that examining "kosher fraud can serve as a model for other food industries").

13. *See id.* at 542, 591 (noting that halal certification "is in its infancy" and "lags far behind kosher supervision").

14. *See, e.g.*, Mohamed H. Marei, A Rising Star? Halal Consumer Protection Laws 16-20 (2001) (unpublished comment, *at* http://leda.law.harvard.edu/leda/data/375/Marei.pdf (last visited May 18, 2006)) (observing that "[t]he kosher legal regime provides the closest analog to what a halal fraud statute might look like").

15. The first kosher statute was passed in 1915. HAROLD P. GASTWIRT, FRAUD, CORRUPTION, AND HOLINESS: THE CONTROVERSY OVER THE SUPERVISION OF JEWISH DIETARY PRACTICE IN NEW YORK CITY 1881-1940, at 13 (1974).

lamic dietary laws, it is also necessary to first develop a basic understanding of the Jewish dietary laws that give meaning to kosher fraud regulations.

A. Jewish Dietary Laws

1. Keeping Kosher

The Jewish dietary laws are called *kashrut*.[16] Food which satisfies the strict requirements of kashrut is referred to as *kosher*.[17] For observant Jews, kashrut controls food preparation, cooking, and consumption.[18] Besides Jews, kosher-certified food is also popular among American Muslims, Seventh-day Adventists, vegetarians, people who suffer from allergies or food intolerances, and other health-conscious consumers.[19] Among the different branches of Judaism, the meaning of kashrut is not uniform.[20] For example, controversy exists as to whether certain types of cheeses, wines, gelatin, birds, and fish (e.g., sturgeon and swordfish) are kosher.[21] Gener-

16. MERRIAM-WEBSTER UNABRIDGED, *supra* note 4 (variations include *kashruth* and *kashrus*). For an exposition of the underlying reasons for the Jewish dietary laws, see 1 ISIDOR GRUNFELD, THE JEWISH DIETARY LAWS (1972).

17. MERRIAM-WEBSTER UNABRIDGED, *supra* note 4 (defining *kosher* as meaning "ritually fit" or "proper").

18. TRUDY GARFUNKEL, KOSHER FOR EVERYBODY: THE COMPLETE GUIDE TO UNDERSTANDING, SHOPPING, COOKING, AND EATING THE KOSHER WAY 7 (2004).

19. *Id.* at 1-2.

20. *See* LISË STERN, HOW TO KEEP KOSHER: A COMPREHENSIVE GUIDE TO UNDERSTANDING JEWISH DIETARY LAWS 2 (2004) ("Ask a dozen Jews why they keep kosher, and you'll probably get two dozen answers. Ask them *how* they keep kosher, and you'll get another dozen responses."); *see also* Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 9-10, 62 (1992) ("the strain between all" branches of Judaism "has increased in recent years"); Catherine Beth Sullivan, *Are Kosher Food Laws Constitutionally Kosher?*, 21 B.C. ENVTL. AFF. L. REV. 201, 212 (1993) (noting "[t]here is a wide divergence of opinion as to the meaning of 'kosher'"); Aharon R. Junkins, Note, *The Establishment Clause's Effect on Kosher Food Laws: Will the Jewish Meal Soon Become Harder to Swallow in Georgia?*, 38 GA. L. REV. 1067, 1072 (2004) (noting the "[d]istinct interpretive rifts" within Judaism). *But see* Stephen F. Rosenthal, *Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment*, 65 GEO. WASH. L. REV. 951, 963-64, 980-81 (1997) (arguing that differences of opinion among branches of Judaism are insignificant); Karen Ruth Lavy Lindsay, Comment, *Can Kosher Fraud Statutes Pass the Lemon Test?: The Constitutionality of Current and Proposed Statutes*, 23 U. DAYTON L. REV. 337, 342 (1998) (same). The major branches of Judaism include Orthodox, Conservative, Reform, and Reconstructionist. *See* GARFUNKEL, *supra* note 18, at 2.

21. *See* STERN, *supra* note 20, at 24-26, 61-63.

ally, Orthodox Jews often maintain stricter criteria for observing kashrut than do Conservative, Reform, or Reconstructionist Jews.[22]

Regardless of their differences, most Jews recognize that the laws of kashrut address three basic types of food: (1) inherently kosher food, such as fruits and vegetables; (2) biblically prohibited food, such as pork and shellfish; and (3) food that becomes kosher once processed, such as meat prepared by a ritual slaughterer (known as a *shohet*).[23] Beyond merely identifying food as being kosher, the laws of kashrut are also concerned about the manner in which food is stored, cooked, served, and eaten.[24] By adhering to the rules of kashrut and keeping kosher, observant Jews are more fully able to protect their health, to follow the commands of the Torah, to affirm their faith, to manifest outwardly their religious devotion and cultural identity, and to strengthen their relationship with God.[25]

2. Regulating the Kosher Food Industry

Because the kosher food market is a multibillion-dollar industry in America and because kosher food is often more expensive than non-kosher food,[26] manufacturers historically have easily succumbed to the temptation of fraudulently labeling food as being kosher without satisfying the strict, and often costly, laws of kashrut.[27] In order to protect innocent buyers of kosher products from fraud, hundreds of private, self-regulating kosher certification and supervision organizations have been established.[28] Additionally, at least

22. *See* GARFUNKEL, *supra* note 18, at 2; *see also* STERN, *supra* note 20, at 3, 7-10.

23. GASTWIRT, *supra* note 15, at 14; MERRIAM-WEBSTER UNABRIDGED, *supra* note 4; *see also* STERN, *supra* note 20, at 49.

24. *See* GASTWIRT, *supra* note 15, at 14-15.

25. *See* GARFUNKEL, *supra* note 18, at 8; STERN, *supra* note 20, at 10-14; *see also* Benjamin N. Gutman, Note, *Ethical Eating: Applying the Kosher Food Regulatory Regime to Organic Food*, 108 YALE L.J. 2351, 2363 (1999) (noting that "eating only kosher food is seen as a way of elevating oneself spiritually").

26. This non-kosher food is referred to as *terefah*. MERRIAM-WEBSTER UNABRIDGED, *supra* note 4 (providing variants including *terefa*, *trefah*, or *trefa*).

27. *See* GASTWIRT, *supra* note 15, at 1-13; *see also* GARFUNKEL, *supra* note 18, 1-2 (stating that "the U.S. market for kosher food is approximately $7.5 billion annually"); Joe Yonan, *You Don't Have to Be Jewish*, BOSTON GLOBE, Sept. 28, 2005, *available at* http://www.boston.com/ae/food/articles/2005/09/28/you_dont_have_to_be_jewish.

28. *See* GARFUNKEL, *supra* note 18, at 25 (noting that there are "[m]ore than four hundred organizations and individuals in the United States and Canada" that issue kosher certifications). The most prominent certifying organizations in the United States include the Union of Orthodox Jewish Congregations, the Organized Kash-

twenty-two states have enacted some form of kosher food consumer protection statutes.[29] While a few of these statutes define *kosher* as meaning "prepared under the *traditional* Hebrew rules"[30] or in "accordance with Jewish *religious* dietary requirements,"[31] most statutes employ more controversial language that generally defines *kosher* as "prepared in accordance with *orthodox* Jewish religious standards."[32]

After the first statute regulating the kosher industry was enacted, claims that its definition of *kosher* was unconstitutionally ambiguous immediately surfaced.[33] In 1924, a case challenging a kosher fraud statute under the Due Process and Commerce Clauses was argued before the United States Supreme Court.[34] Because the First Amendment had not yet been held to apply to the States, the Court upheld the statute without considering the Religion Clauses.[35] Since 1925, the United States Supreme Court has not heard any cases challenging a kosher fraud statute.[36] If the Court ever considers such a statute based upon First Amendment grounds, the following

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rus Laboratories, Kosher Supervision Services, and STAR-K Kosher Certification. *See id.* at 25-27.

29. *See supra* note 11 & accompanying text.

30. ARIZ. REV. STAT. ANN. § 36-941(1) (emphasis added).

31. 305 ILL. COMP. STAT. 5/5-5.5a(a) (2005) (emphasis added).

32. MASS. GEN. LAWS ch. 94, § 156(a)(1) (emphasis added); *see also* N.J. STAT. ANN. § 2C:21-7.2(d) (defining *kosher* as being prepared in conformity with "the Orthodox Jewish religion").

33. *See, e.g.*, The People of the State of New York v. Atlas, 170 N.Y.S. 834 (App. Div. 1918); People v. Goldberger, 163 N.Y.S. 663, 665-66 (Ct. Spec. Sess. 1916) (holding statute to be neither ambiguous nor invasive of "religious freedom or personal rights").

34. *See* Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925). The United States Supreme Court did not incorporate the Free Exercise Clause until 1940. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940). Subsequently, in 1947, the Court similarly incorporated the Establishment Clause in *Everson v. Bd of Educ. of Ewing TP*, 330 U.S. 1, 15-18 (1947).

35. *Hygrade*, 266 U.S. at 503.

36. However, state courts have heard cases challenging these statutes. *See, e.g.*, Erlich v. Mun. Ct., 55 Cal. 2d 553 (1961) (upholding statute under due-process attack); Sossin Sys., Inc. v. City of Miami Beach, 262 So. 2d 28 (Fla. Dist. Ct. App. 1972) (holding city ordinance did not violate Religion Clauses); United Kosher Butchers Ass'n v. Associated Synagogues of Greater Boston, Inc., 211 N.E.2d 332, 334-35 (Mass. 1965) (refusing to decide case where issue is "so exclusively one of religious practice and conscience"); Prime Kosher Foods, Inc. v. Administrators, Bureau of Employment Servs., 519 N.E.2d 868 (Ohio 1987); State v. Glassman, 441 N.Y.S.2d 346 (1981) (Sullivan County Ct. 1981) (dismissing complaint); People v. Johnson Kosher Meat Prods., Inc., 248 N.Y.S. 2d 429 (N.Y. City Civ. Ct. 1964) (upholding criminal conviction). So also have some federal district courts. *See, e.g.*, Nat'l Foods, Inc. v. Rubin, 727 F. Supp. 104 (S.D.N.Y. 1989) (stating that "[t]he constitutionality of [kosher] laws has long been recognized").

cases invalidating kosher regulations under the Establishment Clause may be indicative of the outcome: *Ran Dav's County Kosher, Inc. v. New Jersey*,[37] *Barghout v. Bureau of Kosher Meat & Food Control*,[38] and *Commack Self-Service Kosher Meats, Inc. v. Weiss*.[39]

In *Ran-Dav's County*, the New Jersey Supreme Court invalidated a state statute that defined *kosher* as "prepared . . . in strict compliance with the laws . . . of the Orthodox Jewish religion."[40] The court held the statute violated the Establishment Clause because it carried "government too far into the religious domain."[41] Given that "there are differences of opinion concerning the application and interpretation of the laws of kashrut," the statute was said to improperly impose "substantive religious standards" on merchants.[42] Because the word *kosher* means "ritually fit," the court rejected the notion that *kosher* had lost its fundamental religious meaning.[43] In addition, the fact that the statute "call[ed] on religious personnel to enforce and certify religious compliance" was also troubling.[44] In particular, the fact that the statute's chief enforcer was an orthodox rabbi, as were most members of the kosher advisory committee, gave credence to the court's belief that the statute had "a principally religious meaning."[45] Indeed, this "close identification" of government with religion suggested that the statute was unconstitutional because it "authorize[d] civil enforcement of . . . religious standards with the assistance of clergy."[46] For these reasons the statute was struck down under the Establishment Clause.

Subsequent to *Ran Dav's County*, the Fourth Circuit in *Barghout* invalidated a Baltimore municipal ordinance, which required that all food labeled as being kosher comply "with the orthodox Hebrew religious rules and requirements."[47] In *Barghout*, a business that had been fined for not satisfying the ordinance's definition of *kosher*

37. 608 A.2d 1353 (N.J. 1992).
38. 66 F.3d 1337 (4th Cir. 1995).
39. 294 F.3d 415 (2d Cir. 2002).
40. *Ran Dav's County*, 608 A.2d at 1355.
41. *Id.*; *see also infra* Section III.A.1.c.
42. *Ran Dav's County*, 608 A.2d at 1356, 1360, 1362. Additionally, the court stated in dicta that the New Jersey statute could possibly be in violation of the "denominational preference" test that was described in *Larson v. Valente*, 456 U.S. 228, 246 (1982). *See Ran Dav's County*, 608 A.2d at 1358-59.
43. *Ran Dav's County*, 608 A.2d at 1360, 1363-64.
44. *Ran Dav's County*, 608 A.2d at 1365.
45. *Id.* at 1357, 1361 (suggesting the advisory committee consisted of nine orthodox rabbis and one conservative rabbi).
46. *Id.* at 1355, 1364-65.
47. *Barghout*, 66 F.3d at 1338, 1340 (internal quotation marks omitted).

brought suit seeking declaration that the ordinance violated the Establishment Clause.[48] After considering the matter, the Fourth Circuit held that the ordinance fostered an "excessive entanglement of religious and secular authority," and that the ordinance had an impermissible effect of advancing tenets of Orthodox Judaism.[49] The court also pointed out that the ordinance created a six-person enforcement bureau, three of the members of which were required to be orthodox rabbis selected by two orthodox associations.[50] For the *Barghout* court, such a composition unconstitutionally delegated governmental authority to religious organizations.[51] These facts, along with others, were enough for the court to conclude that the ordinance was facially unconstitutional.[52]

Similarly, in *Commack*, the Second Circuit held that the State of New York's kosher fraud statutes violated the Establishment Clause and were unconstitutional on their face.[53] Because New York's statutes defined *kosher* by explicitly referring to "orthodox Hebrew religious requirements," the court said the statutes "excessively entangle government and religion."[54] According to the court, the statutes "take sides in a religious matter, effectively discriminating in favor of the Orthodox Hebrew view of dietary requirements."[55] The *Commack* court also stated that the statutes "require the State to take an official position on religious doctrine" and "create an impermissible fusion of governmental and religious functions by delegating civic authority to individuals apparently chosen according to religious criteria."[56] Citing *Ran Dav's County* and *Barghout*, the Second Circuit in *Commack* struck down New York's kosher statutes for basically the same reasons as the laws in *Ran Dav's County* and *Barghout* were invalidated.[57]

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48. *Id.* at 1339.

49. *Id.* at 1344-46.

50. *Id.* at 1339, 1342.

51. *Id.* at 1342.

52. *Barghout*, 66 F.3d at 1342. The *Barghout* concurrence noted that the ordinance promoted a denominational preference of Orthodoxy over other branches of Judaism. *See id.* (Luttig, J., concurring in the judgment); *id.* at 1350 (Wilkins, J., concurring).

53. *Commack*, 294 F.3d at 432.

54. *Id.* at 423, 425.

55. *Id.* at 425.

56. *Id.*

57. The *Commack* court also held that New York's statutes were not narrowly tailored to serve their stated purposes inasmuch as "their avowed purpose" was already "covered by the existing general fraud laws." *Id.* at 431.

B. Islamic Dietary Laws

1. Halal Food

Although there are certain similarities between Islamic and Jewish dietary laws, many differences exist.[58] Islamic dietary laws were originally given by Allah[59] to the Prophet Muhammad in the Qur'an.[60] Through the life, teachings, and traditions of the Prophet, as recorded in the *hadith*,[61] faithful Muslims are more fully able to understand and interpret this dietary code.[62] With the exception of those explicitly prohibited by the Qur'an or the hadith, all other dietary items are permitted for human consumption under Islamic traditions.[63] Food that is permitted is referred to as *halal*, while food that is prohibited is *haram*.[64]

Just as there is disagreement within Judaism over the meaning of the word *kosher*, controversy exists within Islam over what constitutes *halal*.[65] For example, currently a lack of consensus exists among Muslims concerning the use of some dairy and cereal-based products, meat,[66] fish (e.g., catfish), and seafood (e.g., mollusks and crustaceans).[67] Disagreement also exists as to when the name of Allah should be invoked over meat and poultry.[68]

Despite the differences of opinion among the different Muslim schools of thought regarding what constitutes halal, generally the

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58. *See* MIAN N. RIAZ & MUHAMMAD M. CHAUDRY, HALAL FOOD PRODUCTION 164 (2004). For a list of some of the differences between kosher and halal, see HUSSAINI, *supra* note 4, at 41-44.

59. Allah is interpted as meaning *God*. *See* MERRIAM-WEBSTER ONLINE, *at* http://www.merriam-webster.com/dictionary/Allah (last visited May 18, 2006).

60. *See* RIAZ & CHAUDRY, *supra* note 59, at 5.

61. *See* MERRIAM-WEBSTER ONLINE, *supra* note 60 (defining *hadith* as "a narrative record of the sayings or customs of Muhammad and his companions").

62. *See* RIAZ & CHAUDRY, *supra* note 59, at 5.

63. *Id.*

64. *See supra* note 3 & accompanying text; *see also* Fatima Asmal, Scholars, Experts Plan Universal Halal Foods Standards (Sept. 13, 2005), *available at* http://www.islamonline.net/English/News/2005-09/13/article08.shtml (noting that there are "differences and variations" among Muslims as to halal regulation).

65. *See supra* notes 7-8 & accompanying text; *see also* Marei, *supra* note 14, at 5 (stating that "although Muslim scholars agree on a [sic] most issues, Islamic jurisprudence has left a considerable amount of room for differing interpretations of rules and laws") (citing MUSTAFA AZAMI, STUDIES IN EARLY HADITH LITERATURE 217 (1992)).

66. SAKR, *supra* note 7, at 4.

67. *See* RIAZ & CHAUDRY, *supra* note 59, at 2-3, 14, 164.

68. *Id.* at 19, 148-49; *see also* Marei, *supra* note 14, at 25.

following categories of food are considered impermissible: blood, pork, intoxicants, carnivorous animals, birds of prey, amphibians, snakes, the meat of dead animals, and food immolated unto idols.[69] Additionally, meat and poultry items are not halal unless the name of Allah has been verbally pronounced upon them at the time of slaughter.[70] This invocation (referred to as *tasmiyyah*) of the name of Allah at the time of slaughter must be performed by a sane and faithful[71] Muslim who is of proper age.[72] Although it is generally considered adequate to say *Bismillah* ("in the name of Allah") only once at the time of slaughter, the slaughterer should repeat the name of Allah three times for larger animals.[73] The person overseeing these processes should also be Muslim.[74] Failure to follow any of these procedures renders the meat or poultry *haram* (not halal)[75] because "[p]roper Islamic slaughter," for Muslims, "is an act of worship to Allah."[76]

2. Regulating the Halal Food Industry

As the Muslim population in America continues to grow, the demand for halal food in the United States has also significantly increased.[77] In order to protect consumers from fraud, Muslims, like Jews, have organized various private, self-regulating certification agencies to oversee the production and sale of halal products.[78] Nevertheless, as with kosher food, some states—California, Illinois,

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69. *See* RIAZ & CHAUDRY, *supra* note 59, at 9; *see also* MAULANA MUHAMMAD ALI, THE RELIGION OF ISLAM 706-09 (1983); *see also* HUSSAINI, *supra* note 4, at 65-66.

70. RIAZ & CHAUDRY, *supra* note 59, at 9, 11; *see also* ALI, *supra* note 69, at 708-09.

71. "The meat of an animal killed by an idolater, a nonbeliever, or someone who has apostatized from Islam is not acceptable." RIAZ & CHAUDRY, *supra* note 59, at 18.

72. *Id.* at 12-13, 17-19, 164.

73. *Id.* at 62; *see also* ALI, *supra* note 69, at 709-10.

74. RIAZ & CHAUDRY, *supra* note 59, at 63.

75. It is also recommended that the Muslim slaughterer be facing Mecca at the time of slaughter. *Id.* at 67.

76. HUSSAINI, *supra* note 4, at 30.

77. "As of 1992, [the] number [of Muslims in North America is] estimated at 6 to 8 million . . . . According to one estimate, the buying power for food of Muslim consumers in North America was worth $12 billion in 1999. It is estimated that amount of spending by Muslims on food will exceed $15 billion in 2003 . . . ." RIAZ & CHAUDRY, *supra* note 59, at 30 (citations omitted).

78. *See* RIAZ & CHAUDRY, *supra* note 59, at 172-73 (identifying, *inter alia*, the following organizations: International Institute of Islamic Thought, Islamic Food and Nutrition Council of America, Islamic Food Authority Inc., Islamic Services of America, and Institute of Halal Food Control); *see also* SAKR, *supra* note 7, at 86.

Michigan, Minnesota, New Jersey, and Texas–have also deemed it necessary to enact statutes regulating the labeling of food as being halal.[79] Generally, these laws often define the term *halal* as meaning "prepared under and maintained in strict compliance with the laws and customs of the Islamic religion"[80] or "in accordance with Islamic religious requirements."[81] Although many lawsuits have been brought by Muslim inmates seeking halal food as part of the free exercise of their religion while in prison,[82] no cases have been reported as challenging the constitutionality of any halal fraud statute.

III. ANALYSIS AND DISCUSSION

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[83] These words from the Constitution are collectively referred to as the Religion Clauses and individually as the Establishment and Free Exercise Clauses.[84] Throughout the history of the Court, various tests have been formulated to determine the constitutionality of a law when challenged under the Religion Clauses. The following sections of this Article will explain some of the most recent tests which the Supreme Court has enunciated for applying the Establishment and Free Exercise Clauses, respectively. In tandem with this explanation of current Supreme Court jurisprudence, the constitutionality of halal fraud statutes will be analyzed and discredited.

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79. *See* statutes cited *supra* note 9. The United Nations ("U.N.") has also established international standards and guidelines for labeling food as *halal.* Joint FAO/WHO Food Standards Programme, Codex Alimentarius Comm'n, *Codex Alimentarius: Food Labelling-Complete Texts,* at 43-46 (2001), *available at* ftp://ftp.fao.org/docrep/fao/0-05/y2770E/y2770E00.pdf. According to the U.N., "Halal Food means food permitted under the Islamic Law." *Id.* § 2.1. Thus, the slaughter of "lawful" animals should be performed "by a Muslim," and accompanied by pronunciation of *Bismillah* "immediately before the slaughter of each animal." *Id.* §§ 3.2.1, 3.2.4.

80. 815 ILL. COMP. STAT. 505/2LL(a) (2005).

81. MICH. COMP. LAWS § 750.297f(1).

82. *See, e.g.*, Williams v. Morton, 343 F.3d 212 (3d Cir. 2003); Johnson v. Simmons, 338 F. Supp. 2d 1241 (D. Kan. 2004); Majid v. Wilhelm, 110 F. Supp. 2d 251 (S.D.N.Y. 2000); Abdullah v. Fard, 974 F. Supp. 1112 (N.D. Ohio 1997); *see also* Liu, *supra* note 10; Minns, *supra* note 10, at 716 (arguing that depriving Muslim prisoners of halal food violates both the First Amendment and the Equal Protection Clause).

83. U.S. CONST. amend. I.

84. *See generally* 16A AM. JUR. 2D *Constitutional Law* §§ 417, 424 (2005).

A. Establishment Clause

The Supreme Court's interpretation and application of the Establishment Clause over the years has been anything but consistent.[85] Nevertheless, despite the many vagaries apparent in the Court's opinions regarding the Establishment Clause, some methods of constitutional analysis have been utilized more often than others. Among the more common methods are the *Lemon* test[86] and the denominational preference test.[87]

1. *Lemon* Test

The *Lemon* test, named after the test the Supreme Court outlined in *Lemon v. Kurtzman*,[88] has perhaps been the single most influential method of Establishment Clause analysis. According to the three-prong *Lemon* test, a law or governmental activity is unconstitutional unless: (1) it has a "secular purpose;" (2) its "principal or primary effect" neither advances nor inhibits religion; *and* (3) it does not foster an "excessive entanglement" with religion.[89] If a law or governmental activity fails to satisfy *any* of these three prongs, the law or activity is considered as violating the Establishment Clause. The following discussion of the respective prongs of the *Lemon* test concludes that halal fraud statutes may fail each of *Lemon*'s three prongs.

a. Secular Purpose

The "secular purpose" prong of the three-part *Lemon* test is often the easiest to satisfy.[90] State action is only invalid under this first

85. In light of the Court's inconsistencies in the Establishment Clause realm, it is often unclear how the Court will decide any given issue and what test the Court will apply in making its decision. Even when the Court applies a traditional test, such as *Lemon*, the manner in which the test is applied is at times somewhat counterintuitive. Thus, a certain degree of vagueness currently exists as to the constitutionality of any specific type of law (e.g., halal fraud statutes).

86. *See supra* Section III.A.1.

87. *See supra* Section III.A.2. *But cf.* Berman, *supra* note 20, at 28 (arguing that "kosher fraud statutes violate the Establishment Clause no matter which analytic framework one applies").

88. 403 U.S. 602 (1971).

89. *See id.* at 612-13 (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (emphasis added).

90. *See* Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 431 (2d Cir. 2002).

prong when there is "no question that the statute or activity was motivated wholly by religious considerations."[91] Thus, so long as a secular purpose for a law or activity can be articulated, the first prong of the *Lemon* test is usually satisfied.[92] This is due to the fact that the Supreme Court is reluctant "to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute."[93] Nevertheless, despite the presence of a secular purpose, a law or governmental activity may still be unconstitutional if the "valid secular objectives can be readily accomplished by other means."[94]

Halal fraud statutes clearly have a secular purpose—the prevention of consumer fraud. This fact, however, is insufficient to justify the promulgation of halal statutes because the valid secular purpose of preventing consumer fraud can "be readily accomplished by other means."[95] Another mean available is private certification agencies. As noted earlier, hundreds of private, self-regulating kosher certification and supervision organizations currently exist, which protect Jews and other consumers from fraud in the kosher food industry.[96] No reason exists why similar types of organizations are insufficient to protect purchasers of halal foods; indeed, many such organizations already exist.[97] Also, instead of providing a statutory definition of the word *halal*, legislatures could command that any product labeled as *halal* must also contain information explaining the bases of that claim.[98] Alternatively, states could abolish halal statutes entirely and instead merely prosecute false representations of halal via the states' general consumer protection laws.[99] Thus,

91. Lynch v. Donnelly, 465 U.S. 668, 680 (1984). *But see* McCreary County v. ACLU, 125 S. Ct. 2722, 2735 (2005) ("[A]lthough a legislature's stated reasons will generally get deference, the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.").

92. *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 648-49 (2002).

93. Mueller v. Allen, 463 U.S. 388, 394-95 (1983).

94. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123-24 (1982).

95. *Id.*; *cf.* Berman, *supra* note 20, at 45 (arguing that "the end that the State seeks to attain" by promulgating kosher statutes can also "be accomplished using secular means").

96. *See supra* note 28 & accompanying text.

97. *See supra* note 78 & accompanying text.

98. *See infra* Section IV; *cf.* Berman, *supra* note 20, at 71-72 (suggesting model statute that does not define *kosher*).

99. *See infra* note 158; *cf.* Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 790 (1998) (recognizing that "[a] conceivable constitutional worry exists if a statute specifically forbids fraud about supposed approvals of products as kosher, rather than leaving such fraud to be covered by general provisions").

although halal fraud statutes clearly have a valid secular purpose, less-intrusive means are available in order for states to affect their stated purpose.[100] For this reason, courts such as those in *Ran Dav's County*, *Barghout*, and *Commack* may find most of the present enactments of halal fraud statutes to be unconstitutional under the first prong of the *Lemon* test.

b. Primary Effects

Even if a statute or activity has a secular purpose, such statute or activity is still unconstitutional under the second prong of the *Lemon* test if it has the primary or principal effect of either advancing or inhibiting religion.[101] Indeed, it is often said that the government must "be a neutral in its relations with groups of religious believers and nonbelievers."[102] In more recent years, a majority of the Supreme Court has reformulated the second prong of the *Lemon* test as precluding the "endorsement or disapproval" of religion.[103] Regardless of the manner in which this prong is stated, however, the Establishment Clause "does not always bar a state from regulating conduct simply because it 'harmonizes with religious canons.'"[104]

Unfortunately, halal fraud statutes do more than merely harmonize with religious canons; instead, they expressly make Islamic canons the law of the land. By statutorily defining *halal* as meaning "compliance with the laws . . . of the Islamic religion,"[105] halal fraud statutes in effect incorporate the laws of Islam into the statutory code. As one commentator observed, "if a state were to . . . make

100. *But cf.* Gerald F. Masoudi, Comment, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 680 (1993) (concluding that "[a]s long as kosher food laws are motivated by . . . a secular objective, they will pass the [first] of the *Lemon* prongs").

101. *See Lemon*, 403 U.S. at 612-13.

102. Everson v. Bd. of Educ., 330 U.S. 1, 16, 18 (1947) (government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another"); *see also* Wallace v. Jaffree, 472 U.S. 38, 60 (1985) ("government must pursue a course of complete neutrality toward religion"); *Walz*, 397 U.S. at 666-67 (government must exercise "benevolent neutrality toward" religion); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion").

103. *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (enunciating the so-called "endorsement test"); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989) (formally adopting the "endorsement test").

104. Marsh v. Chambers, 463 U.S. 783, 792 (1983) (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961) (Frankfurter, J., concurring)).

105. 815 ILL. COMP. STAT. 505/2LL(a) (2005).

some Christian ritual the law of the land, a court would not hesitate to invalidate it."[106] Similarly, courts should not hesitate to invalidate halal fraud statutes because they have the impermissible effect of facially endorsing Islamic law.[107]

The fact that halal fraud statutes have the impermissible effect of endorsing Islamic law is even more poignant once one recalls that the Islamic dietary laws governing the halal-status of food provide that the meat of land animals may only be halal if, at the time of slaughter, the name of Allah is pronounced upon it.[108] Further, unless the person who slaughters the animal is a faithful Muslim, the meat is still not considered halal.[109] Thus, by requiring that food manufacturers strictly comply with Islamic law in preparing halal food, halal fraud statutes in effect require that food manufacturers recite Muslim prayers and hire Muslim employees to the exclusion of all others. Such a position by government is anything but neutral towards religion, and constitutes an express endorsement of *mainstream* Islam.

Regardless of any alleged endorsement of Islam which halal fraud statutes might present, the Supreme Court has recognized that "the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[110] Yet, accommodation of religion "[a]t some point . . . may devolve into 'an unlawful fostering of religion.'"[111] For example, while the second prong of the *Lemon* test permits states "to alleviate significant *governmental interference* with the ability of religious organizations to define and carry out their religious missions,"[112] *Lemon* is violated where "the *government itself* has advanced

106. Berman, *supra* note 20, at 43-44.

107. *But cf.* Jared Jacobson, Comment, Commack Self-Service Kosher Meats, Inc. v. Rubin*: Are Kosher Food Consumers No Longer Entitled to Protection from Fraud and Misrepresentation in the Marketplace?*, 75 ST. JOHN'S L. REV. 485, 503 (2001) (opining that "[r]eliance on Jewish dietary laws does not make the primary effect of [a kosher] statute to advance or endorse Judaism").

108. *See supra* Section II.B.1 & accompanying text. Essentially, individuals who are opposed to saying *Bismillah* would be statutorily required to do so despite their personal objections or would otherwise risk losing their jobs. Government would also be involved in verifying that this invocation of the name of Allah is correctly pronounced.

109. *Id.*

110. Corporation of the Presiding Bishopric of The Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334 (1987) (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987)).

111. *Id.* at 334-35.

112. *Id.* at 335 (emphasis added).

religion through its own activities and influence."[113] While halal fraud statutes may constitute a form of accommodation of religion as they make it easier for Muslims to identify halal products, any burden which American Muslims might experience if such statutes did not exist would not be the result of "significant governmental interference."[114] Because halal fraud statutes do not relieve Muslims of any significant *government-imposed* burden, they do not constitute a constitutionally-permissible accommodation of religion. Further, given that halal fraud statutes have the effect of endorsing and incorporating Islamic law, they should be found invalid under *Lemon*'s second prong.

c. Excessive Entanglement

The third and final prong of the *Lemon* test looks at whether there is "excessive entanglement" between government and religion.[115] The basic principle underlying this prong was enunciated long ago by the Supreme Court in *United States v. Ballard*.[116] In *Ballard* the Court held that because "[m]en may believe what they cannot prove," secular courts are incompetent to determine the truth or falsity of religious beliefs.[117] To engage in such an analysis of religious beliefs would improperly and unconstitutionally entangle government with religion.[118] In a subsequent decision, the Supreme Court reaffirmed its *Ballard* ruling and held the First Amendment prohibits government from "resolving underlying controversies over religious doctrine" or from employing "organs of government for essentially religious purposes."[119] Similarly, just as government may not determine questions of religious doctrine, religious institutions may not possess or exercise any delegation of governmental

113. *Id.* at 337.

114. *See id.* at 335. *But cf.* Kristin Morgan, Note, *The Constitutionality of New Jersey Kosher Food Regulations Under the Establishment Clause*, 62 U. CIN. L. REV. 247, 279 (1993) (recognizing that not regulating kosher fraud could impose upon Jewish community "the substantial burden of policing the industry").

115. *See Lemon*, 403 U.S. at 612-13.

116. 322 U.S. 78 (1944).

117. *Id.* at 86-87.

118. *See* Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 447, 449 (1969); *see also Everson*, 330 U.S. at 16 (stating that government cannot "participate in the affairs of any religious organization or groups and vice versa").

119. *Id.* at 449.

power.[120] Such interactions among government and religion are said to constitute "excessive entanglement."

The question of "excessive entanglement" under *Lemon*'s third prong "is inescapably one of degree" since some governmental involvement with religion is unavoidable.[121] Under this prong, "the questions are whether the involvement is *excessive* and whether it is a *continuing* one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[122] Although courts once considered whether a program caused (1) "political divisiveness" or required (2) "administrative cooperation" and (3) "pervasive monitoring" in determining excessive entanglement, the Supreme Court has since held that the first two of these three considerations are "insufficient by themselves to create an 'excessive' entanglement."[123]

The word *halal*, like *kosher*, is an inherently religious term. Indeed, both words mean "ritually fit."[124] For the New Jersey Supreme Court in *Ran-Dav's County Kosher, Inc. v. New Jersey*,[125] this fact alone may have been sufficient to invalidate the kosher fraud statute at issue in that case.[126] Because no uniform interpretation or application of *halal* or *kosher* exists among Muslims and Jews, any state-

120. *See* Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 690, 697-99 (1994) (plurality opinion) (invalidating New York statute creating school district for enclave of Satmar Hasidim because the statute was "tantamount to an allocation of political power on a religious criterion"); *County of Allegheny*, 492 U.S. at 590-91; *Larkin*, 459 U.S. at 117, 125 (holding Massachusetts statute that allowed churches to veto applications for liquor licenses was unconstitutional because "[t]hat power may . . . be used by churches to promote goals beyond insulating the church from undesirable neighbors"); Spacco v. Bridgewater Sch. Dept., 722 F. Supp. 834, 842 (D. Mass. 1989) (holding lease of church property constituted "excessive entanglement" because it was "the functional equivalent of sharing with the Roman Catholic Church the power to determine aspects of the public school curriculum").

121. *Walz*, 397 U.S. at 674, 676; *see also Lynch*, 465 U.S. at 684 ("[e]ntanglement is a question of kind and degree").

122. *Walz*, 397 U.S. at 675; *see also* Agostini v. Felton, 521 U.S. 203, 233 (1997).

123. *Agostini*, 521 U.S. at 233-34. Application of these three prongs to halal fraud statutes would also probably find them unconstitutional; this application, however, is beyond the scope of the present Article in light of the fact that halal fraud statutes can be invalidated via other means as stated in this Article.

124. *See* MERRIAM-WEBSTER UNABRIDGED, *supra* note 4.

125. 608 A.2d 1353 (N.J. 1992).

126. *See supra* note 43 & accompanying text; *cf.* Jared A. Goldstein, *Is There a "Religious Question" Doctrine? Judicial Authority to Examine Religious Practices and Beliefs*, 54 CATH. U. L. REV. 497, 548 (2005) (arguing that "a court may not determine whether food actually is ritually fit for consumption according to God's laws," but that "a court may constitutionally determine whether Jews believe the food to be kosher").

defined meaning of *halal* or *kosher* may unconstitutionally entangle government with religious doctrine and require government to take sides in an inherently religious debate. As was recognized by the Second Circuit in *Commack Self-Service Kosher Meats, Inc. v. Weiss*,[127] such a statutorily-imposed interpretation of inherently religious terms would "require the State to take an official position on religious doctrine."[128] This government may not do this without running afoul of the Supreme Court's present interpretation of the Establishment Clause.[129]

Given the fact that most Muslims interpret Islamic law as requiring the slaughter of halal meats be supervised by an observant Muslim, enforcement of halal fraud statutes may also constitute excessive entanglement with religion to the extent that they vest political or governmental power in individuals based on religion.[130] In this context, enforcement of halal fraud statutes would require the person inspecting the preparation of halal meats to be Muslim, to the exclusion of non-Muslims.[131] Regardless of the religious affiliation of the person enforcing halal fraud statutes, such statutes would also require that person to enforce "substantive religious standards."[132] For example, because meat is only halal if the name of Allah has been verbally pronounced upon it at the time of slaughter,[133] enforcement of halal fraud statutes would require the state to punish those who fail to invoke Allah's favor. This type of "official and continuing surveillance" of religious beliefs and practices should be held constitutionally impermissible.[134]

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127. 294 F.3d 415 (2d Cir. 2002).

128. *Id.* at 425.

129. *See, e.g.*, *Presbyterian Church*, 393 U.S. at 449; *Ballard*, 322 U.S. at 86-87.

130. *See Kiryas Joel*, 512 U.S. at 690, 697-99; Masoudi, *supra* note 101, at 686 (stating that "[a] law that requires officers with law enforcement power to be religious figures with religious training creates excessive entanglement"); *see also* sources cited *supra* note 74 & accompanying text.

131. *But cf.* Rosenthal, *supra* note 20, at 995 (arguing that kosher fraud statutes do not involve excessive entanglement because kosher inspectors need not have "religious belief" in the origin of the laws of kashrut).

132. *See Ran-Dav's County*, 608 A.2d at 1365. *But cf.* Shelley R. Meacham, Note, *Answering to a Higher Source: Does the Establishment Clause Actually Restrict Kosher Regulations as* Ran Dav's County Kosher *Proclaims?*, 23 SW. U. L. REV. 639, 659 (1994) (arguing that kosher statutes "do not excessively entangle government in religion because they do not impose substantive religious standards") (footnotes omitted).

133. *See* sources cited *supra* notes 73-74 & accompanying text.

134. *See Agostini*, 521 U.S. at 233-34.

2. Denominational Preference Test

In *Larson v. Valente*,[135] the Supreme Court distinguished the three-prong *Lemon* test as only "intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions . . . that discriminate *among* religions."[136] Where a law is found to discriminate among religions, the *Larson* Court held that strict scrutiny applies, thereby requiring that a law be narrowly tailored to a compelling governmental interest.[137] This test, enunciated by the Court in *Larson*, has been referred to as the "denominational preference test." Under the denominational preference test, "one religious denomination cannot be officially preferred over another" without first satisfying strict scrutiny.[138] Thus, "denominational neutrality" is the preferred standard to which laws ought to conform.[139]

As opposed to kosher fraud statutes, which explicitly refer to Orthodox Judaism's interpretations of *kosher* as dispositive, current halal fraud statutes do not facially prefer one Islamic school of thought over another. In this manner, halal fraud statutes appear (at least facially) to be neutral as between competing Islamic schools of thought.[140] The problem with halal fraud statutes under the denominational preference test appears to result from the observation that such statutes may discriminate in favor of mainstream Islam as opposed to other religions or non-religion. By expressly adopting Islamic law as the standard for interpreting and enforcing halal fraud statutes, states may maintain the appearance of preferring Islam over other religions. Although this argument might have some merit in the formalistic sense, the realities of today's religious demographics and politics in a post-September-11th America make such an argument unwarranted. Nevertheless, because the doctrine of "formal neutrality" is gaining increasing prominence in the Supreme Court's opinions,[141] it may be wise for states to erase all refer-

135. 456 U.S. 228 (1982).

136. *Id.* at 252.

137. *See id.* at 248, 251, 255.

138. *Id.* at 244-45.

139. *Id.* at 246; *see also Ballard*, 322 U.S. at 87 (stating that "[t]he First Amendment does not select any one group or any one type of religion for preferred treatment").

140. A strong argument, however, could easily be made that halal fraud statutes have the purpose or effect of discriminating in favor of *mainstream* Muslims, to the detriment of individuals whose interpretations of halal are counter-majoritarian. In so doing, halal fraud statutes have the impermissible effect of taking sides in a religious debate.

141. *See, e.g.*, Locke v. Davey, 540 U.S. 712 (2004); Zelman, 536 U.S. at 696 (Souter, J., dissenting). Although the so-called doctrine of "formal neutrality" is

ences to Islam or to any other specific religion from their halal fraud statutes.[142] Instead, states could simply require that all halal labels indicate the bases, or lack thereof, for their assertion of being halal (such as certification by a named private organization).[143] Failure to make halal fraud statutes more neutral as between Islam and other religions or non-religion may cause such statutes to be held unconstitutional once subjected to strict scrutiny for lack of narrow tailoring.[144]

B. Free Exercise Clause

The Supreme Court first considered a constitutional challenge under the Free Exercise Clause in *Reynolds v. United States*.[145] In *Reynolds*, the Court upheld the constitutionality of the Morrill Anti-Bigamy Act,[146] which made "spiritual marriage[s]" performed by members of The Church of Jesus Christ of Latter-day Saints ("Mormons") a federal crime.[147] "Laws are made for the government of actions," the Court explained in *Reynolds*, "and while they cannot interfere with mere religious belief and opinions, they may with practices."[148] Over a century later, in *Employment Division v. Smith*,[149] the Supreme Court reaffirmed its prior ruling in *Reynolds*, holding that the government can constitutionally prohibit religiously motivated action if the law prohibiting such actions is neutral and of general applicability.[150] A law is not neutral, however, if the law targets religious belief or "prohibits conduct *because* it is undertaken

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generally only used in the funding context, this Article uses it here to point out the importance of laws not facially preferring one religion, or form of religion, to the exclusion of all others.

142. *See supra* Section III.A.1.a.

143. *See infra* Section IV.

144. *Cf.* Berman, *supra* note 20, at 63 (arguing that "State cannot ban individuals' observance of their own personal interpretation of kashrut by legally establishing one denomination's, *or even many denominations'*, preferred interpretation") (emphasis added).

145. 98 U.S. 145 (1878).

146. Ch. 126, 12 Stat. 501 (1862).

147. *See id.*; *see also* Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257 (2006).

148. *Reynolds*, 98 U.S. at 166; *see also* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940) ("Conduct remains subject to regulation for the protection of society").

149. 494 U.S. 872 (1990).

150. *Id.* at 880-81.

for religious reasons."[151] Thus, "if the object of a law is to infringe upon or restrict practices *because* of their religious motivation," such law is invalid unless it can satisfy strict scrutiny.[152]

In regards to halal fraud statutes, an argument may be made that they violate the Free Exercise Clause because they may require consumers of halal food to accept religious practices contrary to their own beliefs.[153] This argument may be further buttressed with the complaint that halal fraud statutes are a form of governmental interference with religious belief and exercise.[154] Nevertheless, because halal fraud statutes appear to be laws of general applicability, they are most likely constitutional under *Smith* so long as they are also neutral.[155] As this Article explained earlier, however, halal fraud statutes, like most kosher fraud statutes, are not neutral because they expressly adopt the standards and beliefs of one religion (i.e., mainstream Islam) to the exclusion of all other religions or of non-religion.[156] Further, given the fact that there is no uniform definition of *halal* among and within the various Islamic schools of thought, by enforcing any statutorily-enacted definition of *halal* government thereby punishes Muslims who hold contrary religious beliefs. Thus, to the extent that halal fraud statutes are not neutral, strict scrutiny should apply.

Although government undoubtedly has a strong interest (regardless of whether that interest is "compelling") in protecting consumers of halal food from fraud, halal fraud statutes should fail strict scrutiny because they are not narrowly tailored to that interest. As this Article has pointed out, halal fraud statutes could be rewritten so as not to define the term *halal*.[157] Also, given the fact that any "discernible burden on the free exercise of religion" which halal fraud statutes might lift was not imposed *by* government, halal fraud statutes may not pass constitutional muster as a valid accommodation of religion.[158] For these reasons, halal fraud statutes should be held unconstitutional under the Free Exercise Clause.

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151. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532-33 (1993) (emphasis added).

152. *Id.* at 533 (emphasis added).

153. *But cf.* Sullivan, *supra* note 20, at 240-41 (rebutting this argument in the context of kosher food).

154. *But see id.*

155. *Smith*, 494 U.S. at 880-81.

156. *See supra* Sections III.A.1.b. & III.A.2.

157. *See supra* Sections III.A.1.a. & III.A.2.

158. Lee v. Weisman, 505 U.S. 577, 629 (1992) (Souter, J., concurring) (citations omitted); *see supra* Section III.A.1.b.

IV. SUGGESTIONS

Despite the foregoing discussion of the constitutionality of halal fraud statutes, which has suggested that such statutes violate the Religion Clauses of the First Amendment, consumers of halal food need not be left totally unprotected. Indeed, as this Article has stated, halal fraud statutes could be reworded to require halal-labeled products to state the bases of their assertions of being halal (such as certification by named private organizations).[159] In this manner, private individuals and halal certification agencies,[160] instead of government, would be defining the meaning of the inherently religious term *halal*. By so doing, government would empower consumers to make informed decisions as to which products meet their own individual understandings of *halal*. Thus, by avoiding any state-imposed definition of *halal*, government would also eliminate the constitutional infirmities presently existing in most halal fraud statutes today.[161]

By leaving the regulation of halal food to the private sector, government would also promote a more robust halal food market. "After all, the best guarantee of quality and price is a competitive marketplace–knowing that there are other suppliers forcing each producer to supply adequate quality at a competitive price."[162] Apart from constitutional concerns, additional reasons why private regulation of the halal food industry deserve greater attention include the following observations: (1) market participants often consider private regulation to be a form of promoting their products and attracting customers; (2) private regulation requires companies to put their reputations on the line, thereby promoting higher industry standards; (3) unlike government agencies generally, "[t]hird parties are flexible and responsive and can keep up with technological innovations and advancements;" and (4) private regulation imposes

159. *See supra* Sections III.A.1.a. & III.A.2. Otherwise, as this Article also noted earlier, government could merely enforce halal fraud as it does consumer fraud generally. *See supra* Section III.A.a. Consumers who discover that they may have been defrauded could bring causes of action based upon theories of contract or tort. *Cf.* Sigman, *supra* note 12, at 548-50, 570 (also noting "that not only do general consumer protection statutes punish the same behavior that kosher fraud statutes capture, but in many cases, they may offer clearly superior remedies for the violation").

160. *See supra* note 78 & accompanying text.

161. *See supra* Section III.

162. Yesim Yilmaz, Private Regulation: A Real Alternative for Regulatory Reform (1998), *available at* http://www.cato.org/pubs/pas/pa-303.pdf.

less cost on both government and businesses.[163] Thus, at least one viable and constitutional alternative (i.e., private food-certification agencies) to the present statutory scheme for avoiding halal fraud exists and should be seriously considered.[164]

V. CONCLUSION

As mentioned at the beginning of this Article, Islam is like a sacred garden that needs constitutional protection. Rather than seeking protection *by* government, however, Islam—and all religions—should seek protection *from* government. The Religion Clauses of the First Amendment were enacted for this very purpose: "For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[165] By allowing government to impose its interpretation of the inherently religious term *halal* upon Muslims via halal fraud statutes, Muslims and all religionists run the risk of having government determine both religious doctrine and heresy for them. Not only does this uninvited intrusion by government into religion's realm likely violate American Muslim's free-exercise rights, but it also violates the Establishment Clause as presently interpreted by the United States Supreme Court. These constitutional conundrums, however, can easily be avoided by leaving the definition of *halal* up to private individuals and organizations to determine, thereby not only ensuring that consumers of halal products are protected from fraud, but also that Islam's garden is not unconstitutionally trampled upon.

163. *Id. But cf.* Sigman, *supra* note 12, at 532 (observing that "once the volume of [kosher] certifiers is too numerous for consumers to recognize who is the creator of a particular certification, the method of signaling through certification becomes meaningless").

164. For an additional suggestion, see *supra* note 158.

165. McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948).