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Can Kosher Fraud Statutes Pass the Lemon Test? The Constitutionality of Current and Proposed Statutes

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Cover Page Footnote

I would like to thank my husband, Matthew, for finding this topic. This Comment is dedicated to my daughter, Aliya Rachel.

CAN KOSHER FRAUD STATUTES PASS THE *LEMON* TEST?: THE CONSTITUTIONALITY OF CURRENT AND PROPOSED STATUTES

Karen Ruth Lavy Lindsay[*]

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I. INTRODUCTION

In the United States, kosher food products are found practically everywhere—in grocery stores, in restaurants. Many people who eat kosher foods do not realize they are doing so. However, for observant Jews and others who intentionally seek out kosher products, it is essential that the products are, in fact, kosher. To be kosher, foods must comply with Judaism's strict dietary requirements, known as *kashrut*.[1] Because

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[1] MICHAEL ASHERI, LIVING JEWISH: THE LORE AND LAW OF THE PRACTICING JEW 89 (1978).

kashrut is detailed and complex, it is easy to come close to complying with *kashrut* but still fall short. There is no "almost kosher"; a food product is either kosher or not kosher. In purchasing kosher foods, Jews seeking to observe *kashrut* often rely upon accurate representations by kosher food merchants. Many states have enacted kosher fraud statutes[2] to ensure that vendors who sell food represented to be "kosher" or "kosher for Passover" comply with kosher requirements.

Although "kosher" stems from Judaism, the need for consumer protection in the area of kosher foods extends beyond Jews. Due to the similarity in Jewish and Muslim dietary restrictions, many Muslims purchase kosher foods to satisfy the requirements of Islam.[3] Furthermore, many people purchase kosher foods for non-religious reasons. However, most consumers do not know all the requirements of *kashrut* and, therefore, cannot confirm that all the requirements have been met. Thus, because consumers typically rely upon representations that particular foods are kosher, the goal of kosher food laws has been to prevent consumer fraud.

The cry for increased consumer protection in the kosher food market has not been unanimous. Many have asserted that the regulation of kosher foods violates the First Amendment prohibition against commingling religion and government action.[4] Throughout much of this century, kosher fraud statutes have withstood constitutional attacks. In the last five years, however, two kosher fraud statutes, one in New Jersey and one in Baltimore, have been invalidated as violative of the Establishment Clause.[5]

This Comment asserts that most states' kosher consumer protection laws or fraud laws violate the Establishment Clause and should be amended. Part II discusses the law of *kashrut* and the availability of kosher

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[2] Statutes regulating the sale of kosher products have a number of names, such as, kosher consumer protection statutes, kosher products laws, and kosher fraud statutes. This Comment refers to all such statutes as kosher fraud statutes.

[3] Interestingly, some Muslim leaders have called for policing foods made under Muslim dietary laws. "Muslim leaders and some meat producers want [New York] to monitor the sale of *halal* foods made under Muslim dietary law. A proposal backed by Assemblyman William Parment would be the first state law against *halal* fraud and would operate much the way New York now monitors kosher food marketing." Pamela Sebastian, *A Special Background Report on Trends in Industry and Finance*, WALL ST. J., Jan. 30, 1992, at A1.

[4] Many of the individuals who are asserting that kosher fraud laws are unconstitutional are business people who have faced enforcement action by a state or municipality for alleged violations of a kosher fraud statute. Mere allegations that a kosher butcher is not complying with *kashrut* can be devastating to the business. Peter B. Smith, *Butchers Fight State on Kosher Food Laws*, TIMES UNION, Apr. 13, 1996, at B11 (noting that publicity when a butcher was fined for violating New York kosher food law, there was a 20% drop-off to his business, even though the fine was rescinded).

[5] N.J.A.C. 13:45 A-21, A-22 (1987); BALT., MD. CITY CODE §§ 49-52 (1983).

products in today's market.[6] Part III introduces the approaches taken by state legislatures in regulating vendors of kosher products.[7] Part III also introduces the *Lemon* test and examines *Ran-Dav's County Kosher v. State*[8] and *Barghout v. Bureau of Kosher Meat & Food Control*,[9] detailing the courts' reasons for invalidating the New Jersey regulation and the Baltimore City kosher consumer protection statute.[10] Part IV further analyzes the legislative approaches and measures them against the *Lemon* test.[11] Part V concludes that, under current Establishment Clause jurisprudence, most kosher fraud statutes, as currently drafted, violate the Establishment Clause. Part V further concludes that proposed basis-approach kosher fraud statutes satisfy the requirements of the *Lemon* test.

II. BACKGROUND: THE LAW AND THE PROFITS

The purpose of kosher consumer protection acts is to ensure that purchasers of purported kosher food actually receive kosher food.[12] Although courts are generally unwilling to define what religious terms mean,[13] some of the "kosher basics" such as the prohibition against eating pork,[14] are recognized by the general public. Despite the general public's familiarity with the word "kosher,"[15] Jewish dietary restrictions are quite complex and generally not fully understood. In addition, few people recognize the prevalence of kosher products in the marketplace.

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[6] *See infra* notes 12-57 and accompanying text.

[7] *See infra* notes 58-76 and accompanying text.

[8] 608 A.2d 1353 (N.J. 1992), *cert. denied*, 507 U.S. 952 (1993).

[9] 66 F.3d 1337 (4th Cir. 1995).

[10] *See infra* notes 77-186 and accompanying text.

[11] *See infra* notes 187-206 and accompanying text.

[12] Mark A. Berman, Comment, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 2 (1992).

[13] *See, e.g.*, Presbyterian Church v. Mary E.B. Hull Presbyterian Church, 393 U.S. 440 (1969) (holding that civil courts cannot weigh the significance of religious doctrines under First Amendment principles).

[14] ASHERI, *supra* note 1, at 89 (pigs have cloven hooves, but do not chew their cud; thus, they are forbidden).

[15] In addition to its religious definition, kosher has a secular, colloquial use. *See* WEBSTER'S NEW WORLD THESAURUS 442 (1985) (providing the following synonyms for kosher: proper, genuine, and on the up and up).

A. What is Kosher?

Kosher is defined as "fit, acceptable, or ritually useable."[16] Although the word "kosher" applies to items other than food,[17] *kashrut* refers to the complex dietary regulations that indicate what food Jews may and may not eat.[18]

The kosher dietary regulations consist of four general categories: (1) laws concerning meat, fowl and fish; (2) laws regarding the mixing of meat and milk;[19] (3) laws concerning wine and grape juice products; and (4) laws governing foods for Passover.[20] *Kashrut* spans the entire process of selecting, preparing, and eating foods.[21] Where animals are involved, *kashrut* also governs the slaughtering.[22] For food to be kosher, food preparers must comply with all *kashrut* requirements throughout the preparation process.[23]

Most non-Jews are aware that certain foods, particularly kinds of meat, are inherently non-kosher. Under the law of *kashrut*, Jews are allowed to eat only those meats that come from warm-blooded animals that chew their cud and have split hooves.[24] However, all birds that are commonly domesticated, such as turkey and chicken, are also kosher.[25] Fish must have fins and easily detachable scales to be kosher; thus, certain

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[16] ASHERI, *supra* note 1, at 89; DAN COHN-SHERBOK, THE BLACKWELL DICTIONARY OF JUDAISM 116 (1992) (foods that are suitable for consumption are referred to as 'kasher' (fit)).

[17] Examples of kosher non-food items include a properly prepared *mezuzah* and razor-sharp, knickless knives used in slaughtering animals. ASHERI, *supra* note 1, at 87.

[18] *See* THE ENCYCLOPEDIA OF JUDAISM 207 (Geoffrey Wigoder ed., 1989) (discussing the dietary laws known in Hebrew as *kashrut*). Although a thorough discussion of *kashrut* is beyond the scope of this Comment, many of the major principles are summarized.

[19] Foods are placed into one of three categories: 1) meat or *fleishig*; 2) dairy or *milchig*; and 3) neutral or *pareveh*. ASHERI, *supra* note 1, at 89. All foods containing meat are considered *fleishig*. *Id.* Foods containing milk or milk products, including derivatives such as whey, are *milchig*. *Id.* All other foods are *pareveh*. *Id.* Although *kashrut* forbids the eating of *milchig* and *fleishig* together and within a certain period of time, these requirements are not aspects of the consumer protection laws and are, thus, beyond the scope of this Comment.

[20] *Id.* at 89. As with the mixing of *fleishig* and *milchig*, the requirements to qualify as kosher for Passover are beyond the scope of this article.

[21] THE ENCYCLOPEDIA OF JUDAISM, *supra* note 18, at 207.

[22] *Id.* The dietary laws deal "with the manner of the animal's slaughter, its health at the time of death, and the manner of its preparation for consumption." *Id.*

[23] A few foods are deemed not kosher due to difficulty in complying with all *kashrut* requirements. For example, deer are warm-blooded animals that chew their cud and have split hooves. As such, they are among the warm-blooded animals that are permissible to eat. ASHERI, *supra* note 1, at 89. However, undomesticated deer usually cannot be slaughtered in accordance with *kashrut*. as such, venison generally is considered non-kosher. *Id.*

[24] *Id.* Examples of kosher meats include beef and lamb.

[25] *Id.*

seafood, such as crabs and oysters, and certain fish, such as shark and catfish, are impermissible.[26]

Many foods are, however, inherently kosher. Virtually all dairy products are kosher.[27] Grains and beverages are generally kosher.[28] Fruits and vegetables are not dealt with in *kashrut*, but all are considered kosher.[29] However, such foods may become non-kosher if they are prepared in a non-kosher fashion. For example, during Passover, certain foods that are generally kosher, such as leavened bread and corn, become non-kosher.[30]

In addition to the food itself being kosher, the preparation must be entirely kosher.[31] This involves, among other things, preparing food with kosher utensils and using a kosher kitchen.[32] Meats from animals that are permissible are only kosher if both the slaughtering and preparation of the meat is performed according to the laws of *kashrut*.[33] The animal must be slaughtered by a *shohet*, an individual licensed by rabbinical authorities to perform the slaughter.[34] The *shohet* must use a razor-sharp knife that is free from nicks.[35] The *shohet* must further ensure that the animal is in good health; if abnormalities exist, the meat is not kosher.[36] A kosher butcher must remove certain cuts of meat that are not considered kosher.[37] Because Jews are forbidden from eating blood, the meat must also be soaked and salted before it can be eaten.[38]

Despite widespread acceptance by most of the Jewish community of the above categorizations, certain groups of Jews[39] disagree on whether certain individual foods are kosher. For example, certain ultra-religious Jews only will consume milk from cows that were milked solely by Jews

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[26] *Id.* at 91.

[27] The debate about certain exceptions to the general rules will be discussed, *infra* note 38.

[28] ASHERI, *supra* note 1, at 91.

[29] THE ENCYCLOPEDIA OF JUDAISM, *supra* note 18, at 207.

[30] ASHERI, *supra* note 1, at 160-61.

[31] *Id.* at 91.

[32] *Id.* at 92.

[33] *See* ASHERI, *supra* note 1, at 89-90.

[34] THE ENCYCLOPEDIA OF JUDAISM, *supra* note 18, at 207.

[35] *Id.* at 207. The *shohet* must slaughter the animal with one continuous motion, severing the esophagus and trachea. *Id.* These requirements are intended to prevent the animal from suffering any needless pain. *Id.* Because these requirements exist, certain animals that appear to be inherently kosher, such as deer, are not kosher due to a *shohet's* inability to slaughter the animal in a kosher manner. *Id.*

[36] *Id.* at 207-08.

[37] THE ENCYCLOPEDIA OF JUDAISM, *supra* note 18, at 208.

[38] ASHERI, *supra* note 1, at 90.

[39] The Jewish community is divided into three general branches: Orthodox, Conservative, and Reform. Some would also consider Reconstructionist and Hassidic as separate groups.

and processed under religious supervision.[40] Similarly, Orthodox Jews do not consider swordfish and sturgeon to be kosher while some Conservative and Reform Jews[41] consider them acceptable.[42] A few other disagreements also exist.[43] Most Jews, however, concur that these disagreements deal with the minutiae of kosher laws and generally agree regarding the vast majority of the dietary requirements.[44]

B. Beyond Jewish: Kosher Is Big Business

The demand for and availability of kosher products has skyrocketed in recent years. Between 1988 and 1993, the sale of kosher food in the United States nearly doubled.[45] Over eighteen thousand kinds of kosher products are sold in the United States, earning thirty billion dollars of business per year.[46] "A certificate guaranteeing rabbinical supervision, [a *hechsher*,[47]] can now be found on thousands of mass-produced foods, especially in Israel and the United States. . . . Airlines, hotels, restaurants, and catering firms throughout the world supply [kosher] food on a regular basis."[48]

Although kosher foods exist due to Jewish dietary restrictions, Jews are merely one segment of the population that purchases kosher foods.

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[40] ASHERI, *supra* note 1, at 91.

[41] Although many Reform Jews do not consider compliance with *kashrut* to be required by Judaism, Reform Jews recognize *kashrut's* existence and interpret its requirements.

[42] ASHERI, *supra* note 1, at 91.

[43] Although cauliflower is considered kosher by most Jews, a small number of Jews will not eat cauliflower due to the difficulty of removing all the tiny insects (which are not kosher) which tend to inhabit cauliflower. *Id.* Similarly, most Orthodox Jews will not eat cheeses containing rennet, which is made from the lining of a calf's stomach. *Id.* at 90. However, many rabbis allow the eating of such cheese due to the very small percentage of rennet in cheese and because the rennet "passes through a stage in which a dog would not eat it thus losing its original characteristics." *Id.* at 91.

[44] This agreement does not extend to the religious significance of *kashrut*. However, debate regarding the extent that Judaism requires people to eat kosher foods is entirely different from disagreement over what *kashrut* itself requires for food to be kosher. This Comment, as well as the kosher food statutes themselves, is concerned only with what *kashrut* requires for food to be kosher.

[45] Beth Laski, *Keeping Kosher Becomes Chic; Demand for Quality Food Triggers Marketing Boom*, LOS ANGELES DAILY NEWS, Apr. 4, 1993, at L14.

[46] Berman, *supra* note 12, at 11.

[47] Such certificates are called *hechshers* or *hekhshers*. THE ENCYCLOPEDIA OF JUDAISM, *supra* note 18, at 334. *Hechshers* or *hekhshers* are provided for meat, wines and spirits, mass-produced foods, and foods for Passover. *Id. Hechshers* may be "granted to approved 'kosher' butchers, bakers, hotels and restaurants. Business premises display this certificate, while a recognized symbol is usually incorporated in the packaging of foodstuffs." *Id.*

[48] *Id.*

Kosher food is purchased by some six million consumers every year.[49] "The bulk of the kosher food market consists of people who believe that kosher products are healthier than similar non-kosher products; adherents of religions with dietary restrictions similar to Judaism's, mainly Muslims and Seventh-Day Adventists; and, finally, the largest group, people who are unaware they are buying kosher products."[50] Vegetarians and health-conscious individuals frequently purchase kosher foods, believing that these products are healthier and receive a greater degree of supervision than non-kosher foods.[51] Jews only represent approximately thirty percent of kosher food consumers.[52]

With the growing popularity of kosher foods, certifying organizations have concentrated on alleviating kosher problems that arise in the mass-production of food.[53] Universally recognized kosher symbols, such as "K" and the circled "U," which are used by national organizations, are generally reserved to large food manufacturers with wide distribution.[54] Although national organizations provide rabbinical supervision and certification for some regional food manufacturers and local businesses, many small manufacturers and businesses receive certification from local rabbis or regional certifying organizations.[55]

Because of the limited use of national symbols by small-scale providers of kosher foods, the local community may be forced to participate in ensuring compliance with *kashrut*.

> Supervision and certification of restaurants, supermarkets, and butcher shops usually are left to the local rabbinate and to individual supervisors. Because each [certifying rabbi] applies his own standard of *kashrut*, the reliability of any given [rabbi] depends on the individual. As a result, there is a general reliance on community enforcement of the dietary laws.[56]

Consumers, however, may have difficulty determining whether a local merchant is selling non-kosher products as kosher. Many kosher product consumers may not be aware of all that *kashrut* requires in the preparation of kosher foods. Even when consumers are aware of kosher requirements,

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[49] Laski, *supra* note 45, at L14.

[50] Berman, *supra* note 12, at 11.

[51] Laski, *supra* note 45, at L14. As stated in a brochure of the Orthodox Union, "[s]ignificant segments of the American public believe that the Jewish kosher laws represent quality, cleanliness and purity, and are especially inclined to purchase kosher products because of the extra level of supervision implied by the kosher symbol." *Id.*

[52] Mike Dunne, *Korbel Releases a Kosher Bubbly*, SACRAMENTO BEE, Apr. 9, 1997, at D5.

[53] *See, e.g.*, Berman, *supra* note 12, at 11.

[54] *Id.* at 11.

[55] *Id.* at 12.

[56] *Id.*

consumers likely would not be permitted to conduct personal inspections to ensure that the merchant consistently complies with kosher requirements. Because of these difficulties, numerous states and localities have enacted statutes to protect consumers from the fraudulent sale of non-kosher food.[57]

III. THE PROTECTION OF KOSHER CONSUMERS: STATUTES AND CASES

Twenty-two states and a number of localities have statutes that prohibit the fraudulent sale of non-kosher foods as kosher.[58] The goal of these statutes is consumer protection.[59] Because "kosher" is an inherently religious concept, most states with kosher fraud statutes have incorporated a religious standard into their statutes.[60] However, such an incorporation creates an inherent tension between the protection of kosher product consumers and the constitutional prohibition against the establishment of religion.

A. The Statutes

Due to the religious origin of "kosher," the drafters of consumer protection statutes faced unique challenges. All kosher fraud statutes grapple with four basic issues: (1) the level of intent that should be

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[57] *See infra* note 58 and accompanying text.

[58] ARIZ. REV. STAT. ANN. §§ 36-941 to -943 (1991); ARK. CODE ANN. § 20-57-401 (Michie 1991); CAL. PENAL CODE § 383b (West 1988); CONN. GEN. STAT. §§ 53-317, 21 a-13 (1994); GA. CODE ANN. §§ 26-2-330 to -335 (1991); Kosher Food Act, ILL. REV. STAT. ch 410 ¶¶ 645/0.01-/1 (1991); KY. REV. STAT. ANN. § 367.850 (Baldwin 1997); LA. REV. STAT. ANN. § 40:608.2 (West 1992); MD. CODE ANN., COM. LAW II §§ 14-901 to -911 (1990); MASS. GEN. L. ANN. ch. 94, § 156 (West 1984 & Supp. 1997); MICH. COMP. LAWS § 750.297e (1991); MINN. STAT. §§ 31.651-.681 (1991); MO. REV. STAT. § 196.165 (1990); Kosher Food Consumer Protection Act, N.J. STAT. ANN. § 56:8-61 to -66 (West 1996); N.Y. AGRIC. & MKTS. LAW § 201-a to -f (McKinney 1991); OHIO REV. CODE ANN. §§ 1329.29, .99(B) (Baldwin 1991); 18 PA. CONS. STAT. § 4107.1 (1991); R.I. GEN. LAWS §§ 21-16-1 to -4 (1990); TEX. BUS. & COM. CODE ANN. §§ 17.821-.826 (West 1991); VA. CODE ANN. § 18.2-236 (Michie 1991); WASH. REV. CODE ANN. §§ 69.90.010-.040 (West 1985 & Supp. 1997); WIS. STAT. § 97.56 (1990). In addition, a number of municipalities have kosher consumer protections law. Such municipalities include, for example: Baltimore City, Maryland; Baltimore County, Maryland; and Miami Beach, Florida. *See* Berman, *supra* note 12, at 18 n.81. Tennessee and Washington, D.C. repealed their kosher food consumer protection statutes. TENN. CODE ANN. §§ 53-6-101 to -102 (repealed 1983); D.C. CODE ANN. §§ 22-3404 to -3406 (repealed 1982). In addition, New Jersey's kosher fraud statute was enacted in 1994 following the New Jersey Supreme Court's determination in *Ran-Dav's County Kosher v. State*, 608 A.2d 1353 (N.J. 1992), *cert. denied*, 507 U.S. 952 (1993), that New Jersey's prior kosher fraud statute violated the Establishment Clause. *See* U.S. CONST. amend. I.

[59] Berman, *supra* note 12, at 2.

[60] *See generally id.* at 22.

required to violate the statute; (2) how kosher should be defined; (3) the number and types of affirmative steps that persons covered by the statute should take to ensure that customers are not misled; and (4) the appropriate enforcement mechanism. Although states and municipalities have not acted uniformly with regard to these questions, these statutes reflect a limited range of approaches.

In most states, specific intent is required to violate kosher fraud laws. The Louisiana kosher fraud law provides a typical statement of intent:

> It shall be unlawful for any person to:
>
> (1) Sell or expose for sale with intent to defraud in any place where food products are sold for consumption either on or off the premises, any article of food falsely represented as kosher . . .; or
>
> (2) Sell or expose for sale with intent to defraud any meat or meat preparations and falsely represent the same to be kosher . . .; or
>
> (3) Falsely represent with intent to defraud any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word kosher in any language.[61]

A handful of states make it unlawful for a person to "knowingly" sell or present for sale non-kosher foods as kosher.[62] Finally, a few states do not specify the level of intent required for a seller to be found liable under their kosher fraud statutes, but rather state that it is unlawful to "falsely represent" food or the contents of packages or containers as kosher when they are not.[63]

The second problem faced by states was how to define kosher. The majority of states define kosher to be food "prepared or processed in accordance with orthodox Hebrew religious requirements sanctioned by a recognized rabbinical council."[64] A few states chose to require compliance

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[61] LA. REV. STAT. ANN. §§ 40:608.2(A)(1)-(3). The majority of states have similar language requiring "intent to defraud."

[62] 18 PA. CONS. STAT. § 4107.1(a); MASS. GEN. L. ANN. ch. 94, § 156; R.I. GEN. LAWS § 21-16-1; WASH. REV. CODE ANN. § 69.90.020.

[63] MD. CODE ANN., COM. LAW II § 14-903; OHIO REV. CODE ANN. § 1329.29; MINN. STAT. § 31.651.

[64] MINN. STAT. § 31.651(1); *accord, e.g.*, ARK. CODE ANN. § 20-57-401; KY. REV. STAT. ANN. § 367.850; MASS. GEN. L. ANN. ch. 94, § 156(a); MO. REV. STAT. § 196.165; OHIO REV. CODE ANN. §1329.29(A)(1). The California statute provides a complex definition of kosher, referring to the "cradle to grave" aspect of kosher laws:

> The word "kosher" is here defined to mean a strict compliance with every Jewish law and custom pertaining and relating to the killing of the animal or fowl from which the meat is taken or extracted, the dressing, treatment and preparation thereof for human consumption, and the manufacture, production, treatment and preparation of such other food or foods in connection wherewith Jewish laws and customs obtain and to the use of tools, implements,

with Jewish law without explicitly specifying which division of Judaism's requirements, Orthodox, Conservative, or Reform, had to be met.[65] New Jersey's statute does not define kosher at all.[66] As discussed below, this choice may have significant ramifications on the constitutionality of kosher statutes, due to the disagreements among Jews regarding the kosher status of certain items.[67]

In a number of jurisdictions, merchants who sell both kosher and non-kosher foods and products, particularly meats, are required to post signs indicating that both kosher and non-kosher foods are sold at that location.[68] For example, Connecticut requires sellers of both kosher and non-kosher meats to indicate "on [their] window signs and all display advertising, in block letters at least four inches in height, 'KOSHER AND NONKOSHER MEAT SOLD HERE.'"[69] Sellers are also required to post a sign, with similar format requirements, over each kind of meat indicating which items are kosher and which are not.[70] In addition, many states require that food establishments file with the state the name and address of the person who supervised and certified the food as kosher.[71]

Finally, to be effective, each statute contains an enforcement mechanism. In all states with kosher fraud statutes, violation of the statute constitutes a criminal offense, usually resulting in a fine or up to six months imprisonment.[72] In addition, many states provide for civil enforcement, either by providing a private cause of action for affected consumers or through actions brought by the state attorney general's

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> vessels, utensils, dishes and containers that are used in connection with the killing of such animals and fowls and the dressing, preparation, production, manufacture and treatment of such meats and other products, foods and food stuffs.

CAL. PENAL CODE § 383b. In *Erlich v. Municipal Court*, 360 P.2d 334, 335 (Cal. 1961), the California Supreme Court determined that "every Jewish law and [pertinent] custom" refers to those customs recognized by the orthodox dietary requirements.

[65] *E.g.*, Kosher Food Act, ILL. REV. STAT. ch. 410 ¶ 645/1 (requiring compliance with the Code of Jewish Laws). The Pennsylvania statute defines kosher as "[a] food product having been prepared, processed, manufactured, maintained and vended in accordance with the requisites of traditional Jewish Law." 18 PA. CONS. STAT. § 4107.1(b). Although many would read traditional to mean orthodox, that view may not be universally shared.

[66] Kosher Food Consumer Protection Act, N.J. STAT. ANN. § 56:8-62.

[67] *See infra* Part IV.

[68] *See, e.g.*, ARK. CODE ANN. § 20-57-401(3); CONN. GEN. STAT. § 53-317(a); KY. REV. STAT. ANN. § 367.850.

[69] CONN. GEN. STAT. § 53-317(a); *accord, e.g.*, ARK. CODE ANN. § 20-57-401(3); KY. REV. STAT. ANN. § 367.850.

[70] CONN. GEN. STAT. § 53-317.

[71] *E.g.*, N.Y. AGRIC. & MKTS. LAW § 201-b.

[72] *E.g.*, VA. CODE ANN. § 18.2-236 (violation of statute is Class 1 misdemeanor); ARIZ. REV. STAT. ANN. § 36-943.

office.[73] Few statutes establish a mechanism for determining whether a violation has occurred. Rather, jurisdictions have promulgated regulations pursuant to the statutes establishing commissions to oversee and investigate compliance.[74] Such determinations are generally done either through the state's department of agriculture or the attorney general's office.[75] A few states establish commissions, hiring rabbis to inspect the food establishments and merchants to ensure compliance with kosher standards.[76] Unfortunately, these enforcement procedures appear to require the governmental entity to determine whether a product that was sold was or was not kosher.

B. Establishment Clause v. Kosher Fraud Statutes

Although kosher fraud laws exist in numerous jurisdictions, challenges to these statutes have been infrequent and, until recently, generally unsuccessful.[77] Initially, kosher fraud laws were attacked under the Due Process Clause with plaintiffs claiming that "kosher" was unconstitutionally vague.[78] None of the suits, however, were successful. Since the First Amendment was applied to the states,[79] only a small handful of courts have faced the issue of whether kosher fraud laws violated the

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[73] For example, New Jersey has both civil and criminal statutes, which prohibit consumer fraud concerning the sale of kosher foods. N.J. STAT. ANN. § 2C:21-7.4 (criminal); N.J. STAT. ANN. § 56:8-61 (civil). The criminal provision creates a "disorderly person offense" for persons who falsely represent non-kosher food as kosher, falsely label food as kosher, or sell or serve food as kosher without indicating that non-kosher food is also served or sold. N.J. STAT. ANN. § 2C:21-7.4. In contrast, the civil provision, which is enforced by the New Jersey Attorney General's office, requires all dealers who distribute, sell, or prepare kosher foods to identify at the place of business the basis for the representation that the food is kosher. N.J. STAT. ANN. § 56:8-61.

[74] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-941 to -943; CAL. PENAL CODE § 383b; ILL. ANN. STAT. ch. 410 ¶¶ 645/0.01-/2; N.Y. AGRIC. & MKTS. LAW, § 201.

[75] *See, e.g.*, *supra* note 73 and accompanying text; MICH. COMP. LAWS § 750.297e(5); OHIO REV. CODE ANN. § 1329.29(D); MASS. GEN. L. ANN. ch. 94, § 156(g).

[76] *See, e.g.*, N.Y. AGRIC. & MKTS. LAW § 26-a.

[77] *E.g.*, Hygrade Provision Co. v. Sherman, 266 U.S. 497, 501 (1925).

[78] In 1925, the Supreme Court addressed whether the terms "kosher" and "orthodox Hebrew religious requirements" in a New York consumer protection statute were unconstitutionally vague. *Id.* at 501. The Court upheld the constitutionality of the statute, saying that "kosher" was a sufficiently precise term such that members of the trade could correctly apply it. *Id.* For a detailed summary of the challenges to kosher fraud statutes, see Berman, *supra* note 12, at 19-29.

[79] Everson v. Board of Educ., 330 U.S. 1 (1947) (applying the Establishment Clause to the states).

Establishment Clause of the First Amendment.[80] None of the kosher fraud statutes were invalidated until 1992.[81]

Both cases that invalidated kosher fraud laws, *Ran-Dav's County Kosher, Inc. v. New Jersey* and *Barghout v. Bureau of Kosher Meat & Food Control*, applied a *Lemon* test analysis. This section, therefore, first introduces the *Lemon* test. Next, this section discusses *Ran-Dav's* and *Barghout*, setting forth the reasoning of the courts in finding the New Jersey regulations and Baltimore City ordinance unconstitutional.

1. The Constitutional Benchmark: *Lemon v. Kurtzman*

The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[82] In 1947, the Supreme Court applied the Establishment Clause to the states.[83] The prohibition against "establishment of religion" has been hard to define. As stated by Justice Burger, "[the Court] can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[84] In 1971, in *Lemon v. Kurtzman*, the Supreme Court adopted a tripartite approach to evaluate the constitutionality of government action attacked under the Establishment Clause.[85] The

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[80] *See, e.g.*, Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992), *cert. denied*, 507 U.S. 952 (1993); Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337 (4th Cir. 1995).

[81] *See supra* note 80.

[82] U.S. CONST. amend. 1.

[83] According to Justice Black's majority opinion in *Everson*, the Establishment Clause meant at a minimum:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Everson, 330 U.S. at 15-16.

[84] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[85] In *Lemon*, the Supreme Court combined two previously formulated tests. *Id.* at 612-13. *Lemon* adopted the secular legislative purpose and primary effect tests from *Abington School District v. Schempp*, 374 U.S. 203 (1963), and the excessive entanglement prohibition from *Walz v. Tax*

approach was formulated to ensure that a government would avoid "the three main evils" that the Establishment Clause was intended to protect against: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[86] Under the *Lemon* analysis, to conform to the limitations of the Establishment Clause, a statute: (1) is required to have a secular legislative purpose; (2) must have a principal or primary effect that does not advance nor inhibit religion; and (3) must not encourage an excessive entanglement with religion.[87]

The requirement of a secular legislative purpose generally is easily satisfied.[88] A statute satisfies the secular purpose prong so long as the statute has any valid secular purpose.[89] The Supreme Court has invalidated statutes due to lack of a secular purpose only where the state's "actual purpose" was to endorse religion, or where "the secular purpose articulated by the legislature is merely [a] 'sham.'"[90] As one commentator noted,[91] only in three cases have statutes been invalidated under the purpose prong of the *Lemon* test—*Edwards v. Aguillard*,[92] *Wallace v. Jaffree*,[93] and *Stone v. Graham*.[94]

Commission, 397 U.S. 664 (1970). *Lemon*, 403 U.S. at 612-13. For further discussion, see GERALD GUNTHER, CONSTITUTIONAL LAW 1509-10 (11th ed. 1985).

[86] *Lemon*, 403 U.S. at 612.

[87] *Id.* at 612-13.

[88] *See infra* notes 89-94 and accompanying text.

[89] Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (stating that the appropriate inquiry is whether the statute is *wholly* motivated by an impermissible purpose).

[90] Witters v. Dept. of Servs. for the Blind, 474 U.S. 481, 486 (1986), *cert. denied*, 493 U.S. 850 (1989).

[91] Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 680 (1993). Mr. Masoudi further notes that the "purpose" prong has been little discussed by the Supreme Court:

> What little guidance the Court has given [regarding this prong] can be summarized in a few sentences. First, the purpose test "asks whether the government's actual purpose is to endorse or disapprove of religion." Second, the Court has noted that it has invalidated legislation under the purpose test only when "there was no question that the statute or activity was motivated wholly by religious considerations."

Id.

[92] 482 U.S. 578 (1987) (striking down Louisiana Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act, which forbids teaching the theory of evolution in public schools unless accompanied by instruction in "creation science"). The Creationism Act's purported secular purpose was the protection of academic freedom. *Id.* at 586. The Court found that the Creationism Act's language did not promote academic freedom but, rather, mandated "equal time" to the creationism approach. *Id.* at 587-89. Accordingly, the Court found that the primary purpose of the Act was the promotion of a particular religious belief. *Id.*

[93] 472 U.S. 38 (1985) (holding that an Alabama statute authorizing a daily period of silence in public schools for meditation or voluntary prayer had no secular purpose).

[94] 449 U.S. 39 (1980) (holding that a statute requiring that the Ten Commandments be posted in every public school classroom had no secular purpose).

Although the purpose prong poses little challenge to most statutes' constitutionality, the same cannot be said of the effect and entanglement prongs of the *Lemon* test. Rather, the Supreme Court's interpretation of the effect and entanglement prongs is complex and varied. Although *Lemon* refers to "a principal or primary effect that neither advances nor inhibits religion," the Supreme Court stated that its inquiry under this prong is "whether [the state action] . . . has the direct and immediate effect of advancing religion."[95]

In determining whether governmental action has the primary effect of advancing religion, the Court recently has focused on two concepts: general availability and endorsement.[96] Because the Establishment Clause requires "benevolent neutrality," meaning that "government should not prefer one religion to another, or religion to irreligion,"[97] the Supreme Court has looked to whether governmental action was of general application.[98] For example, in *Bowen v. Kendrick*, the Court sustained grants to religious organizations under a program to educate, assist and prevent teenage motherhood, saying that "religious institutions need not be quarantined from public benefits that are neutrally available to all."[99] Conversely, in *Board of Education v. Grumet*, the Court held that the creation of a special school district for the Village of Kiryas Joel, which consisted of solely Satmar Hasidic Jews, had the primary effect of advancing religion.[100] In doing so, the Court noted that "Kiryas Joel did not receive its new governmental authority simply as one of many communities eligible for equal treatment under a general law."[101]

Due to the impetus of Justice O'Connor, the Court also has focused on whether the statute endorses religion.[102] "[A]t the very least, [the

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[95] Community for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973).

[96] *See* Board of Educ. v. Grumet, 114 S. Ct. 2481, 2491 (1994); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 592-93 (1989).

[97] *See Grumet*, 114 S. Ct. at 2491; Wallace v. Jaffree, 472 U.S. 38, 52-54 (1985).

[98] *E.g.*, *Grumet*, 114 S. Ct. at 2491 ("[The Court] ha[s] frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges."); Walz v. City of New York, 397 U.S. 664 (1970); Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[99] Brown v. Kendrick, 487 U.S. 589, 608 (1988) (quoting Roemer v. Board of Pub. Works, 426 U.S. 736, 746 (1976)).

[100] *Grumet*, 114 S. Ct. at 2492.

[101] *Id.* at 2491.

[102] *E.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 592-93 (1989). As Justice Blackmun states in his brief history of the Establishment Clause,

> in recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion . . . . [T]he prohibition against governmental endorsement of religion "preclude[s] government from

Establishment Clause] prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[103]

Although Establishment Clause cases generally include neutrality and endorsement themes, the Supreme Court increasingly has been divided as to the extent that governmental action permissively can advance religion.[104] The division stems from the inherent constitutional tension between the Establishment Clause and the Free Exercise Clause. For example, in *Texas Monthly, Inc. v. Bullock*,[105] Justice Blackmun lamented the apparent need to favor one religion clause over another.[106] In his concurrence, Justice Blackmun noted that Justice Brennan's opinion resolved the conflict between the Establishment Clause and the Free Exercise Clause by subordinating the Free Exercise Clause, while Justice Scalia's opinion resolved the tension in favor of the Free Exercise Clause.[107] A few months later in *County of Allegheny v. ACLU*, the Court again was deeply divided as to whether a nativity scene in a county courthouse and a menorah and Christmas tree located on city and county property improperly endorsed religion.[108] Deciding 5-4 that the creche violated the Establishment Clause and 7-2 that the menorah did not, the Justices' opinions displayed the full range of approaches, from strict neutrality toward religion to considerable accommodation of religion.[109]

Implicit in the conflict over the appropriate level of "advancing religion" is an underlying conflict regarding the intent and historical

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conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred*."

Id. at 592-93.

[103] *Id.* at 594 (citing Lynch v. Donnelly, 465 U.S. 668, 687 (1984)).

[104] *See, e.g., infra* notes 117-121 and accompanying text.

[105] 489 U.S. 1, 26 (1989) (involving the constitutionality of a state exemption from sales tax for religious periodicals).

[106] *Id.* at 27.

[107] *Id.*

[108] *See generally* County of Allegheny v. ACLU, 492 U.S. 573 (1989).

[109] *Id.* For example, on one hand Justice Kennedy, with whom Justices Scalia, Rehnquist and White joined, argued that neither display violated the Establishment Clause due to the government's need to accommodate religion. *Id.* at 657. Justice Kennedy stated that "[r]ather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." *Id.* On the other hand, Justice Brennan, with whom Justices Stevens and Marshall joined, asserted that both displays violated the Constitution due to the prohibition against endorsing religion and the requirement that government be neutral toward religion. *Id.* at 637-44. For a thorough discussion of *County of Allegheny v. ACLU*, see generally Shahin Rezai, County of Allegheny v. ACLU: *Evolution of Chaos in Establishment Clause Analysis*, 40 AM. U. L. REV. 503 (1990).

foundation of the Establishment Clause. Throughout Establishment Clause jurisprudence, Justices have disagreed over whether the Establishment Clause requires government to be entirely neutral toward religion and irreligion, or merely nonpreferential regarding various religious sects.[110] Although the majority view of requiring "benevolent neutrality" toward religion and irreligion has persisted since *Everson*, a vocal minority has consistently asserted that the Establishment Clause is limited to precluding government from establishing a national religion and to prevent discrimination among sects.[111] The Supreme Court's recent position in *Rosenberger v. University of Virginia*, in which the Court required, under the Free Speech Clause, funding for religious student organizations at a state-funded university, suggests that the minority position may soon appear in a majority holding.[112]

In addition to avoiding the advancement or inhibition of religion, the governmental action must not foster an excessive entanglement with religion. Although the Establishment Clause prohibits excessive entanglement, it does not proscribe all entanglement. As such, the Court is frequently called upon to decide whether the government went too far. As stated by one commentator,

> [i]mpermissible entanglement of government and religion can take a number of forms. A government action is prohibited by the Establishment Clause if "it creates excessive administrative entanglement between church and state" or if "it turns over traditionally governmental powers to religious institutions." . . . [T]his administrative entanglement "sometimes arises when

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[110] *See* Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985); Rosenberger v. University of Va., 115 S. Ct. 2510, 2512-13 (1995). *But see* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

[111] Wallace v. Jaffree, 472 U.S. 38, 91-114 (1985) (Rehnquist, J. dissenting) (providing a detailed history of the formulation of the Establishment Clause by the Framers). Justice Rehnquist stated:

> It would seem from this [historical] evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning [during the 1800's]: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Id. at 106. More recently, in *Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995), Justice Thomas wrote a separate concurrence to express his disagreement with the historical analysis of the Establishment Clause presented by the dissenters. As maintained by Justice Rehnquist in *Wallace*, Justice Thomas asserts that James Madison's Memorial and Remonstrance Against Religious Assessments demonstrates that the Framers saw the Establishment Clause as a prohibition against governmental preference, but not as a prohibition of government preference for religion over irreligion. *Id.* at 2528-33.

[112] *Id.* at 2512-13.

> religious and public employees must work closely together in order to carry out the legislative plan."[113]

In evaluating whether governmental action creates an excessive entanglement, a court should examine "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[114] Excessive entanglement has been found to exist in a number of situations, ranging from transferring governmental powers to religious organizations[115] to providing financial support to teachers of secular subjects at parochial schools.[116]

In *Larkin v. Grendel's Den, Inc.*, the Supreme Court struck down a Massachusetts statute that allowed churches and schools to veto liquor licenses for establishments located within five hundred feet of the church or school.[117] The Court found that excessive entanglement existed because the statute "enmesh[ed] churches in the exercise of substantial governmental powers"[118] and delegated "'important, discretionary governmental powers' to religious bodies, thus impermissibly entangling government and religion."[119] More recently, in *Board of Education v. Grumet*, the Supreme Court struck down a New York statute creating a new school district for Kiryas Joel, a village comprised solely of Satmar Hasidic Jews.[120] In *Grumet*, the Court rejected the argument that the special school district was necessary in order to accommodate religion.[121] Rather, the Court considered the creation of the school district an unconstitutional delegation of political power to a group "chosen according to a religious criterion."[122] The relationship between the government and the religious leaders of the village constituted an excessive entanglement with religion.[123]

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[113] Masoudi, *supra* note 91, at 683 (citations omitted).

[114] Lemon v. Kurtzman, 403 U.S. 602, 615 (1971); *see* Jimmy Swaggart Ministries v. Board of Equalization, 493 U.S. 378, 393 (1990).

[115] *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).

[116] *Lemon*, 403 U.S. at 625.

[117] *Larkin*, 459 U.S. at 126.

[118] *Id.* at 126.

[119] Board of Educ. v. Grumet, 114 S. Ct. 2481, 2488 (1994) (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982)).

[120] Board of Educ. v. Grumet, 114 S. Ct. 2481, 2488-93 (1994).

[121] *Id.* at 2494.

[122] *Id.* at 2488-93.

[123] *Id.* at 2494. At the same time, the delegation had the primary effect of advancing religion, violating the second *Lemon* prong. *See id.* at 2488.

The *Lemon* analysis is further complicated by the inherent tension between the effect prong and the entanglement prong. As noted by the Court in *Bowen v. Kendrick*, the interplay between the effect prong and the entanglement prong often presents the Court with a "Catch-22": The means of ensuring that governmental actions do not have the primary effect of advancing religion is through oversight, which often leads to excessive entanglement.[124] The difficulty in satisfying both the effect and entanglement prongs has contributed to many of the Justices' discontentment with the *Lemon* test as a whole.[125]

Between 1971 and 1991, the Supreme Court employed the *Lemon* framework of analysis in thirty out of thirty-one Establishment Clause cases.[126] However, the Supreme Court's use of the *Lemon* test recently has been unpredictable, calling the vitality of the test into question.[127] In addition, a number of Justices have overtly criticized *Lemon*.[128] Despite this unpredictability and statements by a number of Justices criticizing the *Lemon* approach, *Lemon* has not been overruled.[129] However, the Court's inconsistent use of the *Lemon* test suggests that the Supreme Court may not follow this approach should the constitutionality of kosher consumer protection statutes be before the Court.

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[124] Bowen v. Kendrick, 487 U.S. 589, 615 (1988).

[125] *See id.* at 616 (noting that the tension between the effect and entanglement prongs has contributed to much of the criticism regarding the establishment prong).

[126] Lee v. Weisman, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring) (noting that the other case was *Marsh v. Chambers*, 463 U.S. 783 (1983)).

[127] In his majority opinion in *Lee v. Weisman*, 505 U.S. 577, 586-87 (1992), Justice Kennedy declined to reconsider *Lemon v. Kurtzman* but failed to apply *Lemon*'s analytical framework. Rather, Justice Kennedy focused on the pervasive government involvement with religious activity, the divisiveness that can accompany such involvement, and the coercive nature of conducting a prayer at a graduation ceremony. *Id.* Justice Rehnquist similarly failed to employ the *Lemon* test in *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (concerning the provision of a state-employed sign language interpreter for a deaf student at a Catholic school). In *Rosenberger v. University of Virginia*, 115 S. Ct. 2510 (1995), the Supreme Court addressed the situation of whether the University of Virginia's policy of not funding student organizations' religious activities violated the Free Speech Clause of the Constitution. The University of Virginia had claimed in lower courts that the exclusion was required by the Establishment Clause. *Rosenberger*, 115 S. Ct. at 2520-21. Justice Kennedy again chose to not employ the *Lemon* test analysis. *Id.* at 2521-25. Rather, Justice Kennedy emphasized the program's neutrality toward religion in rejecting the contention that the Establishment Clause mandated the lack of funding. *Id.*

[128] *E.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J. concurring). Justice Scalia stated that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again." *Id.* at 398.

[129] In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), the majority reaffirmed the use of and applied the *Lemon* test in overruling a school district's prohibition on the use of school facilities after school hours for religious activities.

2. *Ran-Dav's County Kosher v. State*

In the past five years, two courts, after performing a *Lemon* analysis, have held kosher fraud laws unconstitutional for violating the Establishment Clause. In 1992, the Supreme Court of New Jersey became the first state court to hold that kosher fraud regulations violated the Establishment Clause of the United States Constitution.[130] In *Ran-Dav's County Kosher, Inc. v. State*, the Attorney General alleged that Ran-Dav's County Kosher, Inc. ("County Kosher") violated numerous regulations, promulgated pursuant to the statute,[131] regarding the preparation, maintenance and sale of kosher products.[132] The allegations included that County Kosher had failed to remove veins from calves' tongues, stored kosher chicken breasts with chicken breasts of a brand that had recently been determined to be non-kosher, failed to remove blood and a vein from beef, and had improperly labeled meat.[133] County Kosher's operations had been supervised and approved by an Orthodox rabbi.[134] County Kosher challenged the regulations as violating the federal and state constitutions.[135]

At that time, civil enforcement of the regulations was shared by the State Kosher Advisory Committee, created by the Attorney General, and by the Bureau of Kosher Enforcement.[136] The State Kosher Advisory Committee consisted of ten rabbis, nine of whom were Orthodox, the tenth Conservative.[137] The Chairman of the Kosher Advisory Committee was the Chief of the Bureau of Kosher Enforcement.[138]

In analyzing the constitutionality of the civil regulations, the New Jersey Supreme Court began with an evaluation of the term "kosher."[139] Although the New Jersey Court of Appeals suggested that all branches of Judaism generally accept the Orthodox standards for determining the kosher status of a food product, the supreme court regarded that suggestion

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[130] Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1366 (1993), *cert. denied*, 507 U.S. 952 (1993).

[131] New Jersey Consumer Fraud Act, N.J. STAT. ANN. § 56:8.

[132] *Ran-Dav's*, 608 A.2d at 1368.

[133] *Id.* at 1357.

[134] *Id.*

[135] *Id.* Because County Kosher was not charged under New Jersey's criminal statute covering false representation of kosher food, those regulations were not challenged. *Id.* at 1355.

[136] *Id.* at 1357. The Bureau of Kosher Enforcement is part of the Division of Consumer Affairs, State Department of Law and Public Safety, which is also under the Attorney General's jurisdiction. *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1355-56.

skeptically.[140] In fact, the court noted that "[c]ontroversies over kosher products center not only on the nature of the products themselves but on the person supervising their preparation. . . . Disputes constantly arise within Orthodox Judaism over the legitimacy of the various religious authorities purporting to ensure that food is kosher."[141] Despite its skepticism regarding assertions that Orthodox Jewish standards are universally accepted by all Jewish branches, the court did not consider whether the regulations and New Jersey's statute were unconstitutional as preferring one religious sect over another.[142] The New Jersey Supreme Court engaged in a *Lemon* analysis, finding that the regulations failed the entanglement and effect prongs.[143]

The New Jersey Supreme Court found that New Jersey's regulations failed the entanglement prong for a number of reasons. First, the regulations caused an excessive entanglement with religion due to the regulations' adoption of Orthodox Jewish dietary requirements.[144] This wholesale adoption of "the laws and customs of the Orthodox Jewish religion" constitutes an administrative scheme whereby the New Jersey government requires and enforces businesses' compliance with religious standards.[145] In addition, the state, through its regulations, was mandating that certain foods conform to religious standards.[146] As stated by the court,

> the State's adoption and enforcement of the substantive standards of the laws of kashrut is precisely what makes the regulations religious, and is fatal to its scheme. . . . They empower the State to establish fraud or misrepresentation in the promotion of the product by demonstrating that the product was not prepared and maintained in "strict compliance" with what the State itself believes to be "the laws and customs of the Orthodox Jewish religion." In that respect, as pointed out by [County Kosher], "[t]he regulations do not

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[140] *Id.* at 1356.

[141] *Id.*

[142] *Id.* at 1359. As noted by the New Jersey Supreme Court, the United States Supreme Court stated that "'explicit and deliberate distinctions between different religious organizations' must be regarded 'as suspect and [subject to] strict scrutiny in adjudging its constitutionality.'" *Id.* (quoting Larson v. Valente, 456 U.S. 228, 246 (1982)). Stating that "the record suggests uncertainty concerning both the precise meaning and the enforcement standards of the regulations," the New Jersey Supreme Court performed only a *Lemon* test analysis. *Id.* at 1359.

[143] *Id.* at 1360, 1364-65. The New Jersey Supreme Court also expressed doubts regarding the ability of the regulations to satisfy the purpose prong of the *Lemon* test. *Id.* at 1365-66. Although the court recognized that the objective was to prevent fraud in the sale of kosher foods, the court was troubled by the expansive nature of the enforcement provisions. *Id.* However, the court chose not to delve into a lengthy purpose analysis due to the regulations' unconstitutionality under the entanglement and effect prongs. *Id.*

[144] *Id.* at 1360.

[145] *Id.* at 1355.

[146] *Id.* at 1360.

> police the nutritional quality or sanitary purity of kosher food, but only its religious purity.[147]

Finding the state was taking on the role of imposing and enforcing religious standards, the New Jersey Supreme Court held that the regulations caused an excessive entanglement with religion.[148]

The court further found that the religious qualifications of those enforcing the regulations, rabbis, supported a finding of excessive entanglement with religion.[149] Unlike the New Jersey Court of Appeals, which recognized that all professional boards "are composed of persons with special professional qualifications related to their regulatory authority,"[150] the New Jersey Supreme Court found that the necessity of hiring persons with certain religious qualifications further supported the contention that the regulations have a religious meaning.[151] In this case, the Advisory Committee was composed of rabbis "precisely because rabbis have the expertise, education, training, and religious authority to interpret, apply, and enforce the regulations."[152] The court likened the enforcement of New Jersey's kosher regulations to the veto power over liquor licenses delegated to churches and schools in *Larkin*.[153] However, the court found the entanglement more severe in the New Jersey regulations as they presented religious enforcement of religious law, not just religious enforcement of secular law.[154]

Because the regulations required compliance with Orthodox Jewish standards, the court also concluded that the State was put in the position of resolving religious controversies regarding what is kosher under those standards.[155] The New Jersey court noted substantial authority admonishing against government resolution of religious disputes.[156] Although the court recognized that controversies over the meaning of kosher may be rare, it reasoned that when the controversies do arise "[i]t is difficult to envision a civil controversy stamped more indelibly with

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[147] *Id.*
[148] *Id.*
[149] *Id.* at 1361.
[150] *Id.*
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* at 1361-62.
[155] *Id.* at 1362.
[156] *Id.*

religious doctrine."[157] Accordingly, the New Jersey Supreme Court held that the regulations constituted excessive entanglement with religion.

The New Jersey Supreme Court also found that the regulations had the effect of promoting Judaism. The court rejected the idea that *kashrut*: (1) has become a secular norm; or (2) is historical in origin but non-religious in application.[158] Rather, the court found that because the regulations "work both as a constraint and as an inducement on merchants who must abide by them and on consumers who cannot avoid them, the primary, if not exclusive, effect of the regulatory process necessarily is to advance particular religious tenets."[159]

Perhaps the most intriguing part of the New Jersey Supreme Court decision was that the court provided a regulatory scheme that it felt would not violate the Establishment Clause. The court stated that New Jersey could validly regulate advertisement and labeling.[160] The court proposed that the State could simply require persons processing, preparing or selling kosher food to divulge the basis on which their claim of complying with kosher standards rests.[161]

In summary, the New Jersey decision is significant in three respects. First, the decision is the first in this country to invalidate a kosher fraud law as unconstitutional. Second, the court held that County Kosher could be liable, despite its sincere belief in the propriety of its actions. Third, the court proposed an alternative statute. In fact, in 1994 the New Jersey legislature passed a new kosher consumer protection statute containing the provisions suggested by the New Jersey Supreme Court.[162]

3. *Barghout v. Bureau of Kosher Meat & Food Control*

In *Barghout v. Bureau of Kosher Meat & Food Control*, the Fourth Circuit found that Baltimore's kosher food consumer protection ordinance violated the Establishment Clause.[163] Unlike County Kosher in *Ran-Dav's*, George Barghout was charged under Baltimore's criminal kosher fraud statutes, which made it a misdemeanor for an individual to intentionally offer for sale any non-kosher food labeled as kosher.[164] As with many

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[157] *Id.* at 1363.

[158] *Id.* at 1364.

[159] *Id.*

[160] *Id.* at 1366.

[161] *Id.*

[162] N.J. STAT. ANN. §§ 56-8-61 to -66.

[163] Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1340 (4th Cir. 1995).

[164] *Id.* at 1338-39; BALTIMORE, MD., CITY CODE art. 19, § 50.

statutes, the Baltimore City ordinance required that persons who process, prepare and sell kosher meat abide by Orthodox Hebrew religious standards.[165] In addition, the ordinance established a six member Bureau of Kosher Meat and Food Control, composed of three ordained Orthodox rabbis and three laymen recommended by The Council of Orthodox Rabbis of Baltimore and The Orthodox Jewish Council of Baltimore.[166] An inspector paid by the Bureau "inspect[ed] slaughter houses, butcher shops, and other establishments offering kosher food for sale 'with the view and purpose of administering and enforcing the laws and rules relating to the possession, sale, manufacture, preparation and exposure for sale of kosher meats, meat preparations, food and food products . . . .'"[167] In addition, the Bureau reports violators to the Mayor of Baltimore and law enforcement officers.[168]

George Barghout, the owner and operator of "Yogurt Plus," was cited by the Bureau's paid inspector, Rabbi Kurefeld, numerous times for placing kosher hot dogs on a rotisserie next to non-kosher hot dogs, thereby rendering the kosher dogs non-kosher.[169] Mr. Barghout was convicted and fined under the Baltimore City statute.[170] Mr. Barghout sought declaratory judgment that sections 49 and 50 of the Baltimore City ordinance violated the First and Fourteenth Amendments.[171] The district court, after receiving answers certified from the Maryland Court of Appeals,[172] held the ordinance unconstitutional as violating the Establishment Clause.[173] The Fourth Circuit affirmed.[174]

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[165] BALTIMORE, MD., CITY CODE art. 19, §§ 49-52.

[166] *Id.* § 49(a).

[167] *Barghout*, 66 F.3d at 1339 (quoting BALTIMORE, MD., CITY CODE art. 19, § 49(e)).

[168] *Id.*

[169] *Id.*

[170] *Id.* at 1338-39.

[171] *Id.*

[172] The United States District Court for the District of Maryland certified two questions to the Maryland Court of Appeals:

> I.) Can an individual be convicted of violating Article 19, § 50 of the Baltimore City Code, if he or she sincerely believes that his or her conduct conforms to kosher requirements, even though the City inspector may disagree, or even though the individual's conduct might in fact be violative of religious laws?
>
> II.) Does Article 19, § 50 of the Baltimore City Code violate Article 36 of the Declaration of Rights of the Constitution of Maryland?

Barghout v. Mayor of Baltimore, 600 A.2d 841, 844-45 (Md. 1992). The Maryland Court of Appeals held that the focus is on the defendant's intent in selling non-kosher food as kosher and, as such, a defendant who sincerely believed that the food was kosher could not be guilty under section 50. *Id.* In addition, the court found that the ordinance did not violate Article 36 of the Maryland Constitution, which proscribes government interference with the free exercise of religion; however, Article 36 contains no equivalent to the Establishment Clause. *Id.* at 847-49. Thus, while the court found that

The Fourth Circuit, as with the New Jersey Supreme Court, began its analysis with the meaning of *kashrut*. While recognizing that not all branches of Judaism require adherence to *kashrut* to the same degree, the Fourth Circuit, unlike the New Jersey court, accepted the suggestion that "the various sects of the Jewish faith agree that kosher standards are determined by reference to Orthodox Jewish law."[175] However, due to the lack of information on the record, the court did not engage in a lengthy discussion regarding whether the statute creates an intra-faith denominational preference.

Rather, as did the New Jersey court,[176] the Fourth Circuit found the Baltimore City ordinance caused excessive entanglement with religion. Extrapolating from the Supreme Court decisions in *Larkin v. Grendel's Den, Inc.*, and *Board of Education v. Grumet*, the Fourth Circuit concluded that "the Establishment Clause forbids the 'fusion of governmental and religious functions'" and delegation of government authority based upon religious standards.[177] Applying that standard to the Baltimore City ordinance, the court found that the city's reliance on rabbis to enforce and interpret the statute essentially transferred governmental functions to a religious organization, thus violating the Establishment Clause.[178] In addition, sections 49 and 50 could not be severed because, due to the adoption of Orthodox Jewish religious standards as the standard for kosher, city officials were dependent upon rabbis to interpret and apply the statute.[179] The court therefore found that the Baltimore City ordinance was facially unconstitutional as "the ordinance still fosters excessive entanglement between city officials and leaders of the Orthodox faith with each and every prosecution."[180]

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section 50 did not violate Article 36, it left to the United States District Court the issue of whether the ordinance violated the Establishment Clause of the United States Constitution. *Id.* at 849.

[173] Barghout v. Mayor of Baltimore, 833 F. Supp. 540 (D. Md. 1993), *aff'd*, 66 F.3d 1337 (4th Cir. 1995).

[174] *Barghout*, 66 F.3d at 1346.

[175] *Id.* at 1341 n.9.

[176] *See supra* notes 130-57 and accompanying text.

[177] *Barghout*, 66 F.3d at 1343 (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982)). In *Larkin*, a Massachusetts zoning statute gave a church authority to veto the issuance of a liquor license to any establishment within a 500-foot radius of the church. *Id.* at 117. The Supreme Court struck down the ordinance, saying that "[t]he churches' power under the statute [was] standardless" and "the mere appearance of a joint exercise of legislative authority by Church and State provides significant benefit to religion in the minds of some by reason of the power conferred." Larkin v. Grendel's Den, Inc. 459 U.S. 116, 125-26 (1982). For a discussion of *Grumet*, see *supra* notes 90-91 and accompanying text.

[178] *Barghout*, 66 F.3d at 1343-44.

[179] *Id.* at 1344.

[180] *Id.*

Although the Fourth Circuit found that the ordinance had a secular purpose, the court briefly stated that the ordinance also violated the effects prong of the *Lemon* test.[181] In finding that the effects prong was not satisfied the court first relied upon the fact that the statute incorporated the Orthodox Judaism standard for kosher.[182] Citing *Larkin*, the court found the incorporation of the Orthodox standard "create[d] an impermissible symbolic union of church and state."[183] The court also rejected the city's contention that the advancement of religion was incidental and remote.[184] In finding that the Baltimore statute had the primary effect of advancing or endorsing religion, the court pointed to three facts: (1) that the ordinance created a misdemeanor that was not included with other fraud statutes; (2) that a special bureau was created solely to enforce the kosher fraud statute; and (3) the statute was more comprehensive than other fraud statutes.[185] Taken together, the three facts demonstrated that kosher food fraud was given comprehensive and separate treatment, thus constituting an advancement of religion.[186]

IV. ANALYSIS: ARE KOSHER FRAUD STATUTES KOSHER?

Although kosher fraud statutes have been in existence throughout the twentieth century, the invalidation of two sets of kosher fraud laws within a span of three years compels a reevaluation of the constitutionality of such statutes. Few articles have been written about the constitutionality of kosher fraud statutes, and scholarly commentary has not reached a consensus on this issue.[187]

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[181] *Id.* at 1345-46.

[182] *Id.* at 1345.

[183] *Id.* at 1345.

[184] *Id.* at 1345-46. Baltimore City relied in part upon *Lynch v. Donnelly*, in which the Supreme Court assessed whether a winter holiday scene, which included a Christmas tree, Santa Clause and striped candy-canes, violated the Establishment Clause. Lynch v. Donnelly, 465 U.S. 668 (1984). The *Lynch* court held that the inclusion of a creche among the secular symbols of the holidays did not violate the Establishment Clause. *Id.* The City attempted to illustrate that the Supreme Court has permitted some use of religious symbolism in governmental affairs. *Barghout*, 66 F.3d at 1345-46.

[185] *Id.* at 1346.

[186] *Id.*

[187] As of April 1997, five law review articles have been written concerning the constitutionality of kosher fraud statutes. Three articles take the position that kosher food laws do not violate the Establishment Clause. Shelley R. Meacham, Note and Comment, *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 (1994); Kristin Morgan, Note, *The Constitutionality of New Jersey Kosher Food Regulations Under the Establishment Clause:* Ran-Dav's County Kosher v. State, 608 A.2d 1353 (N.J. 1992), *cert. denied*, 113 S. Ct. 1366 (1993), 62 U. CIN. L. REV. 247 (1993); Catherine Beth Sullivan, Comment, *Are Kosher Food Laws Constitutionally Kosher?*, 21 B.C. ENVTL. AFF. L.

Kosher fraud statutes, whether civil or criminal, are consumer protection statutes. Because kosher fraud statutes have some secular purpose, the purpose prong of the *Lemon* test poses no danger to their constitutionality. When it comes to the effects and entanglement prongs of the *Lemon* analysis, however, kosher fraud statutes pose a challenging constitutional problem. Because "kosher" is a uniquely Jewish concept, any statute relating to kosher foods, particularly a statute that imposes a definition of kosher, will implicate Judaism in some respect. The sale and consumption of kosher foods are not, however, religious acts. A seller of kosher foods need not understand the requirements of *kashrut* to sell kosher foods. Similarly, consumers of kosher products are not limited to observant Jews.[188] Accordingly, kosher fraud statutes do not further religion in the same manner as, for example, government subsidies to religious organizations. However, as currently formulated, most kosher fraud statutes violate the Establishment Clause.

A. Establishment Problems: Why Current Statutes Are Not Constitutional

Despite their clear consumer protection purpose, current kosher fraud statutes and regulations are prone to invalidation due to excessive entanglement with religion for two reasons: (1) they require preparers, processors and sellers of kosher meats to comply with the laws of *kashrut* as defined by Judaism; and (2) they provide for enforcement by ordained rabbis.

The most problematic aspect of kosher fraud laws is the use of a religious definition to define kosher. As most statutes require compliance with Orthodox Jewish standards,[189] the majority of such statutes are prone to a two-tiered attack, first for establishing a denominational preference and second for causing government entities to be intimately involved with the definition and enforcement of religious requirements. Statutes that fail to tie their definition of kosher to a particular branch of Judaism are still subject to attack on Establishment Clause grounds due to the need to determine the "Jewish" definition of kosher.

REV. 201 (1993). On the other hand, one article asserts that most kosher fraud laws violate the Establishment Clause and proposes an alternative statute. Berman, *supra* note 12. A fifth article does not judge whether kosher statutes violate the Establishment Clause, but proposes an alternative statutory scheme to avoid such challenges. Masoudi, *supra* note 91.

[188] *See supra* note 3 and accompanying text.

[189] *See, e.g.*, ARK. CODE ANN. § 20-57-401; GA. CODE. ANN. § 26-2-330; LA. REV. STAT. ANN. § 40:608.2; MINN. STAT. § 31.651; WIS. STAT. § 97.56.

Compliance with and enforcement of kosher standards inherently involve a definition of kosher. In a prosecution for fraudulent sale of kosher products, the issue of whether the food sold or presented for sale was kosher is an issue of fact on which the government has the burden of proof. This is true even when the kosher fraud statute provides as a defense the defendant's belief that the product was kosher. Although some argue that the focus of criminal enforcement actions is the intent of the defendant rather than whether the food was actually kosher, a determination of the kosher status of the product remains an element of enforcement actions. For example, should the prosecution establish that the defendant acted with intent to defraud, the defendant could assert that he or she should not be found guilty because, despite his or her intent, the product was kosher.[190] Thus, requiring specific intent to defraud does not necessarily negate the necessity of determining whether the food complied with kosher standards. Unfortunately, such a determination would require the government, the judiciary in this case, to delve into religious doctrine.

The Supreme Court has consistently held that the government is not the appropriate forum for determination of compliance with religious doctrine.[191] As stated in *Watson v. Jones*[192] regarding an appeal to civil courts regarding ecclesiastical matters,

> [i]t is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.[193]

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[190] A showing that the food product that the defendant sold was, in fact, kosher, creates the argument of impossibility, such that the defendant would not be held criminally liable. Legal impossibility occurs

> when the actions which the defendant performs or sets in motion, even if fully carried out as he desires, would not constitute a crime, whereas "factual impossibility" occurs when the objective of the defendant is proscribed by the criminal law but a circumstance unknown to the actor prevents him from bringing about that objective. . . . Defense of "legal impossibility" may be established only where a defendant's actions, if fully performed, would not constitute a crime. . . .

BLACK'S LAW DICTIONARY WITH PRONUNCIATIONS 894 (1990).

[191] Much of the Supreme Court's discussion has arisen in the context of church property disputes. Although the Court permits resolution of such disputes, the court has recognized two major approaches: deference to church decisions based upon the polity of the church, and use of neutral principles of law. Jones v. Wolf, 443 U.S. 595 (1979). Both approaches aim to avoid "entanglement in questions of religious doctrine, polity, and practice." *Id.* at 603.

[192] 80 U.S. 679 (1871).

[193] *Id.* at 729.

Accordingly, kosher fraud statutes that require a determination of whether a processor, preparer or vendor of kosher foods complied generally with kosher requirements may breach limitations on a court's role regarding questions of religious doctrine.

For the majority of statutes that specifically adopt the Orthodox kosher requirements, constitutional battles may be an even harder fight. In *Presbyterian Church v. Mary E.B. Hull Memorial Presbyterian Church*, the Supreme Court interpreted the First Amendment to prohibit civil courts from "resolving underlying controversies over religious doctrine."[194] The Establishment Clause further proscribes preferring one denomination over another.[195] Despite the assertions of numerous Jewish organizations that all branches of Judaism accept the Orthodox requirements as the standard for kosher food,[196] it is undisputed that the branches of Judaism disagree regarding certain food items, such as swordfish.[197] Courts may invalidate those statutory provisions based on the fact that the provisions facially require courts to determine whether Judaism has a single definition of kosher.

In addition, kosher fraud statutes that provide for enforcement by commissions comprised mostly or entirely of rabbis also face a high risk of unconstitutionality. Contrary to the positions of the courts in *Ran-Dav's* and *Barghout*, excessive entanglement does not stem from the fact that rabbis, as opposed to laymen well-versed in the requirements of *kashrut*, are the individuals performing the inspections. After all, administrative agencies and other government entities frequently hire experts in the agency's field. Rather, the excessive entanglement occurs due to limitless discretion given to the rabbis to interpret Orthodox Judaism and the implied adoption of the standards used by the rabbis in determining that a food product is not kosher.

Under existing statutes, the same entanglement would exist if a lay individual trained in the law of *kashrut* performed the inspections for the state or municipality. In order for that inspector to perform his duties, the government would need to train the individual, not on the State's requirements for kosher-labeled foods, but on the religious requirements

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[194] Presbyterian Church v. Mary E.B. Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (concerning intra-denominational dispute over church property).

[195] *See supra* notes 97, 111 and accompanying text.

[196] The New Jersey Association of Reform Rabbis, the Reconstructionist Rabbinical Association, the New Jersey Region of the Rabbinical Assembly, and the Rabbinical Council of New Jersey filed an amicus brief in *Ran-Dav's County Kosher v. State* to refute the contention that adoption of orthodox standards prejudices other branches of Judaism. Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1354 (N.J. 1992).

[197] *See supra* notes 41-42 and accompanying text.

for kosher foods. Much like the veto power given to churches in *Larkin*, rabbis in such enforcement positions are given the power to apply religious criteria to citizens in the name of the government.

The more difficult, and unpredictable, question regarding kosher fraud statutes is whether kosher fraud statutes violate the effects prong of the *Lemon* test. With statutes that define kosher according to Judaism and use rabbis to enforce that definition, the answer is a resounding no. Although such kosher fraud statutes do not promote the practice of Judaism, the same aspects of the statutes that create an excessive entanglement with religion also evince an advancement of religion by governmental entities. Kosher fraud statutes violate the effects prong of the *Lemon* test because they are focused toward one religious group and, through their enforcement mechanisms, express an endorsement of religion in general.

The Establishment Clause proscribes not only preferential treatment of one religion over another, but also religion over irreligion.[198] First, by adopting an Orthodox Jewish standard for kosher, many statutes are implicitly stating a preference for Orthodox Judaism over other branches of Judaism. Second, by having rabbis perform enforcement of kosher fraud statutes, jurisdictions have gone beyond "benevolent neutrality" to aiding religion. By creating such entities as the Baltimore's Bureau of Kosher Meat and Food Control, governments aid religious enforcement of kosher laws, not government enforcement of purely secular standards. Similar to the creation of the special school district for the Satmar Jewish village of Kiryas Joel, the creation of kosher fraud enforcement boards that rely on knowledge of Judaism conveys governmental authority to religious organizations outside of a religiously-neutral governmental scheme to combat consumer fraud.

B. The Trend to Basis-Based Statutes: Can Any Kosher Fraud Statute Pass Constitutional Muster?

The New Jersey Supreme Court suggested a statute requiring persons proclaiming to process, prepare or sell kosher foods to post the basis for such an assertion.[199] The New Jersey Supreme Court's "basis" approach

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[198] *See supra* note 97 and accompanying text.

[199] Ran-Dav's County Kosher, Inc. v. New Jersey, 608 A.2d 1353, 1366-67 (N.J. 1992), *cert. denied*, 507 U.S. 952 (1993). The Fourth Circuit, noting the New Jersey Supreme Court's proposed legislation, similarly stated that Baltimore City could prevent fraud in the sale of kosher food by requiring vendors who sell kosher food to state the basis on which the food is labeled. Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1346 n.15 (4th Cir. 1995).

acts essentially as a "sunshine" law in which the state takes no position regarding the kosher status of the product, but requires venders of kosher food to provide the basis for their use of the kosher label. Other commentators have suggested similar approaches.[200] New Jersey has adopted such an approach,[201] and at least two other jurisdictions are considering revising their statutes to reflect this basis approach.[202]

Basis-based kosher fraud statutes avoid the entanglement problems that plague most of the current statutes, which incorporate Judaism into their definitions and enforcement mechanisms. By requiring vendors of kosher products to simply display the basis for their assertion that the

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[200] Mark Berman proposed the following Kosher Labeling Law, in part:

> 1. Any person who sells or exposes for sale any food or food product identified, described, or advertised using the words, "Kosher", "Kosher for Passover", "Hebrew", "Pareve", "Glatt", "Rabbinical Supervision" or "Jewish"; or who uses any of these words in conjunction with the words "style", "type" or any other similar expression; orally or in writing; in any language; or who includes on the labeling, packaging, or advertising materials a "Star of David", "Menorah", "K", or any other mark which might lead a reasonable person to believe that a representation is being made that the food exposed for sale is kosher;
>
> (a) shall identify on any labeling, packaging and advertising of such products the:
>
> i. name;
> ii. religious title, if any;
> iii. address or telephone number; and
> iv. religious affiliation
>
> of the certifying authority, be it an individual; or the:
>
> i. registered symbol; and
> ii. address or telephone number
>
> of the certifying authority, be it an organization;
>
> (b) if there is no such certifying authority, the labeling, packaging, and advertising of such food or food product must state in at least 10 point type:
>
> "THIS PRODUCT HAS NO RELIGIOUS CERTIFICATION".

Berman, *supra* note 12, at 71-72.

[201] Kosher Food Consumer Protection Act, N.J. REV. STAT. § 56:8-61.

[202] The Maryland Senate and House of Representatives are both considering bills which would require products sold as kosher to be affixed with a kosher identification. 1997 Md. H.B. 867, 1997 Regular Sess.; 1997 Md. S.B. 630, 1997 Regular Sess. Under the current bills, prepackaged foods must contain a kosher identification symbol affixed by the producer. Unpackaged kosher products must be accompanied by a prominently and conspicuously displayed disclosure statement. 1997 Md. H.B. 867, 1997 Regular Sess.; 1997 MD. S.B. 630, 1997 Regular Sess. Although the bills have not been enacted, the bills are moving rapidly throughout the Maryland legislature. David Conn, *Seal of Approval*, BALTIMORE JEWISH TIMES, Mar. 14, 1997, at 22 ("[A] Senate committee last week unanimously approved legislation to rewrite Maryland's kosher products law, only seconds after hearing testimony on the bill. Usually, a committee will take days or weeks to vote on a bill after its hearing."). New York is also considering adding a provision to its kosher fraud statutes, requiring vendors of kosher foods to maintain "all records with respect to the origin of such kosher meat, meat by-products, meat food products or poultry, which records shall be subject to inspection by the department." 1997 N.Y. A.B. 3605, 220th Leg. (amending subdivision 4 of section 201-a of the Agriculture and Markets Law).

products are kosher, governments remove themselves from having to determine whether the product is kosher, how to define kosher, and if rabbis are necessary for adequate enforcement. To enforce such statutes, governments merely must inquire whether a vendor has received some certification to sell kosher products or whether the vendor has fraudulently placed a kosher identification mark on previously unmarked prepackaged products. Accordingly, governmental enforcement would be akin to ensuring, for example, that an individual who practices medicine is a licensed physician. Because questions of religious doctrine and use of rabbis as experts in *kashrut* are eliminated, basis-based statutes avoid excessive entanglement with religion.

With the growing divisiveness among the Supreme Court regarding the degree that government can accommodate religion without violating the Establishment Clause, it is increasingly difficult to predict whether basis-type kosher fraud statutes would be held constitutional under the effects prong of the *Lemon* test. However, with the Supreme Court leaning toward increased accommodation, basis-type kosher fraud statutes should pass constitutional muster.

Unlike kosher fraud statutes that adopt a religious definition of kosher and rely upon religious leaders for enforcement, basis-based statutes do not have the effect of advancing religion. As with the federal grants in *Bowen*, basis-based kosher fraud statutes have, at most, an incidental affect of aiding religion.[203] Basis-based kosher fraud statutes does not expressly promote the practice of Judaism, require religious knowledge to define the statute or require expertise regarding Judaism. As such, kosher fraud statutes facilitate compliance with *kashrut* by observant Jews, but do not promote Judaism or religion. Rather, the statutes' focus and primary effect is to ensure disclosure to consumers.

Although basis-based statutes are likely constitutional when evaluated separately, legislatures that adopt such an approach should be mindful to place kosher fraud statutes within their general fraud statutes, rather than as stand-alone kosher products statutes. In determining the constitutionality of a governmental action that implicates religion, the Supreme Court has analyzed whether the governmental action is part of a broader, neutral statutory scheme.[204] By placing kosher fraud statutes among the

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[203] *See* Bowen v. Kendrick, 487 U.S. 589, 608-13 (1988). Although the federal grants under the Adolescent Family Life Act may help religious organizations express similar views, the fact that the government and religion goals are the same do not render the grants unconstitutional. *Id.* at 612-13. In addition, it was significant that the funding went to a variety of organizations with the goals of preventing teenage pregnancy, not just religious organizations. *Id.* at 608-11.

[204] *E.g.*, *id.* at 602.

jurisdiction's general fraud statutes, as New Jersey has done,[205] governments can help ensure that a reviewing court does not infer a special benefit for Judaism or Jewish products.

For most consumers, the basis-approach kosher fraud statutes should provide adequate consumer protection. Individuals who intentionally seek out kosher products, whether Jewish or non-Jewish, likely have some understanding of what kosher means and what kosher marks, such as the circled "U," indicate. In addition, although some Reform and Conservative Jews keep kosher as a means of reaffirming their Judaism,[206] many Jews who purchase kosher foods are Orthodox Jews, who are familiar with the requirements of *kashrut* and are part of a Jewish community that helps police kosher establishments.

For some consumers, however, basis-approach kosher fraud statutes do not afford a comparable level of consumer protection as does the majority of the current statutes. Kosher fraud statutes were intended to prevent fraudulent labeling and sale of kosher foods among a wide variety of businesses—from local butchers and groceries to mass producers of food within the jurisdiction. While large food and drug manufacturers are likely to be certified by national corporations, such as the Union of Orthodox Rabbis, smaller manufacturing operations and local businesses may be certified by regional organizations or individual rabbis. For many Jews, the value of the kosher mark or disclosure statement will depend upon the stature of the certifying rabbi or organization. Accordingly, the disclosure statement posted at the business or on the product label will only have a value to the consumer at the time of purchase if the consumer is familiar with the organization or individual rabbi who certified the kosher status of the product. In addition, because kosher food increasingly is purchased by non-Jews for non-religious reasons, certain consumers may find the affidavits have minimal or no value.

Despite the decrease in effectiveness that basis-based kosher fraud statutes have for some consumers, kosher fraud statutes play an important role in consumer protection. The basis-based statutes will satisfy the need for such protection in a manner that aids most consumers and prevents the government from advancing and becoming unconstitutionally entangled with Judaism.

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[205] New Jersey's Kosher Food Consumer Protection Act is located within Title 56, Chapter 8, which covers fraud in the sale or advertisement of merchandise.

[206] Deborah S. Hartz, *Kosher Comes of Age: Growing Numbers of Jews Are Finding That Keeping A Kosher Kitchen Reconnects Them with Their Ethnic and Spiritual Roots*, SUN-SENTINEL, Feb. 27, 1997, at 16 FOOD.

V. CONCLUSION

Undoubtedly, kosher fraud laws have an important consumer purpose. They allow persons, who for personal, religious, or health reasons choose to purchase kosher food, to have confidence in the representations made to them by food establishments and merchants. However, most of this country's kosher food laws violate the Establishment Clause of the Constitution. By mandating that processors and venders of kosher food comply with the laws of *kashrut* and by using rabbis to enforce compliance, the statutes place the government in the position to determine the religious meaning of kosher, creating an excessive entanglement with religion and advancing Judaism.

Motivated by the courts' suggestions in *Ran-Dav's* and *Barghout*, states and other jurisdictions are beginning to modify their statutes to require that vendors of kosher products display the basis for their assertions that the products are kosher. Although these statutes do not provide the same degree of protection for all consumers of kosher products, basis-based statutes adequately protect knowledgeable consumers who seek out kosher products while satisfying the requirements of the Establishment Clause.