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ARE KOSHER FOOD LAWS CONSTITUTIONALLY KOSHER?

*Catherine Beth Sullivan**

I. INTRODUCTION

Ten years ago, only 1,000 products bore a kosher seal of approval.¹ In 1989, this figure was up to 17,500.² Some kosher marketing experts estimate that approximately six million Americans purchase kosher food in the supermarket.³ Of these people, a mere 1.5 million are Jewish.⁴ Most consumers of kosher products are people who believe that the kosher designation means higher-quality food.⁵

An increasing number of non-Jewish consumers purchase kosher food today because they perceive it as better quality and healthier.⁶ Because the Food and Drug Administration has its hands full with steroids and drugs, many consumers believe that it does not ade-

* Executive Editor, 1993-1994, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW.

¹ See Caroline E. Meyer, *Rabbis' Seal of Approval, Who's Keeping Kosher Now?*, WASHINGTON POST, September 27, 1989, at E1. The kosher seal of approval is a symbol placed on a food label which informs the consumer that a product has been inspected by a supervising rabbi and a large certifying organization. They endorse the product as conforming to the laws of *kashruth*. The kosher seal may come in several different forms. For example, individual rabbis across the country use the letter "K" to indicate that a product has kosher supervision. However, because the symbol "K" is a letter of the alphabet, and cannot be copyrighted, many rabbis question buying products with a "K" symbol since anyone could print the letter "K" on a label. Thus, in addition to a letter "K," there are at least eight other copyrighted symbols to designate supervision. An "O" with a "U" at the center is the most common of these. Other symbols are used to show that the product is kosher for Passover. Still other symbols appear on wine. See *id.* at E1-E2; *Ran-Dav's County Kosher, Inc. v. State of New Jersey*, 579 A.2d 316, 324 n.15 (N.J. Super. Ct. App. Div. 1990), *rev'd* 608 A.2d 1353, 1366 (N.J. 1992).

² See Meyer, *supra* note 1, at E1.

³ *Id.* at E2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

quately supervise the food business as it should.⁷ For these kosher food consumers, the kosher designation serves as a check. It means that a rabbi has been to the food processor's company and has inspected the equipment. This leads many consumers to conclude that the product is going to be more hygienic.⁸ Thus, the kosher designation is like a "Good Housekeeping seal of approval."⁹

One reason behind the surge in the number of products certified as kosher and the number of food processors seeking the kosher certification is a basic business motivation.¹⁰ Rabbi Hillel Klavan, chairman of the Rabbinical Council of Greater Washington, explains that "[v]ery few of these establishments are in it for the love of religion. It's a marketing system, a profit-making endeavor."¹¹ It does not cost much to be designated as "kosher," and the designation may bring higher sales. Thus, for companies seeking to gain market share, a kosher seal of approval can be a valuable asset.¹²

It was precisely this profit-seeking motivation that prompted the State of New York to enact legislation in 1915 regulating the sale of kosher food products.¹³ Allegedly, in the late nineteenth century, profiteers were passing off non-kosher food as kosher.¹⁴ The State of New York sought to prevent such fraudulent or deceptive practices in order to protect the consumer by regulating the market.¹⁵ A number of states followed the New York example, adopting kosher food laws modelled after the New York statute.¹⁶ Since their inception, there have been numerous constitutional challenges to these kosher food laws on vagueness, due process, equal protection, and First Amendment grounds.¹⁷ Until the most recent New Jersey Supreme Court case of *Ran-Dav's County Kosher, Inc. v. State of New Jersey*,¹⁸ the courts had consistently upheld the constitutionality of kosher food laws.¹⁹ The decision in *Ran-Dav* marks the first time that a kosher

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *See id.*

¹³ Marc D. Stern, *Kosher Food and the Law*, 39 JUDAISM 389, 389 (Fall 1990).

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See generally* Earl L. Kellett, Annotation, *Validity and Construction of Regulations Dealing with Misrepresentation in the Sale of Kosher Food*, 52 A.L.R. 3d 959 (1973).

¹⁸ *Ran-Dav's County Kosher, Inc. v. State of New Jersey*, 608 A.2d 1353, 1366 (N.J. 1992).

¹⁹ *See generally* Kellett, *supra* note 17, at 961. *See also* *Barghout v. Mayor*, 600 A.2d 841, 842 (Md. 1992).

food statute was struck down.²⁰ In this case, the New Jersey Supreme Court decided that a New Jersey statute regulating the sale of kosher food was unconstitutional since it violated the Establishment Clauses of both the federal and state Constitutions.²¹ This decision is significant because it calls into question the validity of other states' kosher food statutes which are similar to New Jersey's law.²²

This Comment analyzes the constitutionality as well as the necessity of the various states' kosher food legislation. Part II of this Comment provides an overview of the dietary laws of *kashruth*.²³ Part III looks at the origins of kosher food statutes in the United States. Part IV gives an overview of the Establishment Clause and the Free Exercise Clause. Part V discusses the history of cases which have interpreted kosher food regulations. Parts VI and VII analyze kosher food laws in light of potential Establishment Clause and Freedom of Religion concerns. Finally, Part VIII analyzes kosher food laws in light of the states' interests in protecting consumers who seek out kosher products for various reasons, such as religious and health concerns.

II. THE CONCEPT OF KOSHER

The general term for the Jewish dietary laws is *kasher* or *kashruth*, known in English as "kosher."²⁴ The concept of kosher is not an easy one to define. The closest English words to describe "kosher" would be "fit" or "proper."²⁵ The word *kashruth* only appears in the Scriptures three times and even then it is not related to food requirements.²⁶ Nevertheless, the word "kosher" has been understood for hundreds of years to signify the system of Jewish dietary laws.²⁷ Although the kosher dietary laws originally derived from biblical law, they have developed over time through rabbinical legislation and custom.²⁸ Much of the material in the Talmud, a collection of the oral supplement to the Torah (the first five books of the Old Testament),²⁹ focuses on these laws.³⁰

²⁰ Ran-Dav's County Kosher, Inc., 608 A.2d at 1366.

²¹ *Id.*

²² *See id.*

²³ *See infra* text accompanying notes 20-53.

²⁴ ALAN UNTERMAN, *JEWIS: THEIR RELIGIOUS BELIEFS AND PRACTICES* 201 (1981).

²⁵ HERMAN WOUK, *THIS IS MY GOD* 128 (1989).

²⁶ 6 *ENCYCLOPEDIA JUDAICA* 26 (1971), *cited in* Ran-Dav's County Kosher, Inc. v. State of New Jersey, 579 A.2d 316, 320 (N.J. Super. Ct. App. Div. 1990).

²⁷ Ran-Dav's County Kosher, Inc., 579 A.2d at 320.

²⁸ *Id.* at 320 n.8.

²⁹ *Id.*

³⁰ *Id.* at 320.

The dietary laws most likely emerged from various prohibitions of antiquity or from health considerations.³¹ These laws outline the rules of permitted and forbidden animals; prohibited parts of otherwise permitted animals; the manner of slaughtering and preparing permitted animals; prohibited food mixtures; and proportions of food mixtures forbidden *ab initio* but permitted *ex post facto*.³²

A. *The Laws of Kashruth*

1. Forbidden Foods³³

While persons adhering to kosher dietary laws are permitted to eat all vegetables, the rules prohibit the consumption of certain animals.³⁴ The Bible establishes specific rules regarding the consumption of animals.³⁵ It permits any animal that "parteth the hoof and is completely cloven footed and cheweth the cud."³⁶ If either of these two traits is lacking, the animal is forbidden.³⁷ This rule, for example, excludes the pig from permissible animals because it has cloven feet, but does not chew the cud.³⁸ The dietary laws also prohibit many types of birds.³⁹ Only certain birds that have customarily been eaten, such as chicken, ducks, geese, pigeons, and turkeys, are deemed "clean" and thus may be eaten.⁴⁰ Fish must have both fins and scales; therefore, all shellfish are prohibited.⁴¹ "Swarming things," such as insects, are forbidden as well.⁴²

2. Rules Regarding Permitted Foods

The dietary laws place specific restrictions on the consumption of "clean" animals, those animals that the rules permit kosher followers

³¹ LEO TREPP, *JUDAISM: DEVELOPMENT AND LIFE* 152 (1966).

³² 8 *ENCYCLOPEDIA OF RELIGION* 270-71 (1972).

³³ In addition to specific foods which are forbidden, the kosher dietary laws prohibit the following: animals that have died on their own; animals that have been torn by other animals; all blood; certain animal fat and sinews; animals not slaughtered by a *Shohet*, a man trained in Jewish law; animals found diseased; and certain foods in combination. See *infra* text accompanying notes 38-53.

³⁴ TREPP, *supra* note 31, at 153.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

to eat.⁴³ The rules forbid the consumption of certain portions of "clean" animals. For example, before any animal other than a bird can be prepared for consumption, the sciatic nerve must be removed.⁴⁴ Also, the rules forbid the consumption of the fat portions attached to the stomach and intestines of an animal. The rules require them to be removed by purging the organs to which they are attached.⁴⁵ The rules further forbid kosher followers from eating the abdominal fat of oxen, sheep, or goats, unless it is covered by flesh.⁴⁶

Furthermore, the rules prohibit the consumption of an animal that dies a natural death or that has been killed by any method other than by a *Shohet*.⁴⁷ Similarly, the dietary laws forbid the consumption of an animal that has been lacerated by a wild beast or that is suffering from an injury which may lead to its death.⁴⁸

3. The Method of Slaughter

Any animal that is not slaughtered according to a method sanctioned by Jewish law is unfit for consumption.⁴⁹ The person charged with slaughtering animals according to the Jewish dietary laws is called a *Shohet*.⁵⁰ The *Shohet* is trained in Jewish law.⁵¹ If an animal was not slaughtered by a *Shohet*, kosher followers may not eat the animal.⁵²

The *Shohet* uses an extremely sharp knife to cut the animal's throat severing the arteries, veins, and windpipe in one continuous stroke.⁵³ In this way, blood drains so quickly from the brain that the animal feels no pain.⁵⁴ Not only does the rapid drainage of blood make the meat more suitable for preservation, but physiological research has shown that the Jewish slaughtering method is the most humane.⁵⁵ After the *Shohet* slaughters the animal, he inspects it for disease.⁵⁶ Any animal which is damaged by disease may not be consumed.⁵⁷

⁴³ 6 ENCYCLOPEDIA JUDAICA, *supra* note 26, at 32. See TREPP, *supra* note 31, at 153.

⁴⁴ ENCYCLOPEDIA JUDAICA, *supra* note 26, at 39.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* See TREPP, *supra* note 31, at 153-54. A *Shohet* is a man trained in the Jewish dietary laws. See *id.* at 154.

⁴⁸ ENCYCLOPEDIA JUDAICA, *supra* note 26, at 39.

⁴⁹ See TREPP, *supra* note 31, at 154.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

4. Forbidden Food Mixtures

The kosher dietary laws forbid certain otherwise permissible foods to be eaten in combination.⁵⁸ The dietary laws outline three prohibitions regarding mixtures of meat and milk products.⁵⁹ The rules forbid the consumption of meat and milk products together; they forbid cooking them together; and they forbid mixing them together in any manner.⁶⁰ Therefore, persons who adhere to the kosher dietary laws may not eat foods such as butter and milk with meat.⁶¹ There is also a temporal element to this prohibition. After a kosher follower eats meat, he or she must wait several hours before consuming any milk products, or vice versa.⁶²

B. Consumers of Kosher Food

Jews are not the only consumers of kosher food.⁶³ In fact, fewer than 25% of those who purchase kosher food are Jewish.⁶⁴ Recent data indicate that 500,000 families in the United States eat kosher.⁶⁵ This figure includes both observant Jews⁶⁶ who eat kosher in order to comply with their religion, and non-Jews.⁶⁷ A growing number of non-Jewish consumers seek out kosher food for diverse reasons.⁶⁸ These consumers include Seventh-Day Adventists⁶⁹ and Moslems who buy specific kosher foods to comply with their religious mandates.⁷⁰ Persons with health problems such as allergies to milk products or shellfish also purchase kosher food. These people rely on the kosher seal which symbolizes that the kosher purveyor has followed the usual bases of kosher designation.⁷¹

Additionally, members of the general public purchase kosher prod-

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 155.

⁶² *See id.*

⁶³ *See* Suzanne Riss, *Court Hears Beef Against State Kosher Rules*, 128 N.J. L.J. 155 (1991); Joe M. Regenstein and Carrie E. Regenstein, *The Kosher Dietary Laws and Their Implementation in the Food Industry*, 42 FOOD TECHNOLOGY, June 1988, at 86.

⁶⁴ *See* Riss, *supra* note 63, at 155.

⁶⁵ Regenstein & Regenstein, *supra* note 63, at 86.

⁶⁶ Observant Jews refers to Orthodox Jews, Conservative Jews, and Reform Jews who have adopted guidelines for modern American kosher homes. *See id.*

⁶⁷ *Id.*

⁶⁸ *Ran-Dav's County Kosher, Inc.*, 579 A.2d at 324.

⁶⁹ Regenstein & Regenstein, *supra* note 63, at 86.

⁷⁰ *Ran-Dav's County Kosher, Inc.*, 579 A.2d at 324.

⁷¹ *Id.*

ucts. These people include animal lovers who believe kosher slaughtering is more humane; vegetarians who buy kosher dairy products;⁷² and people who believe that kosher processes of food preparation are under closer scrutiny and are thus likely to be cleaner and healthier.⁷³

C. *The Notion of a "Kosher Ecology"*⁷⁴

Jews observe kosher dietary laws because of their religious beliefs and not because the laws are scientifically correct.⁷⁵ Jews avoid eating pork because the Scriptures prohibit it, not because they fear trichinosis. Likewise, they refrain from eating milk and meat together because it is a forbidden combination according to dietary law and not because they know that a bacteria, coated by milk during digestion, may make them sick.⁷⁶ Nevertheless, kashruth is significant not merely for religious reasons but also for "scientific" ones.⁷⁷ While the hygienic practices behind kosher food are followed by Jews primarily as a matter of faith, these dietary laws also have ecological value.⁷⁸

The Jewish dietary laws are "natural" in that they conform to the scientific laws of the food chain.⁷⁹ They discourage short-term exploitation of natural resources and encourage long-term restraint.⁸⁰ Furthermore, the kosher rules regarding the slaughtering of animals have an ecological effect on people: they "reinforce sensitivity to the suffering of other creatures; more importantly, they do not reinforce brutalization."⁸¹

Among those animals prohibited by the kosher dietary laws,⁸² carnivores predominate.⁸³ The only mammals permitted for consumption are plant-eaters.⁸⁴ Professor Newtol Press⁸⁵ explains that humans have domesticated primarily herbivorous mammals as sources of

⁷² Frances Ann Burns, *ACLU, Jewish Groups, Clash Over Kosher Food Regulation*, UPI, July 6, 1990, available in LEXIS, Nexis Library, UPI File.

⁷³ See *id.*; *Ran-Dav's County Kosher, Inc.*, 579 A.2d at 324.

⁷⁴ See generally Newtol Press, *Kosher Ecology*, 79 COMMENTARY 54 (1985).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.* at 56-58.

⁸⁰ See *id.* at 58.

⁸¹ See *id.* at 54.

⁸² The following animals are prohibited by the Kosher dietary laws: the pig; the rabbit; birds of prey; all shellfish; eel and sturgeon; mice; crocodiles; and most insects. See TREPP, *supra* note 31, at 153.

⁸³ See Press, *supra* note 74, at 56.

⁸⁴ *Id.* at 54, 56.

⁸⁵ Newtol Press is a professor of biology at the University of Wisconsin (Milwaukee).

meat.⁸⁶ In contrast, they have not domesticated dogs, cats, or bears as sources of meat, although they could have done so.⁸⁷ The reason is ecological; indeed, it makes "ecological sense" for humans to consume herbivores.⁸⁸ Carnivores are fewer in number than herbivores,⁸⁹ and hence, many more herbivores can be raised for consumption.⁹⁰

Because animals cannot digest cellulose, plants will always abound on our planet.⁹¹ In this way, the laws of nature protect plant eaters.⁹² In contrast, there is no such protection for carnivorous animals.⁹³ Consuming carnivores for food would likely increase the risk of diminishing their numbers below the critical sustainable level at which an animal population can sustain itself.⁹⁴ Thus, the Jewish dietary laws' prohibitions against eating carnivores makes sense ecologically: by prohibiting the consumption of carnivores, the dietary laws aid in preserving a "balance" among animal populations.⁹⁵

III. KOSHER FOOD LEGISLATION

A. *Origins*

A Hungarian Jewish immigrant to the United States wrote a letter to his rabbi in Hungary in 1887 recounting the disorderly state of the kosher food industry in the United States.⁹⁶ In the late nineteenth century, many profiteers and charlatans were passing off non-kosher food as kosher. Since most Jewish immigrants were completely unfamiliar with their local surroundings, these "kosher crooks" were able to successfully deceive their customers.⁹⁷ Early on, states such as New York and Massachusetts made efforts to eliminate this disorder by appointing a "Chief Rabbi."⁹⁸ These efforts proved wholly unsatisfactory, however, because the kosher food industry mounted unrelenting

⁸⁶ See Press, *supra* note 74, at 56.

⁸⁷ *Id.*

⁸⁸ *Id.* at 58.

⁸⁹ Since carnivores eat each other, their numbers dwindle. See *id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See generally MOSES WEINBERGER, *JEWES AND JUDAISM IN NEW YORK*, app. at 115-26 (Jonathan D. Sarna ed. & trans., Holmes and Meier Publishers, Inc. 1982) (1887). References that follow are to the reprinted English version.

⁹⁷ *Id.*

⁹⁸ Stern, *supra* note 13, at 390.

opposition to any such supervision of the industry.⁹⁹ In an effort to remedy this chaos and thereby protect consumers of kosher food products, many of the states enacted legislation to prevent fraudulent or deceptive slaughtering, distribution, or sale of foods designated kosher, primarily meat and poultry.¹⁰⁰

The purpose behind kosher food laws was primarily consumer protection.¹⁰¹ By its label, a kosher food item invited the consumer's trust and reliance. Consumers of kosher products trusted that kosher purveyors supplied strictly kosher products.¹⁰² These customers trusted that food labeled "kosher" had been prepared according to the Jewish dietary laws. Because most consumers could not determine whether food labeled "kosher" was in fact prepared under kosher standards, unscrupulous purveyors could reap substantial profits by misleading consumers into believing that their products were kosher.¹⁰³ Therefore, kosher food regulations served to protect consumers who purchased kosher products for various reasons, relying on the fact that the products were indeed kosher.¹⁰⁴

New York enacted the first kosher food law in 1881.¹⁰⁵ Massachusetts passed similar legislation one year later.¹⁰⁶ In 1922, the New York Legislature amended their kosher food law in order to make it more comprehensive.¹⁰⁷

The New York kosher food statute served as the model for all subsequent kosher food legislation.¹⁰⁸ Little is known about the spe-

⁹⁹ See *id.* at 389; 10 ENCYCLOPEDIA JUDAICA 221, 222 (1971).

¹⁰⁰ The states which have enacted kosher food laws include the following: Arizona, Arkansas, California, Connecticut, Georgia, Kentucky, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Virginia, and Wisconsin. See Elazar & Goldstein, *The Legal Status of the American Jewish Community*, 73 AM. JEWISH Y.B. 3, 35 n.13 (1972).

¹⁰¹ *Ran-Dav's County Kosher, Inc. v. State of New Jersey*, 579 A.2d 316, 323 (N.J. Super. Ct. App. Div. 1990).

¹⁰² See I. KLEIN, A GUIDE TO JEWISH PRACTICE 348 (1979).

¹⁰³ *Id.*

¹⁰⁴ See *Ran-Dav's County Kosher, Inc.*, 579 A.2d at 323.

¹⁰⁵ Elazar & Goldstein, *supra* note 100, at 35.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Most other Eastern and Midwestern statutes that now have kosher food statutes enacted them during the 1920's, with California adopting its kosher food law in 1931. The last surge of kosher food legislation occurred after the Second World War. Arkansas passed its law in 1949, Virginia in 1950, Arizona in 1951, and Kentucky in 1956. In 1966, New Jersey substantially altered its kosher food statute in order to strengthen its enforcement provisions. See *id.*

¹⁰⁸ The New York law, as it applies today, forbids the fraudulent sale of food being represented as kosher when it is not. It also requires stores which sell both kosher and nonkosher products to clearly post that fact so that customers will not be misled into believing that all the food is kosher. A purveyor violating the statute is guilty of a misdemeanor punishable by either a fine

cific origins of the original New York kosher food statute.¹⁰⁹ Information is available, however, for the reenactment of the New York legislation in 1922.¹¹⁰ The reinforced statute of 1922 was supported by various Orthodox and Conservative Jewish groups, notably the New York division of the United Synagogue of America, the Union of Orthodox Rabbis, and the Assembly of Orthodox Rabbis.¹¹¹ These Jewish groups believed that a stronger law was necessary to protect the Jewish consumer observing kashruth from deceptive vendors engaged in the fraudulent practices of slaughter, distribution, and sale of food designated as kosher.¹¹² The president of the New York division of the United Synagogue of America expressed his concern to the governor of New York for the hundreds of thousands of Jewish residents in greater New York who observed the dietary laws that required the products they purchased to be kosher.¹¹³ The president wished to crack down on the problem of unscrupulous dealers who had been practicing deception on these people by keeping both kosher and non-kosher products, and by representing non-kosher products as kosher.¹¹⁴

While certain Jewish organizations supported the 1922 Kosher Food Statute, the Progressive Hebrew Butchers Protective Association of New York vigorously opposed it. They opposed the statute because it defined "kosher" as food prepared according to Orthodox Hebrew religious requirements only.¹¹⁵ These groups opposed equating "kosher" with "Orthodoxy."¹¹⁶

Opponents of California's kosher food statute of 1931 looked to the problems prevalent within the New York kosher food industry in an effort to prevent the statute's adoption.¹¹⁷ A letter written to a California State Senator from the president of a (Reform) First Hebrew Congregation depicts one Jewish group's resistance to the statute.¹¹⁸ The president of this Congregation opposed the bill because he felt

or short jail term, or both. Large purveyors of kosher meat can be guilty of a felony. The word "kosher" is described as food conforming to the Orthodox Hebrew religious requirements. See N.Y. AGRIC. & MKTS. LAW § 201(a) (McKinney 1991).

¹⁰⁹ Elazar and Goldstein, *supra* note 100, at 36.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at n.14.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 36.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 36-37.

that the state should stay out of Judaism's internal affairs.¹¹⁹ He explained that New York state had a similar kosher food law, yet it did not prevent the scandal within the kosher food industry in New York City. He urged the Senator to prevent the legislation, saying that if Judaism did not have enough inner resources to meet the present conditions, Judaism should pass away as soon as possible.¹²⁰

The legislative history of California's kosher food law provides no record of its proponents.¹²¹ Despite the conflict, the California legislature ultimately enacted the kosher food statute in 1931.¹²²

B. Enforcement of Kosher Food Legislation

The extent of enforcement and agency responsibility for enforcing kosher food laws differs among the states.¹²³ In nine states, state officials, either alone or together with local officials, are responsible for enforcement.¹²⁴ In the other states, enforcement of kosher food statutes rests with local prosecuting attorneys or local boards of health.¹²⁵

Only a small number of prosecutions have been brought under the kosher food laws.¹²⁶ This could indicate two things. First, it could indicate that the statutes are ineffectual.¹²⁷ Particularly in states where the major state officials enforce the kosher food laws, the statutes may have minimal effect because state budgets fail to allocate funds specifically for kosher food law enforcement.¹²⁸ Second, the very few prosecutions brought under the kosher food statutes could indicate that the statutes serve a deterrent function and reduce the necessity of prosecution.¹²⁹ Indeed, the mere existence of kosher food legislation might act as a deterrent to fraudulent kosher purveyors

¹¹⁹ *Id.* at 37.

¹²⁰ *Id.*

¹²¹ *Id.* at 36.

¹²² *Id.*

¹²³ *Id.* at 37. Responsible agencies generally include the state agricultural department, the state department of public health, or a designated segment of the state attorney general's office. *See id.* at 37-38.

¹²⁴ *Id.* at 37. These states include: Arkansas, California, Connecticut, Minnesota, New Jersey, New York, Rhode Island, Tennessee, and Wisconsin. *Id.* at 37-38.

¹²⁵ *Id.* at 37-38. In Pennsylvania, Arizona, Kentucky, Illinois, Virginia, Michigan, and Maryland, local prosecuting attorneys are responsible for enforcement. In Massachusetts, Ohio, and the District of Columbia, local boards of health enforce the statutes.

¹²⁶ *Id.* at 38.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

who fear the personal and economic ramifications of an investigation, not to mention a prosecution.¹³⁰ Hence, the threat of being investigated and/or prosecuted may correct violative conduct.¹³¹

Another possible reason why few prosecutions have been brought under kosher food statutes may be due to the fact that actions have become confusing because of the interpretation of the term "kosher." There is a wide divergence of opinion as to the meaning of "kosher" among the different factions of the Jewish community.¹³²

Of all the prosecutions under kosher food laws, most occurred in New York and California.¹³³ New York, for example, has an average of six civil penalties per month for such violations.¹³⁴ The significant number of prosecutions in these states as compared to all other states may be explained by the fact that these two states together account for more than half the Jewish population in the United States.¹³⁵

Prosecutions under the kosher food laws have historically led to litigation challenging the validity of kosher food laws on constitutional grounds.¹³⁶ Before examining the history of cases which have interpreted kosher food laws, it is important to understand the Religion Clauses of the First Amendment. Much litigation questioning the validity of kosher food laws has focused on whether kosher food laws violate the Establishment Clause and/or the Free Exercise Clause of the First Amendment.¹³⁷ The next section provides an overview of these two clauses.

IV. THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The first sixteen words in the Bill of Rights provide that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."¹³⁸

The Establishment Clause prevents government from advancing, promoting, or endorsing religion.¹³⁹ The Free Exercise Clause prevents government from unduly burdening the exercise of religion.¹⁴⁰

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *Id.* at 40.

¹³³ *Id.* at 38.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See, e.g.,* Ran-Dav's County Kosher, Inc., 579 A.2d 316, 318-19 (N.J. Super. Ct. App. Div. 1990); Sossin Systems, Inc. v. City of Miami Beach, 262 So. 2d 28, 29. (Fla. Dist. Ct. App. 1972)

¹³⁷ *See, e.g.,* Ran-Dav's County Kosher, Inc., 579 A.2d at 319; Sossin, 262 So. 2d at 29-30.

¹³⁸ U.S. CONST. amend. I.

¹³⁹ *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

¹⁴⁰ *See* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)

When taken together, the Religion Clauses are intended to ensure that government remains "benevolently neutral" toward religion.¹⁴¹

A. *The Establishment Clause*

The First Amendment to the United States Constitution provides that: "Congress shall make no law respecting the establishment of religion. . . ." ¹⁴² The Establishment Clause of the First Amendment prohibits congressional action respecting an establishment of religion.¹⁴³ In 1947, the Supreme Court unanimously supported incorporation of the Establishment Clause into the Due Process Clause of the Fourteenth Amendment, thereby extending Establishment Clause restrictions to state as well as federal governmental actions.¹⁴⁴ In *County of Allegheny v. ACLU Greater Pittsburgh Area*, the Supreme Court explained what the Establishment Clause means:

it means that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.¹⁴⁵

The United States Supreme Court provided an extensive discussion of the latitude of the Establishment Clause in *Everson v. Board of Education*.¹⁴⁶ The Establishment Clause prohibits a state and the federal government from setting up a church.¹⁴⁷ Also, neither a state nor the federal government can pass legislation helping one religion, helping all religions, or preferring one religion over another.¹⁴⁸ Neither government can influence a person to go to or remain away from church against that person's will or compel him or her to avow belief or disbelief in any religion.¹⁴⁹ Neither government can punish a person for church attendance or nonattendance.¹⁵⁰ Furthermore, neither a state nor the federal government can levy a tax to support any relig-

¹⁴¹ *Walz v. Tax Commission of the City of New York*, 397 U.S. 664, 669 (1970).

¹⁴² U.S. CONST. amend. I.

¹⁴³ *Id.*

¹⁴⁴ *See Everson v. Board of Education*, 330 U.S. 1, 8 (1947).

¹⁴⁵ 492 U.S. 573, 590-91 (1989).

¹⁴⁶ 330 U.S. at 15-16.

¹⁴⁷ *Id.* at 15.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 15-16.

ious activities or institutions, and neither government can involve itself in the matters of any religious organization or group.¹⁵¹

The Establishment Clause is designed to prevent certain evils.¹⁵² These evils include:

discriminating among religions or between religion and non-religion, symbolic union between government and a given religious faith or religion in general, sponsorship of the religious mission of a group, excessive entanglement between government and religion, and political divisiveness incited by the government's favoritism of a particular religious faith.¹⁵³

It is important to distinguish between governmental actions which establish religion and those which accommodate persons who are practicing their religion.¹⁵⁴ The Court clarified this distinction in *Jones v. Butz*, where the Court upheld the exception for kosher slaughtering from the general requirements of the Humane Slaughter Act, 7 U.S.C. § 1901 *et. seq.*¹⁵⁵ Of course, legislation which establishes religion is invalid.¹⁵⁶ However, the Court has found that legislation which merely accommodates those who are practicing their religion is valid.¹⁵⁷ For example, in *Zorach v. Clauson*, the Supreme Court upheld a New York "released time" statute permitting public schools to release students to go to religious centers for religious education or devotional exercises.¹⁵⁸ Justice Douglas noted in *Zorach* that church and

¹⁵¹ *Id.* at 16.

¹⁵² *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

¹⁵³ *See id.* at 612-15, 623. *See also* School District of the City of Grand Rapids v. Ball, 473 U.S. 373, 390, 392-97 (1985)

¹⁵⁴ *See* Ran-Dav's County Kosher, Inc., 579 A.2d 316, 326 (N.J. Super. Ct. App. Div. 1990).

¹⁵⁵ *Jones v. Butz*, 374 F. Supp. 1284, 1292-93 (S.D.N.Y. 1974), *aff'd*, 419 U.S. 806 (1974). The statutory provisions of the Humane Slaughter Act which were involved in *Butz* are as follows: 7 U.S.C. § 1902(b) (1988), which provides "No method of slaughtering or handling in connection with slaughtering shall be deemed to comply with the public policy of the United States unless it is humane. Either of the two following methods of slaughtering and handling are hereby found to be humane: . . . by slaughtering in accordance with the ritual requirements of the Jewish faith or any other religious faith that prescribes a method of slaughter whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries with a sharp instrument and handling in connection with such slaughtering." Section 1905 which related to establishment, composition, functions, compensation, meetings, and reports of advisory meetings has been repealed. *See* Pub. L. 95-445, § 5(b), Oct. 10, 1978, 92 Stat. 863. Section 1906 provides: "Nothing in this chapter shall be construed to prohibit, abridge, or in any way hinder the religious freedom of any person or group. Notwithstanding any other provision of this chapter, in order to protect freedom of religion, ritual slaughter and the handling or other preparation of livestock for ritual slaughter are exempted from the terms of this chapter. For the purposes of this section the term 'ritual slaughter' means slaughter in accordance with section 1902(b) of this title."

¹⁵⁶ U.S. CONST. amend. I.

¹⁵⁷ *See, e.g.*, *Butz*, 419 U.S. at 1292-93; *Zorach v. Clauson*, 343 U.S. 306, 314-15 (1952).

¹⁵⁸ *Zorach*, 343 U.S. at 312.

state need not be “aliens” to each other, but only that they should not be dependent on each other.¹⁵⁹ Similarly, the Supreme Court in *Board of Education of Westside Community Schools v. Mergens* explained that government may accommodate religious groups to allow meetings in schools, provided they are not a subterfuge for the establishment of any particular religion.¹⁶⁰

In order to determine whether legislation establishes religion, the Court applies a three-pronged test which was first fully developed in a 1971 education case, *Lemon v. Kurtzman*.¹⁶¹ To avoid violating the Establishment Clause, the legislation must satisfy three elements under the *Lemon* test. First, the legislation must have a secular purpose.¹⁶² This does not mean, however, that the law’s purpose must be totally unrelated to religion.¹⁶³ Rather, it means that when the entire motivation behind the legislation is the endorsement or disapproval of religion, such legislation will fail the first prong of the *Lemon* test.¹⁶⁴

Second, the legislation’s principal or primary effect must neither advance nor inhibit religion.¹⁶⁵ For legislation to have “forbidden ‘effects’” under the *Lemon* test, the government must have advanced (or inhibited) religion through its own acts and influence.¹⁶⁶ Government practices which engender identification of the government with religion violate the “effects” prong of the *Lemon* test, since such practices will advance at least one religion and will often inhibit other religions as well.¹⁶⁷

Third, the legislation must not foster excessive entanglement of government in religious matters.¹⁶⁸ Determining what is “excessive” is not an easy task. The Court must examine the particular facts of

¹⁵⁹ *Id.*

¹⁶⁰ See *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 239–41 (1990).

¹⁶¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

¹⁶² *Id.* at 612.

¹⁶³ *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987). See also *Zorach*, 343 U.S. at 314.

¹⁶⁴ See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (overturning Alabama’s period of silence because the legislative history demonstrated that there was no secular purpose and that it was intended to return prayer to the classroom). See also *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (upholding the city of Pawtucket, Rhode Island’s inclusion of a *creche* in its annual Christmas display because, viewing the display as a whole, Court found a legitimate secular purpose—*i.e.*, the celebration of a congressionally recognized holiday and national tradition and the depiction of the origins of that holiday).

¹⁶⁵ *Lemon*, 403 U.S. at 612.

¹⁶⁶ See *Amos*, 483 U.S. at 337.

¹⁶⁷ See *Ran-Dav’s County Kosher, Inc.*, 608 A.2d at 1364. See also *School District of the City of Grand Rapids v. Ball*, 473 U.S. at 389.

¹⁶⁸ *Lemon*, 403 U.S. at 613.

each case to decide whether the third prong of the *Lemon* test has been satisfied.¹⁶⁹ The Court has held that legislation which vests governmental powers in a religious body constitutes "excessive" entanglement.¹⁷⁰ For example, in *Larkin v. Grendel's Den*, the Court found a zoning statute, which vested in the governing bodies of churches and schools the power to effectively veto applications for liquor licenses within a five hundred foot radius of the church or school, violative of the Establishment Clause.¹⁷¹ The Court invalidated the statute, reasoning that government may not delegate its decision-making function to a religious body.¹⁷² The Court noted that the statute served to substitute the unilateral and absolute power of a church for the reasoned decision-making of a public legislative body.¹⁷³ This entangling of religious authorities with governmental powers was just the sort of excessive entanglement prohibited by the third prong of the *Lemon* test.¹⁷⁴

B. The Free Exercise Clause

The Free Exercise Clause prohibits government from burdening or inhibiting the exercise of religion.¹⁷⁵ The Free Exercise Clause flatly forbids the outlawing of any religious belief. However, it does not absolutely prohibit governmental regulation of conduct that is related to religious belief.¹⁷⁶ Indeed, the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs, reasoning that even when the conduct is in accord with a person's religious beliefs, it is not entirely free from governmental restrictions.¹⁷⁷ Nevertheless, in *Cantwell v. Connecticut*, an action involving fund solicitation by a Jehovah's Witness, the Court ruled that acts which are related to religious beliefs were within the protection of the Free Exercise Clause.¹⁷⁸ The Court

¹⁶⁹ *Accord* *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 766 (1976).

¹⁷⁰ *Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982). *See* *Spacco v. Bridgewater School Dept.*, 722 F. Supp. 834, 844 (D. Mass. 1989).

¹⁷¹ *Larkin*, 459 U.S. at 117, 127.

¹⁷² *See id.* at 127.

¹⁷³ *See id.*

¹⁷⁴ *See id.* *See also* *Spacco*, 722 F. Supp. at 844, 847 (lease which gave lessor-church power to influence elementary school curriculum in space leased from its parish center constituted an impermissible delegation to Roman Catholic Church of town's responsibility to determine what is taught to its elementary school students).

¹⁷⁵ *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

¹⁷⁶ *See Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

¹⁷⁷ *See id.* at 303-04, 306; *Braunfield v. Brown*, 366 U.S. 599, 603 (1961).

¹⁷⁸ *Cantwell*, 310 U.S. at 303-04, 307.

found that the freedom to act under the Free Exercise Clause, although not absolute like the freedom to believe, could only be regulated without undue infringement of the freedom to believe.¹⁷⁹

The modern approach to free exercise jurisprudence commenced in 1963 in *Sherbert v. Verner*.¹⁸⁰ In this case, Adell Sherbert, a Seventh-Day Adventist, was fired for refusing to work on Saturdays, her religion's day of rest.¹⁸¹ She failed to obtain other employment because of her unwillingness to work on Saturdays, and she filed a claim for unemployment compensation benefits with South Carolina.¹⁸² South Carolina denied her claim for unemployment compensation because she had refused "suitable work when offered."¹⁸³ The Supreme Court held that the state's denial violated Mrs. Sherbert's right to the free exercise of her religion.¹⁸⁴ The Court ruled that the state did not have a compelling interest in the eligibility provisions of its unemployment compensation statute sufficient to justify a denial of benefits to Mrs. Sherbert who would have been forced to choose between receiving benefits and following her religion.¹⁸⁵

Strict scrutiny was also applied in *Wisconsin v. Yoder*, where the Court invalidated Wisconsin's refusal to exempt fourteen- and fifteen-year old Amish students from the requirements of attending school until the age of 16.¹⁸⁶ The parents of the Amish students objected to sending their children to school past the eighth grade.¹⁸⁷ The parents satisfied the Court that it was an essential element of the Amish religion that members be informally taught to earn a livelihood through farming and other rural activities, and that compulsory high school education conflicted with that belief.¹⁸⁸ The Court ruled that Wisconsin's interest in compulsory education was not compelling enough to trump a religiously based claim that the Amish religion forbade formal education past the eighth grade.¹⁸⁹

The Court's application of strict scrutiny in free exercise cases continued until a 1990 case, *Employment Division v. Smith*.¹⁹⁰ In this

¹⁷⁹ *Id.* at 304.

¹⁸⁰ *Sherbert v. Verner*, 374 U.S. 398 (1963).

¹⁸¹ *Id.* at 399.

¹⁸² *Id.* at 399-400.

¹⁸³ *Id.* at 400-01.

¹⁸⁴ *Id.* at 403.

¹⁸⁵ *Id.* at 406-09.

¹⁸⁶ *Wisconsin v. Yoder*, 406 U.S. 205, 207-08, 234 (1972).

¹⁸⁷ *Id.* at 207.

¹⁸⁸ *See id.* at 210-11, 217, 235-36.

¹⁸⁹ *Id.* at 235-36.

¹⁹⁰ *Employment Division v. Smith*, 494 U.S. 872 (1990).

case, the plaintiffs, Alfred Smith and Galen Black, were two drug rehabilitation counselors from Oregon.¹⁹¹ As members of the Native American Church, they ingested the hallucinogenic drug peyote as a sacramental substance in their worship services.¹⁹² As a result of their ingestion of peyote, they were fired.¹⁹³ When Oregon denied their unemployment compensations claims, they sued.¹⁹⁴ Not only did the U. S. Supreme Court rule against Smith and Black on the merits of the case (that their firing was justified and that Oregon could constitutionally deny them benefits), but the Court also held that no balancing of the state's interest in its denial of benefits against the burden on the individual's religious beliefs needed to be carried out.¹⁹⁵ So long as the ban on peyote was generally applicable and not motivated by a governmental desire to promote or restrict religious beliefs, the Court found that the law was fully enforceable despite the burden on the plaintiffs' free exercise rights.¹⁹⁶

Thus, in *Smith*, the Court abandoned the compelling interest doctrine.¹⁹⁷ The decision in *Smith* probably means that any generally applicable regulation will be enforceable and upheld even if it severely burdens individuals' free exercise rights.¹⁹⁸ Conceding that their holding in *Smith* would detrimentally affect minority religious practice, the Court explained that this was merely an "unavoidable consequence of democratic government."¹⁹⁹ The decision clearly illustrates a trend on the Court's part to curtail Free Exercise rights.²⁰⁰

V. HISTORY OF CASES INTERPRETING KOSHER FOOD LAWS

Since their inception, there have been several constitutional challenges to kosher food laws on vagueness, due process, equal protection and first amendment grounds. Most litigation questioning the validity of kosher food regulations occurred in New York.

¹⁹¹ *Id.* at 874.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See id.* at 883-85, 890.

¹⁹⁶ *See id.* at 879, 890.

¹⁹⁷ *See id.* at 888-89.

¹⁹⁸ *See id.* at 879.

¹⁹⁹ *Id.* at 890.

²⁰⁰ *See* J. Brent Walker, *Free Exercise of Religion: A Right Not a Luxury*, 66 FLA. B. J. 22, 24-26 (1992).

A. *Litigation Concerning New York State's Kosher Food Statute*

1. Litigation in State Courts

In New York, litigation concerning the enactment and constitutionality of ordinances or statutes prohibiting the passing off of non-kosher food products as kosher began soon after the passage of its kosher food law.²⁰¹ In 1916, two kosher butchers, charged with violating New York's kosher food statute,²⁰² brought suit to challenge the statute's validity in *People v. Goldberger*.²⁰³ The statute provided that "a person who, with intent to defraud, sells or exposes for sale any meat, and falsely represents it to be kosher . . . is guilty of a misdemeanor."²⁰⁴ The court upheld the statute against a variety of constitutional challenges.²⁰⁵

The butchers argued that the statute was meaningless, "impossible of interpretation," and hence, void.²⁰⁶ They insisted that the term "kosher" was a foreign word; that its use as an essential element of kosher food legislation rendered the law invalid. They also argued that the law as enacted assumed a knowledge in those addressed of the entire history, law, and literature of the Hebrew race. Furthermore, they contended that the wording of the legislation was so strange and difficult for the community to interpret, that the courts should declare it void.²⁰⁷

The court dismissed these arguments, saying that the word "kosher" must be recognized as an English word; but, regardless of whether it was recognized as English or foreign, it was still within the Legislature's power to deal with the subject-matter.²⁰⁸ The court reasoned that the legislature's power extended to using the term that described the subject in question, even if that word was foreign.²⁰⁹

The court also rejected the contention that the law was a private or local bill, creating a special privilege or immunity.²¹⁰ Instead, the court found that the statute was a general regulation which applied

²⁰¹ Stern, *supra* note 13, at 391.

²⁰² At the time of this case, New York's kosher food statute was designated as section 435 of the Penal Law of New York. Today it is N.Y. AGRIC & MKTS. LAW § 201-a *et. seq.* (McKinney 1991).

²⁰³ *People v. Goldberger*, 163 N.Y.S. 663 (1916).

²⁰⁴ *Id.* at 664.

²⁰⁵ *Id.* at 665.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 666.

to all inhabitants of the state who might at any time be included within the class to which its provisions applied, and stated that a statute was not private or local because it might affect only a limited class.²¹¹

The butchers also contended that the statute was an invasion of religious liberty or personal rights.²¹² The court dismissed this argument, holding that there was no invasion of religious freedom or personal rights.²¹³ The statute was directed against an aspect of fraud. According to the Court, protection from fraud was not contrary to the constitutional provision which forbids the interference with the free exercise and enjoyment of religious profession and worship, but was rather in distinct accord with it.²¹⁴ While the Legislature could not enact a religious creed, the Constitution protects men of all creeds in undisturbed enjoyment of religious freedom.²¹⁵ The court found that such protection was the statute's aim.²¹⁶

Thus, from the beginning, New York's kosher food law withstood constitutional attack. Interestingly, the butchers never appealed this decision and no Jewish organization intervened in this case.²¹⁷ Two years later, in *People v. Atlas*, a different kosher butcher raised another constitutional challenge to the New York State kosher food statute.²¹⁸ In this case, the butcher contended that the statute failed to sufficiently define the crime because the meaning of "kosher" involved a consideration of the vast quantity of imprecise rabbinic law.²¹⁹ In effect, he argued that no one could discern in advance that a certain piece of meat was not kosher, and therefore, that its sale was illegal.²²⁰ The court rejected this argument, stating that the legislature did not mean to use "kosher" in any indefinite sense, but rather in the ordinary sense in which it was used in the trade—*i.e.*, to designate meat as having been prepared under and sanctioned by the Orthodox religious requirements.²²¹

The butcher in *Atlas* also contended that the statute constituted unconstitutional legislation aimed at a particular class.²²² The court

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*; Stern, *supra* note 13, at 391.

²¹⁷ Stern, *supra* note 13, at 391.

²¹⁸ *People v. Atlas*, 170 N.Y.S. 834, 835 (Sup. Ct. 1918) *aff'd*, 230 N.Y. 629 (1921)

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ *Id.*

²²² *Id.*

rejected this argument, reasoning that the benefits of the law were being conferred on both Jews and non-Jews alike.²²³ According to the court, although those principally interested in the subject-matter of the legislation might be Jewish, the benefits of the statute were not confined to them.²²⁴ Non-Jews might be interested in knowing that greater care and cleanliness had been observed in the selection and slaughter of the animals than is otherwise exercised by non-kosher butchers.²²⁵

2. Litigation in Federal Courts

In 1922, several kosher food processors challenged the New York State kosher food statute in federal courts as contravening the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Commerce Clause of the United States Constitution in *Hygrade Provision Co., Inc. v. Sherman*.²²⁶ The U. S. Supreme Court dismissed the argument that the statute was unconstitutionally vague because of the indefinite nature of the word "kosher" and phrase "Orthodox Hebrew religious requirements."²²⁷ The court, referring to the New York courts' construction of the statute in *Atlas*, found that the statute was not unconstitutionally vague. The court held that the statute would be violated only if the purveyor intentionally sold non-kosher products as kosher.²²⁸ Since the statute required not only falsity of representation, but also intent to defraud, the chance that there would be much rabbinic disagreement about a product posed no constitutional problems, even though the Due Process Clause of the Fourteenth Amendment required that criminal statutes precisely define the conduct prohibited.²²⁹ Thus, to the Court, it seemed that whatever difficulty there might be in correctly determining whether a given product was kosher, appellants were unduly apprehensive since they were only required to exercise good faith judgment in order to avoid violating the statutes. Indeed, the court said that even without the statutes, kosher food processors would be bound to exercise such good faith judgment based upon the ordinary principles of

²²³ See *id.* at 836.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Hygrade Provision Co., Inc. v. Sherman*, 266 U.S. 497 (1925). The Federal District Court for the Southern District of New York rejected the food processors' claims without publishing any opinion, and the processors appealed to the United States Supreme Court. See Stern, *supra* note 13, at 391.

²²⁷ *Hygrade Provision Co., Inc.*, 266 U.S. at 501.

²²⁸ *Id.*

²²⁹ *Id.* at 501-02; Stern, *supra* note 13, at 392.

fair dealing. By dealing in the kosher food business, they in effect assert a good faith intent to distinguish between kosher and non-kosher foods.²³⁰

Furthermore, the Court held that the evidence warranted the conclusion that the word "kosher" had a meaning well-enough defined to allow one who was engaged in the kosher food trade to apply it correctly.²³¹ Finally, the court found that the statute did not violate the Commerce Clause because it was not aimed at interstate commerce; did not impose a direct burden upon interstate commerce; did not discriminate against it; was fairly within the police powers of the state; bore a reasonable relation to the legitimate purpose of the enactment; and did not conflict with any congressional legislation.²³² No Establishment Clause challenge was made in *Hygrade*. This is probably because at the time this case was decided, the First Amendment's Establishment Clause²³³ was thought not to apply to state laws.²³⁴

B. Challenges to Kosher Food Laws in Other States

Other states enacted kosher food laws patterned after the New York statute. Non-Orthodox groups opposed many of these enactments; however, the groups' resistance was ineffectual.²³⁵ It was not until 1961, thirty-six years after the *Hygrade* decision, that opponents of the kosher food laws raised another challenge to the constitutionality of these kosher food statutes.²³⁶ The challenges to the California's kosher food statute in *Ehrlich v. Municipal Court of Beverly Hills Judicial District* were similar to those that had been raised against the New York kosher food law.²³⁷

The court upheld the California statute²³⁸ making it a misdemeanor to sell or expose for sale, with intent to defraud, any meat falsely represented to be kosher, or to be a product sanctioned by Orthodox Hebrew religious requirements against an attack that it was void for

²³⁰ *Hygrade Provision Co. Inc.*, 266 U.S. at 501-02; Stern, *supra* note 13, at 392.

²³¹ *Hygrade Provision Co., Inc.*, 266 U.S. at 502.

²³² *Id.* at 503.

²³³ The Establishment Clause of the First Amendment states in relevant part that "Congress shall make no law respecting an Establishment of religion." U.S. CONST. amend. I.

²³⁴ Stern, *supra* note 13, at 392.

²³⁵ *Id.* at 393.

²³⁶ *Ehrlich v. Municipal Court of Beverly Hills Jud. Dist.*, 360 P.2d 334 (1961); See Stern, *supra* note 13, at 393.

²³⁷ 360 P.2d at 335.

²³⁸ The California kosher food statute is designated as section 383b of the Penal Code. The relevant portions of § 383b of the Penal Code read as follows:

vagueness.²³⁹ The statute defined "kosher" to mean a strict compliance with every Jewish law and custom.²⁴⁰ The defendant contended that the law was so vague and uncertain that it was unenforceable because no two rabbis could agree on the meaning of the term "kosher."²⁴¹ The *Ehrlich* court, however, found that the statute was similar to the New York law. Relying on decisions in that state, such as *Atlas* and *Hygrade*, the court held that the California statute should be interpreted to apply only to intentional violations of the kosher food laws.²⁴² Referring to the Supreme Court's decision in *Hygrade*, the *Ehrlich* court pointed out that the kosher food statute required specific intent to defraud.²⁴³ Therefore, the court held that the specificity required in describing prohibited acts is unnecessary where the statutory violation depends upon the existence of a specific wrongful intent. The court declared that even if the actions that a statute prohibits are defined in vague terms, the statute would be upheld so long as the law requires an adequately defined specific intent.²⁴⁴

The *Ehrlich* court recognized, however, that the California law was different from the New York statute in one significant respect: the California statute defined food as kosher only if it was in "strict compliance with every Jewish law and custom."²⁴⁵ The court said that this language, which necessitated the adoption of "every possible halakhic compulsion,"²⁴⁶ introduced some level of uncertainty into the California law beyond that which was present in New York's stat-

Every person who with intent to defraud, sells or exposes for sale any meat or meat preparations, and falsely represents the same to be kosher, whether such meat or meat preparations be raw or prepared for human consumption, or as having been prepared under and from a product or products sanctioned by the orthodox Hebrew religious requirements . . . is guilty of a misdemeanor. . . . 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 with Jewish laws and customs, and to the use of tools, implements, 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 foodstuffs.

CAL. PENAL CODE § 383b (West 1988).

²³⁹ Ehrlich, 360 P.2d at 337.

²⁴⁰ *Id.* at 335.

²⁴¹ *Id.*

²⁴² *Id.* at 337; See Stern, *supra* note 13, at 393.

²⁴³ Ehrlich, 360 P.2d at 337.

²⁴⁴ Ehrlich, 360 P.2d at 337, (quoting *People v. McCaughan*, 317 P.2d 974, 977 (1957)).

²⁴⁵ *Id.* at 337.

²⁴⁶ The term "*halakhic*" describes that part of Jewish teaching dealing with ritual and behavior, Judaism's legal side. See UNTERMAN, *supra* note 24, at 235.

ute.²⁴⁷ Rather than finding the statute void for vagueness because of this language, the court declared that “mere surplusage” would not invalidate the statute because of the doctrine of severability.²⁴⁸

Eleven years after *Ehrlich*, the corporate operator of a hotel in Miami Beach challenged the kosher food ordinance of Miami Beach in *Sossin Systems, Inc. v. City of Miami Beach*.²⁴⁹ The city fined the hotel operator for selling non-kosher-for-Passover cakes as kosher-for-Passover.²⁵⁰ The municipal kosher food ordinance prohibited the fraudulent sale, by restaurants, of any food falsely represented to be kosher, and provided that the possession of non-kosher food on premises held out to be places where only kosher food was served, constituted prima facie evidence of intent to defraud.²⁵¹ The defendant contended that the ordinance was an enactment affecting the establishment of religion by compelling, under threat of prosecution, compliance with religious law.²⁵² This case marked the first Establishment Clause challenge to a kosher food statute in 55 years. Even though this was a concrete Establishment Clause claim, the Florida court brushed it aside. The court refused to view the ordinance as a legislative enactment establishing or respecting the establishment of religion, or as prohibiting the free exercise of religion. Instead, the *Sossin* court reasoned that the ordinance served to safeguard the observance of Judaism’s tenets, and to prohibit conduct that improperly interfered with it.²⁵³ The court stressed that enactments such as the ordinance involved in this case had been consistently recognized as valid.²⁵⁴ This was by no means a conclusive response to the Estab-

²⁴⁷ *Id.* See Stern, *supra* note 13, at 394.

²⁴⁸ *Ehrlich*, 360 P.2d at 337.

²⁴⁹ 262 So. 2d 28, 29 (Fla. Dist. Ct. App. 1972). The kosher food ordinance of the City of Miami Beach is designated as section 16-50 of the Code of the City of Miami Beach. The pertinent sections of the municipal ordinance read as follows:

A person who, with intent to defraud, sells or exposes for sale in any hotel, restaurant, or other place where food products are sold for consumption on the premises, any meat or meat preparation or any article of food or food preparation and falsely represents the same to be kosher, or as having been prepared in accordance with the orthodox Hebrew religious requirements . . . shall upon conviction thereof be punished as provided in Section 1-8 of the City Code. . . . The possession of food, food products, beverages and merchandise, which, in fact, are not kosher in any premises wherein it is held out that only kosher food, food products, beverages and merchandise are dealt in therein shall be prima facie evidence that the person in possession of such premises exposes such food, food products, beverages and merchandise for sale with intent to defraud. MIAMI BEACH CODE § 16-50.

²⁵⁰ *Sossin Systems, Inc.*, 262 So. 2d at 29.

²⁵¹ *Id.*

²⁵² *See id.*

²⁵³ *Id.* at 30.

²⁵⁴ *Id.*

lishment Clause challenge, and it did not prevent other such challenges to kosher food laws from being raised.²⁵⁵

In a recent Maryland case, *Barghout v. Mayor*, a hot dog vendor was prosecuted under a Baltimore kosher food ordinance²⁵⁶ for selling hot dogs contaminated with non-kosher sausage grease as kosher.²⁵⁷ The vendor was found guilty and fined \$400 plus \$100 in court costs.²⁵⁸ The vendor sought a declaratory judgment from the United States District Court for the District of Maryland that the ordinance violated the First and Fourteenth Amendments of the United States Constitution.²⁵⁹ The District Court judge certified two questions to the Court

²⁵⁵ Stern, *supra* note 13, at 394. See *Brach's Meat Market v. Abrams*, 668 F. Supp. 275, (S.D.N.Y. 1987). In this 1987 case, a New York butcher shop owner sought a declaratory judgment that the state law regulating kosher meat sales was unconstitutional. In a disagreement involving the correct method of preparing tongue for sale to the kosher food market, the butcher shop owner, with support from his Orthodox rabbi, insisted that the tongues displayed in his shop were properly labeled kosher. The state inspector disagreed, complaining that the tongues were not kosher since the meat had not been "deveined" and contained major blood vessels. The inspector assessed a \$5,800 fine against the butcher. In response, the butcher brought an action in federal court, contending that the New York kosher food law violated the Establishment Clause of the First Amendment. The court in this case avoided reaching the merits of the butcher's claims on technical grounds, stating that the plaintiff would have an adequate opportunity to raise his constitutional claims in state court. The butcher, however, never pursued his claim in the state courts. *Id.* at 276-81.

²⁵⁶ The Baltimore kosher food ordinance is designated as Article 19, section 50 of the Baltimore City Code. The relevant portions of Article 19, § 50 of the Baltimore City Code read as follows:

Any person, firm or corporation who, with intent to defraud, sells, exposes for sale, any meat or meat preparation, article of food or food products, and falsely represents the same to be Kosher, whether such meat or meat preparation, article of food or food product, be raw or prepared for human consumption, or as having been prepared under, and/or of a product or products sanctioned by the orthodox Hebrew religious rules and requirements or under the dietary laws either by direct or indirect statement, orally or in writing, which might reasonably be calculated to deceive or lead a reasonable man to believe that a representation is being made that such food, meat, meat preparations or food product is kosher or prepared in accordance with the orthodox Hebrew religious rules and requirements and/or dietary laws, or falsely represents any food products or food 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, is . . . guilty of a misdemeanor punishable by a fine of not less than fifty dollars (\$50.00) or more than five hundred dollars (\$500.00) or by imprisonment of not less than thirty (30) days or more than one (1) year, or both, at the discretion of the Court. . . . In order to comply with the provisions of this section persons dealing with either kosher meat, meat preparations, food and/or food products only, or persons dealing with both kosher and non-kosher meat, meat preparations, food and/or food products must adhere to and abide by the orthodox Hebrew religious rules and regulations and the dietary laws; otherwise, he [sic] shall be in violation of this section.

BALTIMORE CODE, art. 19, § 50.

²⁵⁷ 600 A.2d 841, 842 (Md. 1992).

²⁵⁸ *Id.* at 843.

²⁵⁹ *Id.*

of Appeals for resolution before reaching the federal constitutional claims.²⁶⁰

The first question asked whether an individual could be convicted of violating the kosher food ordinance if he or she sincerely believed that his or her conduct conformed to the kosher requirements.²⁶¹ The court answered this question in the negative, stating that the ordinance was drafted to protect consumers from unscrupulous purveyors attempting to deceive them into purchasing something less than what they expected.²⁶² For this reason, the court held that only those vendors who intentionally deceived people by making false representations violated the statute's proscriptions, while those who sincerely believe that their food products met the kosher requirements were in compliance with the ordinance.²⁶³

The second question asked whether the ordinance violated Article 36 of the Maryland Declaration of Rights,²⁶⁴ which dealt with religious freedom. Again, the court answered in the negative.²⁶⁵ It first reasoned that the term "kosher" was not overly vague, so that even though a particular word in a statute embodied a complex concept, this did not render the statute void for vagueness.²⁶⁶ Next, the court ruled that the ordinance did not create a private denominational preference.²⁶⁷ Accordingly, the court held that nothing in Baltimore's

²⁶⁰ *Id.*

²⁶¹ *Id.* at 841-42.

²⁶² *Id.* at 845.

²⁶³ *Id.*

²⁶⁴ Article 36 of the Maryland Declaration of Rights is headed "Religious Freedom." It states as follows:

[T]hat as it is the duty of every man to worship God in such manner as he thinks most acceptable to Him, all persons are equally entitled to protection in their religious liberty; wherefore, no person ought by any law to be molested in his person or estate, on account of his religious persuasion, or profession, or for his religious practice, unless, under the color of religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others in their natural, civil or religious rights; nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry; nor shall any person, otherwise competent as a witness, juror, on account of his religious belief, provided, he believes in the existence of God, and that under his dispensation such person will be held morally accountable for his acts, and be rewarded or punished therefor either in this world or in the world to come.

Nothing shall prohibit or require the making reference to belief in, reliance upon, or invoking the aid of God or a Supreme Being in any governmental or public document, proceeding, activity, ceremony, school, institution, or place.

Nothing in this article shall constitute an establishment of religion. MD. CONST. CODE ANN. art. 36 (1981).

²⁶⁵ *Barghout v. Mayor*, 600 A.2d at 849.

²⁶⁶ *Id.* at 847.

²⁶⁷ *See id.* at 848.

food ordinance inhibited the free exercise of religion guaranteed under Article 36 of the Maryland Declaration of Rights.²⁶⁸ The court found that rather than inhibiting religious freedom, the ordinance enhanced such freedom by protecting those individuals who desired to adhere to the Jewish dietary laws.²⁶⁹

The court in *Barghout* never addressed the Establishment Clause claim.²⁷⁰ Reasoning that Article 36 of the Maryland's Declaration of Rights did not contain an establishment clause which would prohibit government from setting up a church, from giving preferential treatment to any religion, or from coercing belief or disbelief in any religion, the court concluded that the final determination as to whether the ordinance violated the Establishment Clause lay with the federal courts.²⁷¹

C. *The Ran-Dav Decision*

1. Background

To date, the most serious challenge to the kosher food laws has been *Ran-Dav's County Kosher, Inc. v. State of New Jersey*.²⁷² In this case, Ran-Dav's County Kosher, Inc. and one of its principals, Arthur Weisman (together RDC), operated a kosher food business in Linden, New Jersey.²⁷³ As such, they were subject to regulatory supervision both privately through a religious rabbi, and civilly, by the State's Bureau of Kosher Enforcement.²⁷⁴ The Bureau of Kosher Enforcement was created within the Attorney General's Consumer Affairs Division in order to enforce the kosher food regulations.²⁷⁵ The head of the Bureau, an Orthodox Hebrew rabbi, oversaw several kosher food inspec-

²⁶⁸ *Id.* at 849.

²⁶⁹ *Id.* at 848.

²⁷⁰ *Id.* at 849.

²⁷¹ *Id.*

²⁷² 579 A.2d 316 (N.J. Super. Ct. App. Div. 1990).

²⁷³ *Id.* at 319.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 320. New Jersey's kosher food statute, N.J.S.A. 2a-1-8-6, was repealed in 1978 and replaced by administrative regulations. The relevant section of the New Jersey Kosher Food Regulations provides:

It shall be an unlawful consumer practice for any person to sell, offer for sale, expose for sale, serve or have in his possession with intent to sell, by any of the following means, in any restaurant, hotel, store or catering facility or other place, any food or food product which is falsely represented to be Kosher, Kosher for Passover, under Rabbinical Supervision, pareve or as having been prepared under and/or with a product sanctioned by Orthodox Jewish religious requirements. . . . N.J. ADMIN. CODE tit. 13, § 45a-21.2 (1987).

tors on his staff.²⁷⁶ The inspectors are not rabbis, and some are not even Jewish.²⁷⁷

The New Jersey Attorney General also created a "State Kosher Advisory Committee" through an executive directive, consisting of ten members appointed by the Attorney General.²⁷⁸ The Committee is responsible for advising the Attorney General on kosher matters and enforcement of the New Jersey kosher regulations, and making recommendations for alterations in the regulatory scheme.²⁷⁹

Inspectors employed by the Bureau of Kosher Enforcement cited Mr. Weisman, a kosher butcher, for violating the New Jersey kosher food regulations.²⁸⁰ Specifically, they charged him with possessing meat that had been neither soaked and salted, nor labeled as such. According to Mr. Weisman, the mislabeling was the result of error.²⁸¹ They also charged him with possessing calf tongues prepared in such a way that they were rendered unfit for sale as kosher.²⁸² The kosher butcher denied any violation of the kosher dietary rules, refused to pay a fine, and ultimately filed suit, along with RDC, challenging the very concept of kosher food laws.²⁸³

In this action, RDC attacked kosher food laws in several different ways. RDC contended that the kosher food regulations violated the Establishment Clause of the First Amendment of the United States Constitution and the coordinate provision of the New Jersey Constitution.²⁸⁴ According to RDC, so long as they were in compliance with the kosher standards set by their supervising rabbi, the State had no constitutional authority to set different standards to which RDC was required to conform.²⁸⁵ By describing kosher food as that which conforms to the "Orthodox Hebrew" requirements, RDC argued that the

²⁷⁶ Ran-Dav's County Kosher, 579 A.2d at 316.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 318. See Stern, *supra* note 13, at 395.

²⁸¹ Ran-Dav's County Kosher, 579 A.2d at 321. See Stern, *supra* note 13, at 395.

²⁸² Ran-Dav's County Kosher, 579 A.2d at 321. See Stern, *supra* note 13, at 395. To be "fit," meat must be soaked and salted to remove blood before cooking. Meat which is not soaked or salted within three days of slaughtering may be eaten only if roasted over an open flame. Obviously, then, a kosher butcher must label meat as to whether it was salted, and, if not, when it was slaughtered. In short, meat which is more than three days old but not soaked and salted can be "kosher," but only if the consumer is advised of the restrictions on its use. Stern, *supra* note 13, at 395 n.19.

²⁸³ Stern, *supra* note 13, at 395. See Brief for Appellant at 2, Ran-Dav's County Kosher, 579 A.2d 316 (1990).

²⁸⁴ Ran-Dav's County Kosher, 579 A.2d at 319. The establishment clause of the New Jersey Constitution states: "There shall be no establishment of one religious sect in preference to another. . . ." N. J. CONST., art. I, par. 4 (1947).

²⁸⁵ Ran-Dav's County Kosher, 579 A.2d at 319.

State had decreed a single standard of religious observance to the exclusion of all others.²⁸⁶ As a result, said RDC, "the State was literally establishing a religion, just as it would if it decreed that only the King James Bible could be sold as the Bible."²⁸⁷ RDC argued that the fact that an Orthodox Hebrew rabbi was the chief official of the Attorney General's Bureau of Kosher Enforcement exacerbated the problems.²⁸⁸

RDC also contended that the state-adopted singular standard for *kashruth* was unconstitutionally vague.²⁸⁹ According to RDC, state prosecutors or judges could not determine what is and is not kosher without having to decide religious questions that were beyond their competence.²⁹⁰ For instance, the kosher butcher in *Ran-Dav* asserted that the charge against him was just one part of a long-running doctrinal conflict between RDC's certifying rabbi and the state's kosher inspector and other Orthodox rabbis.²⁹¹

The state argued that the regulations had a valid secular purpose because they clearly prohibited the sale of food deceptively mislabeled as kosher.²⁹² The state insisted that its only purpose in regulating the sale of kosher food was to protect consumers who pay higher prices for food labeled as kosher.²⁹³ The state contended that the regulations did not require anyone to participate in a religious ceremony or to perform any other religious ritual or to eat kosher food.²⁹⁴ According to the State, the New Jersey kosher food law required only that those who sought to profit from the sale of kosher foods sell exactly what they claimed to be selling.²⁹⁵

In response to RDC's contention that the law's prescription of a singular standard of *kashruth* was overly vague, the State said that it was interpreting the phrase "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion" as validating any bona fide belief by a purveyor that an item in question was in fact kosher.²⁹⁶ The state conceded that where Ortho-

²⁸⁶ *Id.* at 322. See Stern, *supra* note 13, at 395.

²⁸⁷ Stern, *supra* note 13, at 395-96.

²⁸⁸ *Id.* See Brief for Appellant at 42-43, *Ran-Dav's County Kosher*, 579 A.2d 316 (N.J. 1990) (No. A-5420-88T2).

²⁸⁹ Stern, *supra* note 13, at 396. See Brief for Appellant at 37, *Ran-Dav's County Kosher* (No. A-5420-88T2).

²⁹⁰ *Ran-Dav's County Kosher*, 579 A.2d at 322.

²⁹¹ Stern, *supra* note 13, at 396.

²⁹² *Ran-Dav's County Kosher*, 579 A.2d at 319.

²⁹³ *Id.*

²⁹⁴ Stern, *supra* note 13, at 396.

²⁹⁵ *Ran-Dav's County Kosher*, 579 A.2d at 319.

²⁹⁶ *Id.*

dox authorities disagreed, any legitimate interpretation of the standard practiced in the industry would be acceptable.²⁹⁷ Thus, under the State's purported interpretation, there would be no violation where there was a dispute among accepted Orthodox Jewish authorities and the seller had complied with either interpretation.²⁹⁸ The Assistant Attorney General argued that the regulation was a civil standard, not a religious standard, and that the purpose of the regulations was to promote truth in advertising.²⁹⁹

The state also contended that the regulations did not establish a religion, as RDC maintained, but instead advanced the purpose for which the state legislature intended the law—*i.e.*, to prevent deception and fraud in the sale and advertisement of Kosher products. According to the state, the regulations did not violate the constitutional prohibitions against advancing the interest of one religion or religious group over another.³⁰⁰

2. Ruling at the Appellate Division Level

The Appellate Court rejected RDC's constitutional challenge, finding that the regulation's reference to kosher law was not impermissibly vague and did not foster an excessive government entanglement with religion.³⁰¹ Responding to RDC's argument that these regulations violated the Establishment Clause, the Court stated that although there were disputes as to whether certain foods may be kosher, the issues in the State's enforcement proceeding against RDC did not entail doctrinal disputes regarding interpretations of Jewish law to determine what was kosher.³⁰² Instead, the court ruled that what was involved was a claim by the State of fraud or mistake and denials by RDC.³⁰³ For example, the court said that if RDC knew that the chicken breasts were not kosher but were representing them to consumers as kosher, their actions would justify a claim of consumer fraud, irrespective of any divergent interpretations of "kosher."³⁰⁴

Since the State's specific claims did not implicate a challenge to the interpretation of "kosher" by RDC's supervising rabbi, RDC's constitutional challenge was viewed as facial.³⁰⁵ The court applied the three-

²⁹⁷ *Id.* at 323.

²⁹⁸ *See id.*

²⁹⁹ Riss, *supra* note 63, at 155.

³⁰⁰ *Id.*

³⁰¹ Ran-Dav's County Kosher, 579 A.2d at 326-29.

³⁰² *Id.* at 322.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

prong test enunciated in *Lemon v. Kurtzman*³⁰⁶ in order to determine whether the State's interpretation and application of "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion" was constitutional.³⁰⁷ Under the *Lemon* test, a statute does not violate the Establishment Clause if (1) it has a secular legislative purpose, (2) its principal or primary effect is one that neither advances nor inhibits religion, and (3) it does not foster an excessive government entanglement with religion.³⁰⁸

The Appellate Court held that, in light of the various health and religious reasons for buying kosher foods and the tremendous profit that could be made by palming off non-kosher food as kosher, it was clear that there was a secular legislative purpose behind the regulations (*viz.* the protection against intentional and negligent misrepresentation in the sale of kosher food).³⁰⁹ Thus, the regulations satisfied the first prong of the *Lemon* test.³¹⁰ The court also held that the regulations satisfied the second prong of the *Lemon* test, finding that the principal or primary effect was one that neither advanced nor inhibited religion.³¹¹ Finally, the court held that the regulations did not foster an excessive government entanglement with religion, satisfying the third prong.³¹²

The court explained that the regulations required no State interpretation of Jewish law and that the State, in fact, determined only whether a purveyor had a good faith belief that an item it offered or intended to offer for sale met acknowledged kosher requirements.³¹³ Although RDC argued that the State entangles itself in religion when it looks to an undefined body of kosher dietary law which is not spelled out in the regulations, the court found that RDC failed to point out any dispute as to the interpretation of Jewish law.³¹⁴ In any event, the court reasoned that because the kosher dietary laws were sufficiently definite, the regulations' reference to such laws were simply a shorthand way of expressing a known entity.³¹⁵

One justice of the Appellate Division dissented, saying that, in his opinion, the kosher food regulations violated the Establishment

³⁰⁶ 403 U.S. 602 (1971).

³⁰⁷ *Ran-Dav's County Kosher*, 579 A.2d at 325, 329.

³⁰⁸ *Lemon v. Kurtzman*, 403 U.S. at 612-13.

³⁰⁹ *Ran-Dav's County Kosher*, 579 A.2d at 325.

³¹⁰ *Id.*

³¹¹ *Id.* at 326.

³¹² *Id.* at 326-27.

³¹³ *Id.* at 327.

³¹⁴ *Id.* at 328-29.

³¹⁵ *Id.*

Clause of the federal and state constitutions.³¹⁶ According to Justice D'Annunzio, the requirements violated all three prongs of the *Lemon* test.³¹⁷ He reasoned that despite the State's attempt to put a commercial spin on the preparation and maintenance of kosher foods and thereby to justify state regulation of this "commerce," the kosher dietary laws were laws of religious ritual.³¹⁸ To Justice D'Annunzio, the State's argument that the regulatory purpose was fraud prevention was too simple, because practically every attempt by the State to regulate religious practice could be justified as a legitimate fraud-preventing measure.³¹⁹ Hence, consumer-protection legislation that prohibited a church from calling itself "Christian" unless it professed and taught the divinity of Jesus Christ would not satisfy the first prong of the *Lemon* test although its objective was the prevention of fraud.³²⁰

Justice D'Annunzio also believed that the regulations violated *Lemon's* second prong because its primary effect was the advancement of religion by raising the kosher dietary rules to legal status.³²¹ Finally, he felt that the third prong was not satisfied because the State's regulatory scheme involved conferring civil authority on clergyman for the supervision and enforcement of religious observance and ritual.³²²

After a majority of the Appellate Division upheld the constitutionality of the kosher food regulations, RDC appealed to the New Jersey Supreme Court.³²³

3. Ruling at the State Supreme Court Level

The New Jersey Supreme Court held in a 4-3 decision that the regulations setting forth the standards for the preparation, maintenance, and sale of kosher products violated the Establishment Clauses of both the federal and state constitutions.³²⁴ In so deciding, the court refrained from distinguishing between the two clauses. It reaffirmed

³¹⁶ *Id.* at 330 (D'Annunzio, J., dissenting).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.* at 330.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ Because Justice D'Annunzio did not dissent from the majority's rejection of the freedom of religion, due process, or vagueness claims, the only issue before the State Supreme Court as a matter of right was the Establishment Clause issue. See Brief for Respondent at 5, *Ran-Dav's County Kosher*, 608 A.2d 1353 (1992) (No. 32-525).

³²⁴ *Ran-Dav's County Kosher, Inc. v. State of New Jersey*, 608 A.2d 1353, 1355 (N.J. 1992).

that New Jersey's Religion Clause, which does not denounce prohibitions on the "free exercise" of religion, was less pervasive than the federal clause. Therefore, the court did not interpret it more broadly than the Establishment Clause of the Federal Constitution.³²⁵

Applying the *Lemon* test to the regulations, the court ruled that the regulations were unconstitutional, primarily because they "fostered an excessive government entanglement with religion."³²⁶ The court's holding was based upon many factors, including the fact that the regulations left state secular law inextricably intertwined with Jewish ritual.³²⁷ The court reasoned that because the regulations imposed substantive religious standards on establishments purporting to be kosher, the administrative scheme did more than require that businesses under a certain type of rabbinical supervision be in fact under that type of supervision. Instead, the scheme required such establishments to adhere strictly to religious kosher standards in the conduct of their business, and authorized the state to monitor the adherence to those religious standards.³²⁸

The court also looked at the religious qualifications of the persons chosen to enforce the regulations, concluding that such evidence clearly illustrated the sectarian nature of the regulations.³²⁹ The Chief of the Bureau of Enforcement was an Orthodox rabbi and the Advisory Committee consisted of rabbis.³³⁰ The court explained that the existence of an Advisory Committee composed predominantly of Orthodox rabbis underscored the theological or religious nature of the State's regulatory endeavors.³³¹

The court stated that clearly the Committee was made up as it was because rabbis have the expertise, education, training, and religious authority to interpret, apply and enforce the regulations. The court did not interpret the state's regulatory scheme as imposing a religious qualification on its enforcement personnel, and it did not hint that it ever would be proper to exclude followers of particular religions from any state body, but it could not disregard or discount the way in which the enforcement entities had been constituted. The court said that the way in which the law had been administered was a strong indication of the government's comprehension of its rules. The court looked to

³²⁵ *Id.* at 1358.

³²⁶ *Id.* at 1360.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 1361.

³³⁰ *Id.*

³³¹ *Id.*

the administration of the kosher food regulations to help its own understanding of their meaning.³³² The court observed that the appointment by the state of enforcement officials with religious qualifications confirmed that the regulations had a chiefly religious meaning.³³³ Thus, the court concluded that while the state could regulate the advertising and labeling of kosher products, it could not impose substantive religious standards on those products.³³⁴ Accordingly, the court invalidated the regulations, remanding them to the Division of Consumer Affairs for reformulation.³³⁵

Over the years, there have been several constitutional challenges to the validity of kosher food legislation. Until the recent *Ran-Dav* decision, courts had consistently held that kosher food laws were constitutional.³³⁶ The New Jersey *Ran-Dav* decision is thus the first to strike down a kosher food statute.³³⁷ Hence, *Ran-Dav* is most significant, since it will undoubtedly call into question the validity of other states' kosher food laws. It is important, therefore, to analyze kosher food legislation in light of both the First Amendment and the consumer protection concerns, for only by examining and balancing these concerns will the validity of kosher food laws become apparent.

VI. KOSHER FOOD LAWS IN LIGHT OF POTENTIAL ESTABLISHMENT CLAUSE CONCERNS

A. Kosher Food Regulations Have a Predominantly Secular Purpose

The first prong of the *Lemon* test evaluates whether the legislation was motivated by a religious purpose. To invalidate a governmental act under this prong of the *Lemon* test, the religious purpose must predominate. Yet, even where substantial benefits have accrued to religion, the courts have found governmental action consistent with the Establishment Clause where such action is motivated by a secular purpose.³³⁸ Thus, although the legislation at issue must serve a secular

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.* at 1366-67.

³³⁵ *Id.* at 1367.

³³⁶ See *Barghout v. Mayor*, 600 A.2d 841, 849 (Md. 1992); *Sossin Systems, Inc. v. Miami Beach*, 262 So.2d 28, 30 (Fla. Dist. Ct. App. 1972); *Ehrlich v. Municipal Court of Beverly Hills Judicial District*, 360 P.2d 334, 337 (1961); *Hygrade Provision Co., Inc. v. Sherman*, 266 U.S. 497, 501-03 (1925); *People v. Atlas*, 170 N.Y.S. 834, 836 (Sup. Ct. 1918); *People v. Goldberger*, 163 N.Y.S. 663, 665-66 (1916).

³³⁷ *Ran-Dav's County Kosher*, 608 A.2d at 1366.

³³⁸ *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984); *Everson v. Board of Education*, 330 U.S. 1, 7, 18 (1947).

purpose, the law's purpose may be related to religion.³³⁹ Indeed, the Supreme Court has noted that even a statute which is motivated partly by a religious purpose, may satisfy the first prong of the *Lemon* test.³⁴⁰

Opponents of kosher food regulations assert that the principal purpose of such legislation is the observance of religious requirements.³⁴¹ These opponents contend that the purpose of kosher food regulations is to fulfill the strict concerns of Orthodox Jewish observance, thereby excluding other Jewish sects.³⁴² The opponents argue further that in selecting the Orthodox Jewish religion as the standard, the government chooses it rather than the Conservative, Reformed or Reconstructionist Jewish sects. Opponents of kosher food legislation argue that, in placing its power behind one religious group, the state violates Establishment Clause prohibitions.³⁴³

Opponents contend that there are far less intrusive means for protecting the kosher consumer against fraud and misrepresentation.³⁴⁴ Opponents argue that kosher purveyors already have their own intensive enforcement mechanism in the form of rabbinical supervision and internal discipline of the congregations to patronize only the individual congregation's approved establishments.³⁴⁵ Furthermore, the general consumer fraud statutes still control those fraudulent representations in the marketplace regarding religious practices which are not under the purview of specific regulations.³⁴⁶ Thus, opponents of kosher food laws contend that state regulations of kosher purveyors already under rabbinical supervision for the purpose of complying with Orthodox Jewish requirements only duplicates a religious function.³⁴⁷

While the contentions of those who oppose kosher food legislation are important, it is evident that kosher food laws, which seek to protect the consumer against misrepresentation in the sale of kosher food, clearly have a secular purpose.³⁴⁸

The kosher food industry involves a vast commercial market, representing almost \$1.5 billion in annual sales. Because consumers of kosher food cannot readily discern whether food has been prepared

³³⁹ See *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

³⁴⁰ *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

³⁴¹ Brief for Appellants at 25, *Ran-Dav's County Kosher, Inc.* (No. A-5420-88T2).

³⁴² *Id.* at 29.

³⁴³ *Id.* at 30.

³⁴⁴ *Id.* at 31.

³⁴⁵ *Id.* at 32.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 33.

³⁴⁸ *Ran-Dav's County Kosher, Inc.*, 608 A.2d 1353, 1371 (N.J. 1992) (Stein, J., dissenting).

in compliance with kosher laws, non-kosher food could easily be represented to be kosher. Therefore, the industry is especially susceptible to fraud and misrepresentation.³⁴⁹ Accordingly, the predominant purpose of kosher food laws is to protect consumers from misrepresentation, whether the consumer purchases kosher products for religious or other reasons.³⁵⁰

Kosher food regulations retain their valid secular purpose despite their incorporation of a religious definition.³⁵¹ The mere reference to religion does not necessarily render a statute or regulation facially invalid.³⁵² An example of this is the Humane Slaughter Act.³⁵³ In *Jones v. Butz*, the Humane Slaughter Act was upheld against an establishment clause attack although it included within its definition of humane, slaughtering in accordance with the ritual requirements of the Jewish faith.³⁵⁴ In *Jones*, the court found a valid secular legislative purpose in that Congress intended "to establish humane standards for the slaughter of livestock."³⁵⁵ The court concluded that even though the provision of the Act defining humaneness coincided with the method of Jewish ritual slaughter, the Act neither advanced nor inhibited religion.³⁵⁶ The incorporation of a religious definition within kosher food regulations merely serves the secular purpose of eliminating consumer fraud.³⁵⁷

The "secular purpose" prong of the *Lemon* test does not mean that the law's purpose must be unrelated to religion.³⁵⁸ Even if kosher food regulations are partly designed to accommodate consumers who buy kosher food for religious reasons, they would not violate the "secular purpose" prong because the regulations still serve the secular purpose of protecting religious as well as non-religious consumers from fraud.³⁵⁹

Thus, the first element of the *Lemon* test is met since kosher food regulations have a secular legislative purpose.

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ 7 U.S.C. § 1901 *et. seq.* (1988).

³⁵⁴ *Jones v. Butz*, 374 F. Supp. 1284, 1291-93 (S.D.N.Y. 1974).

³⁵⁵ *Id.* at 1293.

³⁵⁶ *Id.*

³⁵⁷ See Brief for Respondent at 20, *Ran-Dav's County Kosher, Inc.*, 579 A.2d 316 (N.J. 1990) (No. A-5420-88T2).

³⁵⁸ *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

³⁵⁹ *Ran-Dav's County Kosher, Inc.*, 608 A.2d at 1371.

B. Kosher Food Regulations Neither Advance Nor Inhibit Religion in Their Principal or Primary Effect

Under the second prong of the *Lemon* test, kosher food legislation's principal or primary effect must neither advance nor impede religion.³⁶⁰ Evaluating the legislation's effect in light of the Establishment Clause entails a determination of whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval of their individual religious choices."³⁶¹ Therefore, even if governmental action causes some advancement of religion, there will be no impermissible effect if the effect merely coincides with a particular religious doctrine. For instance, in *County of Allegheny v. ACLU Greater Pittsburgh Area*, the Court noted that even an explicitly religious reference may be allowed if it conveys a secular message and does not communicate an endorsement of any particular religion.³⁶² In this case, the Court addressed the issue of the constitutionality of two holiday displays located on public property.³⁶³ Although the Court found a creche display unconstitutional, it held that the display of a Chanukah menorah was consistent with the Establishment Clause.³⁶⁴ In so deciding, the Court recognized that the menorah was a religious symbol which served to commemorate the miracle of the oil as discussed in the Talmud.³⁶⁵ Nevertheless, the Court said that the menorah's message was not exclusively religious.³⁶⁶ Emphasizing that the menorah was the primary visual for a holiday which, like Christmas, has both religious and secular dimensions, the Court found the menorah display constitutionally permissible.³⁶⁷ Thus, it is evident, that even if legislation has some effect on religion, it may be allowed under the Establishment Clause so long as it has a "secular" dimension.³⁶⁸

Opponents of kosher food laws contend that the principal effect of kosher food regulations is to advance the religious authority of the

³⁶⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

³⁶¹ *County of Allegheny v. ACLU Greater Pittsburgh Area*, 492 U.S. 573, 597 (1989) (quoting *Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

³⁶² *Id.* at 592, 617-20.

³⁶³ *Id.* at 578.

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 583.

³⁶⁶ *Id.* at 613.

³⁶⁷ *Id.* at 613-14.

³⁶⁸ *See id.*

Orthodox Jewish sect.³⁶⁹ Opponents argue that any secular impact the regulations may have cannot be separated from their religious impact.³⁷⁰ Opponents also contend that the regulations violate the Establishment Clause by impermissibly providing government funds for inspection and enforcement which directly benefits the Orthodox sect.³⁷¹

Despite these contentions, kosher food regulations do not have the primary effect of advancing or inhibiting religion, because they neither advance Orthodox Judaism nor disapprove other Jewish sects or religions in general.³⁷² Such regulations do not foster converts to the Jewish faith, for they do not require a kosher purveyor to believe in the Jewish religion. Also, they neither encourage purveyors to sell kosher food nor encourage consumers to buy kosher products.³⁷³ While some consumers purchase kosher food for religious reasons, the appeal of kosher products has a secular dimension. Today, consumers of many faiths purchase kosher products for wholly non-religious reasons such as health and cleanliness concerns.³⁷⁴ Since fewer than one-third of the consumers of kosher food are Jewish, it is evident that the regulations protect a broad group of consumers and not just persons of a particular religion or religious sect.³⁷⁵ The enforcement of the kosher food regulations provides no direct support to any particular religious organization, therefore, the regulations do not have an impermissible effect of advancing religion just because they incorporate a religious definition.³⁷⁶

C. Kosher Food Regulations Do Not Foster Excessive Entanglement of Government in Religious Matters

Under the final prong of the *Lemon* test, the legislation at issue must avoid excessive entanglement with religion in order to withstand an Establishment Clause challenge.³⁷⁷ Determining the amount of entanglement necessary to invalidate the legislation is not an “ex-

³⁶⁹ Brief for Appellant at 34, *Ran-Dav's County Kosher, Inc.* (No. A-5420-88T2).

³⁷⁰ *Id.*

³⁷¹ *Id.*

³⁷² See *Ran-Dav's County Kosher, Inc.*, 608 A.2d 1353, 1372 (N.J. 1992) (Stein, J., dissenting).

³⁷³ See *id.*

³⁷⁴ See *id.* See also *Ran-Dav's County Kosher, Inc.*, 579 A.2d 316, 324 (N.J. Super. Ct. App. Div. 1990).

³⁷⁵ *Ran-Dav's County Kosher*, 608 A.2d at 1372 (Stein, J., dissenting).

³⁷⁶ *Id.*

³⁷⁷ *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971).

act science."³⁷⁸ The Court stresses that it is excessive entanglement that is prohibited.³⁷⁹

Legislation which vests governmental authority in religious leaders or which enmeshes the State in religious controversies fosters excessive governmental entanglement with religion.³⁸⁰ Kosher food legislation does not foster an excessive entanglement of government in religious matters. Opponents of kosher food laws argue that the regulations foster excessive entanglement because they "impose substantive religious standards and authorize the state to monitor the adherence to those standards."³⁸¹ This argument lacks merit. Kosher food regulations concentrate essentially on whether kosher foods offered for sale comply with various display and identification requirements. They do not address other aspects of kosher food preparation such as the requisite method of animal slaughter.

The regulations are merely an unintrusive form of monitoring that limits the evaluation to objective judgments—not religious ones.³⁸² An inspector of kosher food establishments requires no religious training or background to ensure that a kosher food establishment is in compliance with kosher food regulations.³⁸³ Such an inspection is essentially the same as that performed by an inspector investigating compliance with health and safety regulations.³⁸⁴ Hence, the government does not police the religious purity of kosher food through the regulations, but merely enforces one more of its consumer protection statutes.³⁸⁵

Opponents of kosher food laws further contend that because of the divergent interpretation of the kosher food regulations and the existence of conflicting standards, the enforcement of the regulations will enmesh the State in disputes over religious doctrine.³⁸⁶ This contention is also devoid of merit since the regulations focus on enforcing compliance with the most fundamental, universally recognized requirements of the kosher food laws.³⁸⁷ The State refrains from enforcing the regulations to the extent that Orthodox Jewish authorities

³⁷⁸ See *Roemer v. Board of Pub. Works of Maryland*, 426 U.S. 736, 766 (1976).

³⁷⁹ *Id.*

³⁸⁰ See *Larkin v. Grendel's Den*, 459 U.S. 116, 127 (1982).

³⁸¹ *Ran-Dav's County Kosher, Inc.*, 608 A.2d 1353, 1372 (N.J. 1992) (Stein, J., dissenting).

³⁸² *Id.* at 1373.

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ *Id.*

³⁸⁶ Respondent's Brief at 29, *Ran-Dav's County Kosher* (No. A-5420-88T2).

³⁸⁷ *Id.*

might dispute a particular requirement.³⁸⁸ Simply put, the regulations are merely an enactment which compels merchants who voluntarily sell kosher products and who advertise such to perform the agreement which they have made with consumers.³⁸⁹ The regulations merely force merchants to perform a secular duty to which they contractually bound themselves by virtue of the fact that they represent their food to be kosher.³⁹⁰ Thus, the regulations are consumer protection laws, and they refrain from enmeshing the government in disputes over religious tenets.³⁹¹

Finally, the diversity of consumers who rely on purveyors' representations that food products are in fact kosher highlights the diminishing aspect of the kosher label.³⁹² Even though the kosher label was once a religious designation, today it serves an increasingly secular role in our society.³⁹³ Thus, the regulations are principally commercial in nature and do not involve the state in monitoring religious practices.³⁹⁴

VII. KOSHER FOOD LAWS IN LIGHT OF THE FREE EXERCISE CLAUSE

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*."³⁹⁵ Opponents of kosher food laws contend that kosher food legislation violates the Free Exercise Clause because it requires kosher purveyors to adhere to religious practices contrary to their own beliefs.³⁹⁶ Opponents also complain that kosher food laws impinge upon the right of kosher purveyors to exercise their religion without governmental interference.³⁹⁷

In *Sossin Systems, Inc. v. City of Miami Beach* and in *People v. Goldberger*, the courts held that kosher food legislation did not violate the Free Exercise Clause. Instead of impinging upon the free exercise

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 33.

³⁹⁰ *Id.* See *Avitzur v. Avitzur*, 446 N.E.2d 136, 138 (Ct. App. 1983) (secular terms of parties' binding prenuptial agreement to arbitrate any post-marital religious obligations before specified rabbinical tribunal, which was entered into as part of religious ceremony, were enforceable).

³⁹¹ *Avitzur*, 446 N.E.2d at 138.

³⁹² *Ran-Dav's County Kosher, Inc.*, 608 A.2d 1353, 1375 (N.J. 1992) (Stein, J., dissenting).

³⁹³ *Id.*

³⁹⁴ *Id.*

³⁹⁵ U.S. CONST. amend. I, (emphasis added).

³⁹⁶ Respondent's Brief at 37, *Ran-Dav's County Kosher, Inc.*, (No. A-5420-88T2).

³⁹⁷ *Id.* at 41.

of religion, the courts in these cases reasoned that the kosher food laws safeguarded the observance of Jewish doctrines.³⁹⁸

Furthermore, it must be noted that the sale of kosher food is a commercial enterprise. Purveyors of kosher food are engaged in the kosher food business because it is profitable, not because it is a means of disseminating their religious beliefs.³⁹⁹ Indubitably, kosher merchants who advertise the sale of kosher food are not deemed to be promoting religious messages or seeking converts to Judaism.⁴⁰⁰ Even if a merchant engages in the kosher food business out of his religious beliefs, the Free Exercise Clause would still be inapplicable because he would be engaged in religious activity. Even if some Free Exercise right was implicated when a merchant sold kosher food, his rights are not absolute. As the Supreme Court explained in *Cantwell v. Connecticut*,⁴⁰¹ the amendment involves freedom to believe and freedom to act. The freedom to believe is an absolute freedom. However, the freedom to act is not, for conduct may be regulated for the protection of society.⁴⁰² The freedom to act must be appropriately defined in order to enforce that protection.⁴⁰³ Thus, a state has the power to enact legislation to regulate the times, the places and the manner of soliciting upon its streets, and of holding meetings therein.⁴⁰⁴ It also may safeguard the order of the community without unconstitutionally infringing the freedoms protected by the Free Exercise Clause.⁴⁰⁵

The kosher food regulations are aimed at the manner in which merchants sell kosher food instead of the religious beliefs associated with the consumption of kosher food. Thus, kosher food legislation does not violate the Free Exercise Clause.⁴⁰⁶

VIII. KOSHER FOOD LEGISLATION IN LIGHT OF HEALTH AND ECOLOGY CONCERNS

A. *The State's Interest in Consumer Protection*

The notion that the primary market for kosher products is comprised of observant Jews and that this group is protected by a group

³⁹⁸ *Sossin Systems, Inc. v. City of Miami Beach*, 262 So. 2d 28, 30 (Fla. Dist. Ct. App. 1972); *People v. Goldberger*, 163 N.Y.S. 663, 666 (1916).

³⁹⁹ Respondent's Brief at 41, *Ran-Dav's County Kosher, Inc.*, (No. A-5420-88T2).

⁴⁰⁰ *Id.*

⁴⁰¹ 310 U.S. 296 (1939).

⁴⁰² *Id.* at 303-04.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ Respondent's Brief at 42, *Ran-Dav's County Kosher* (No. A-5420-88T2).

of self-regulating mechanisms⁴⁰⁷ through certifying organizations or local congregations is an utter misconception.⁴⁰⁸ Granted, if observant Jews were the only group of consumers involved, there might be no need for state regulation of kosher food. The fact of the matter is, however, that most purchasers of kosher foods are not Jewish and thus are in no way exposed to the self-regulating process of certification or congregation approval.⁴⁰⁹ Hence, absent some state oversight, most consumers of kosher products would be left without any protection against fraudulent practices.⁴¹⁰

The state, therefore, has a compelling interest in protecting the 75% of kosher food consumers who are non-Jews and who are thereby left out of the self-regulating mechanisms.⁴¹¹ It is important to remember that most non-Jewish consumers include persons who seek out kosher products for health and hygienic concerns.⁴¹² Persons with health problems such as allergies to milk products or shellfish buy kosher products knowing and relying on the fact that the usual bases of kosher designation will be observed.⁴¹³ Vegetarians purchase kosher dairy products, and animal lovers seek out kosher food because they believe that the method of kosher slaughtering is more humane.⁴¹⁴ Other members of the general public purchase kosher products because they believe that the method of kosher food preparation, which is under the close scrutiny of a supervising rabbi, will lead to a high degree of cleanliness and hygienic fitness.⁴¹⁵ There are important pol-

⁴⁰⁷ These self-regulating factors include: (1) If a supplier's practices diverge from the norm, there are immediate bulletins issued by various congregations, news services, magazines and the like to inform observant Jews that a particular manufacturer's products are questionable, and (2) the presence of large certifying organizations who inspect in addition to the particular supervising rabbi, or out of respect for the supervising rabbi on the basis of his certification, will endorse the product as conforming to religious standards. In addition to a letter "K" which merely notes some Kosher supervision, there are at least eight other copyrighted symbols to show supervision. The most common of these, an "O" with a "U" at the center is the symbol of the joint Kashruth Commission of the Union of Orthodox Jewish Congregations of America. Other symbols are used to show that the product is Kosher for Passover, and still other designations appear on wine. *Ran-Dav's County Kosher, Inc. v. State of New Jersey*, 579 A.2d 316, 324 (N.J. Super. Ct. App. Div. 1990).

⁴⁰⁸ Letter Brief of Amici: The New Jersey Association of Reform Rabbis, the Reconstructionist Rabbinical Association, the New Jersey Region of the Rabbinical Assembly, the Rabbinical Council of New Jersey at 3, *Ran-Dav's County Kosher v. State of New Jersey*, 579 A.2d 316 (N.J. Super. Ct. App. Div. 1990) (No. A-5420-88T2).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.*

⁴¹¹ Riss, *supra* note 63, at 155.

⁴¹² *Ran-Dav's County Kosher, Inc. v. State of New Jersey*, 579 A.2d 316, 324 (N.J. Super. Ct. App. Div. 1990).

⁴¹³ *Id.*

⁴¹⁴ See Burns, *supra* note 72.

⁴¹⁵ *Ran-Dav's County Kosher*, 579 A.2d at 324.

icy reasons, therefore, behind the state's regulation of the sale of kosher food, and the state certainly has the authority pursuant to its police powers to protect the consuming public's health interests.⁴¹⁶ By protecting consumers who purchase kosher food for health and cleanliness concerns, the state is thereby promoting the health of its citizenry, which is undoubtedly a valid exercise of its police powers.⁴¹⁷

Kosher food regulations serve an important state interest in protecting consumers who seek out kosher food for various reasons. These consumers rely on the fact that the food is actually "kosher."⁴¹⁸ According to I. Klein, a contemporary authority on *kashruth*, the kosher butcher places himself in a position of trust because the people of the community rely on him to sell strictly kosher meat.⁴¹⁹ Customers of kosher purveyors trust them not only to supply products satisfying the ordinary sanitary and nutritional standards, but also to prepare the products in accordance with a system of dietary laws deeply rooted in an ancient tradition.⁴²⁰ By its label, kosher food items invite the consumer's trust and reliance.⁴²¹ Each product labelled "kosher" holds itself out to have been prepared according to certain commonly understood standards of what is "kosher." Non-Jewish kosher consumers who purchase kosher products for health reasons such as allergies to particular foods may trust to their peril that the consumption of kosher products will not be detrimental to their overall health.⁴²²

Non-kosher products falsely designated kosher pose a uniquely distressing problem to the trusting kosher consumer, since he or she might never be able to detect that kosher food had not been prepared by strictly kosher standards.⁴²³ For example, if a kosher butcher ground into meat trimmings blood clots and veins found in the same tub with the meat, a kosher consumer might be unable to detect the presence of these forbidden substances.⁴²⁴ Therefore, the consumer of the more expensive kosher product places a great deal of trust in the kosher purveyor to abide by the kosher dietary laws.⁴²⁵ For non-Jew-

⁴¹⁶ See Amici's Letter Brief at 3, Ran-Dav's County Kosher (No. A-5420-88T2).

⁴¹⁷ See *id.*

⁴¹⁸ See Amicus Brief and Appendix on Behalf of the New Jersey Association of Reform Rabbis *et. al.* in Support of Respondents at 6, Ran-Dav's County Kosher, Inc. v. State of New Jersey, 579 A.2d 316 (N.J. 1990) (No. A-5420-88T2).

⁴¹⁹ KLEIN, *supra* note 102, at 348.

⁴²⁰ The New Jersey Association of Reform Rabbis, *et. al.* Amicus Brief at 6, Ran-Dav's County Kosher (No. A-5420-88T2).

⁴²¹ See *id.*

⁴²² See *id.*

⁴²³ *Id.* at 9.

⁴²⁴ *Id.*

⁴²⁵ *Id.* at 6.

ish consumers, the amount of trust and reliance placed on kosher purveyors is even greater, for at least the observant Jewish consumer is protected by the self-regulating mechanisms within the congregation.⁴²⁶ The state has a significant interest, therefore, in ensuring that the kosher consumer buying food labelled “kosher” receives food prepared according to the kosher dietary laws.⁴²⁷

B. The Preservation of Kashruth's Ecological Value

The kosher dietary laws have significant ecological value.⁴²⁸ The laws conform to the scientific laws of the food chain.⁴²⁹ Their prohibition against consuming carnivores is ecological: by forbidding the consumption of carnivores, the Jewish dietary laws aid in preserving “balance” among animal populations.⁴³⁰ Furthermore, kashruth's discouragement of short-term exploitation of natural resources and the humane method of kosher slaughter have an ecological effect on people: they foster sensitivity to the environment and to the suffering of other creatures.⁴³¹ The state certainly has an interest in encouraging long-term preservation of natural resources and sensitivity to other creatures.

Without state regulation of the kosher food industry, kosher purveyors might be able to pass off non-kosher food as kosher more easily. In turn, this could decrease the numbers of kashruth observers, especially those who are non-Jews. In a society such as ours where violence and exploitation of natural resources abound, an observance which furthers sensitivity to other creatures and conservation of environmental resources is valuable to society, and the state should be able to preserve and protect the integrity of such observance.⁴³²

IX. CONCLUSION

Over the past decade, the number of products bearing a kosher label increased 1,750%. The central motivating factor behind the surge in the numbers of products certified kosher is that it is a profit-making endeavor. This profit-seeking motivation prompted the state of New York to pass the first kosher food legislation regulating

⁴²⁶ See Amici's Letter Brief at 3, Ran-Dav's County Kosher (No. A-5420-88T2).

⁴²⁷ See *id.* at 11.

⁴²⁸ Press, *supra* note 74, at 54.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

⁴³¹ *Id.*

⁴³² See *id.*

the sale of kosher food. The legislation was designed to ensure that profiteers did not pass off non-kosher food as kosher. Numerous states followed New York's example, enacting kosher food statutes modelled after the New York law. Since 1915, several people and organizations have challenged kosher food regulations on a variety of constitutional grounds. Prior to the most recent *Ran-Dav* decision, the courts had consistently upheld the constitutionality of kosher food laws. *Ran-Dav* is the first decision which strikes down a kosher food statute. The majority in *Ran-Dav* concluded that New Jersey's kosher food statute violated the Establishment Clause of the federal and state Constitutions.

Ran-Dav was wrongly decided. Kosher food laws serve important state interests and should pass constitutional muster because they satisfy the three-pronged *Lemon v. Kurtzman* test. Kosher food regulations serve the secular legislative purpose of protecting consumers against misrepresentation in the sale of kosher food. Kosher food legislation does not have the impermissible effect of advancing or inhibiting religion, for it does not advance Orthodox Judaism or disapprove other religious choices. Finally, kosher food laws do not foster an excessive entanglement of the government in religious matters. The government does not police the purity of kosher food through the regulations, but merely enforces another of its consumer protection statutes. Thus, kosher food laws satisfy the basic standards outlined in *Lemon v. Kurtzman* and should not be struck down on establishment clause grounds.

Furthermore, kosher food laws serve significant state interests. The state has an interest in protecting the trusting consumer who seeks out the kosher designation, relying that the food is in fact "kosher." Since a consumer of kosher food may never be able to detect that the food had not been prepared by strictly kosher standards, misrepresentations could be detrimental to persons with allergies or heart conditions who purchase kosher food for health reasons. Thus, protecting consumers from misrepresentations in the sale of kosher food is a proper exercise of the state's police powers. Indubitably, kosher food laws should be deemed constitutionally "kosher."