The Constitutional Complexity of Kosher Food Laws

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For nearly 100 years, many U.S. jurisdictions have had statutes in effect regulating the use of the term "kosher" in the food industry. Most kosher food laws in force today, however, should be subject to strict-scrutiny review and would likely be found unconstitutional. This Note argues that the government can pursue its legitimate interest in protecting kosher consumers from fraud by adopting a more narrowly tailored option — mandatory disclosure laws. Such laws require a vendor who claims that a product is kosher to show on what basis that claim is made. The interested kosher consumer can then, upon his or her own initiative, determine whether or not the product meets the consumer's particular religious or other needs. The state need not involve itself in deciding the theological questions inherent in determining whether a particular food is kosher.

I. INTRODUCTION

For nearly 100 years, many jurisdictions in the United States have had statutes in effect regulating the use of the term "kosher" in the food industry. Most of these laws have explicit facial preferences for "Orthodox" Jewish definitions of kosher. Even those that do not, still often require the state to select among internal Jewish doctrinal disputes to define the term kosher for enforcement purposes. Only in the past twenty years have any Establishment Clause challenges successfully invalidated these laws. These challenges, however, have been limited both in scope and impact. This Note argues that most kosher food laws in force

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today should be subject to strict-scrutiny review and would likely be found unconstitutional under such review. The government, however, can pursue its legitimate interest in protecting consumers of kosher food products from fraud by adopting mandatory disclosure laws. Such laws require a vendor who claims that a product is kosher to show the basis of that claim. The kosher consumer, upon his or her own initiative, can determine whether or not the product meets his or her particular religious or other needs. The state need not involve itself in deciding the theological questions inherent in determining whether a particular food is kosher.

Part II of this Note provides a working definition of kosher and describes the current U.S. kosher food market. Part III surveys various models for protecting kosher consumers from fraud. Part IV traces the history of state and federal constitutional jurisprudence concerning kosher food laws, through decades of unsuccessful Due Process and Equal Protection lawsuits, to the successful Establishment Clause challenges of the past twenty years. Part V considers the constitutionality of kosher food laws in force today and argues that laws requiring the state to define the term "kosher" should be reviewed with strict scrutiny. This Note then proposes that laws requiring the mandatory disclosure of basic information underlying the claim that a food product is kosher would be both constitutional and sufficient to deter fraud.

II. UNDERSTANDING KOSHER FOODS AND KOSHER CONSUMERS

The term "kosher" is an adjective derived from the Hebrew word *kasher*, describing a food product that is ritually fit for consumption according to Jewish tradition.[1] The term "kashrut" describes the corpus of Jewish law, lore, and custom controlling whether a particular food qualifies as kosher.[2] Observing the dictates of *kashrut* is often referred to as "keeping kosher."[3]

Kashrut concerns itself almost exclusively with whether animal products come from a permitted source and have been pre-

1. 7 OXFORD ENGLISH DICTIONARY 533–34 (2d ed. 1989).
2. *Id.* at 358.
3. *Id.* at 533–34.

pared in specific manner. Though there are many definitions and interpretations of what is kosher, there are some general principles shared by almost all parties; significant disagreements among and within sects typically occur at a far greater level of specificity than the following definition provides. The biblical laws at the core of *kashrut* forbid adherents from consuming the meat of certain animals, regardless of how they are prepared or served. For example, the meat and milk of all mammals that are not both artiodactyls (with split hooves) and ruminants (chew their cud) are categorically forbidden.[4] Only fish with both fins and scales are permitted.[5] Specific fowl are excluded by name.[6]

Even meats from permitted animals only qualify as kosher if slaughtered according to specified practices.[7] Most significantly, the animal must be slaughtered while upright by hand with a specially sharpened knife. The slaughterer recites a blessing prior to killing each animal.[8] The trachea, esophagus, carotid artery, and jugular vein must be severed in one uninterrupted pass.[9] The blood is then immediately drained, and the animal checked for organ defects that could render the meat non-kosher.[10] Certain impermissible fats and nerves are removed.[11] Finally, within seventy-two hours, the meat is soaked and salted in order to purge any remaining blood.[12]

Based on the authoritative rabbinic interpretation of an opaque biblical passage, *kashrut* has come to require that meat and dairy not be eaten together.[13] Over time, normative Jewish prac-

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4. *Leviticus* 11:3 (permitting the consumption of meat from cows, sheep, goats, deer, giraffe, and bison and forbidding the consumption of meat from *inter alia* pigs, horse, hare, and donkeys).

5. *Id.* at 11:9 (excluding *inter alia* crustaceans, mollusks, marine mammals, sharks, and catfish).

6. *Id.* at 11:13–19. Chicken, turkey, duck, goose, and dove are almost exclusively the only fowl considered kosher today. *Id.*

7. *See generally* ZUSHE YOSEF BLECH, KOSHER FOOD PRODUCTION 139–43 (2d ed. 2008).

8. YOSEF CARO, SHULKHAN ARUKH [CODE OF JEWISH LAW], *Yoreh De'ah* ch. 19 (Brukhman Barukh 1995) (1535) (containing the laws of kosher slaughtering).

9. *Id.* at ch. 23.

10. *Id.* at ch. 25.

11. *Id.* at chs. 64–65.

12. *Id.* at ch. 69.

13. *See generally* David Stern, *Midrash and Midrashic Interpretation*, *in* THE JEWISH STUDY BIBLE 1866–69 (Oxford University Press 2004); Gloria London, *Why Milk and Meat Don't Mix*, 34 BIBLICAL ARCHAEOLOGY REV. 66 (2008).

tice has evolved in such a way as to minimize the possibility of contact between even trace amounts of meat and dairy foods.[14] Most contemporary observers of *kashrut* eat only food prepared with equipment reserved exclusively for use with either dairy or meat products.[15] Such food often only remains kosher if it is served on dishes and eaten with cutlery also dedicated to one food type or the other.[16]

Beyond the above technical requirements of *kashrut*, keeping kosher raises various theological questions. For example, rabbinic authorities are divided about whether meat that was not blessed by the slaughterer immediately before the killing is still kosher.[17] Some rabbis interpret the biblical prohibition against the use of products dedicated to the service of other deities to mean that only wine produced exclusively by pious Jews can be deemed kosher.[18] Some Jewish communities today also require that cheese, bread, or even all cooked foods be prepared wholly or in part by pious Jews.[19] Those Jews who incorporate these doctrinal requirements into their definitions of kosher are making theological judgments when determining whether a particular food product is kosher.

Because the specific laws are complex, devotees with questions about whether a particular food is kosher will often rely on the advice of a local rabbi. Though some rabbis may be influential figures, there is no formal structure within Judaism for resolving disagreements among rabbis regarding ritual determinations.

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14. David C. Kraemer, *Separating the Dishes: The History of a Jewish Eating Practice*, 15 STUD. JEWISH CIVILIZATION 235 (2005).

15. BINYOMIN FORST, THE LAWS OF KASHRUS 264 (1994) ("[W]henever meat and dairy tastes mingle, we encounter the possible [violation of Jewish dietary laws]. Therefore, one certainly may not use the same pot, dishes, and flatware for meat and dairy foods.").

16. DAVID KRAEMER, JEWISH EATING AND IDENTITY THROUGH THE AGES 99–122 (2007).

17. *See, e.g.*, CARO, *supra* note 8, at 19:1 and commentaries ad loc.

18. Odelia E. Alroy, *Kosher Wine*, 39 JUDAISM 452 (1990) (describing the basis in Jewish tradition for restricting the definition of kosher to wines made by pious Jews); *but see* Elliot N. Dorff, *On the Use of All Wines*, *in* COMMITTEE ON JEWISH LAW AND STANDARDS, RABBINICAL ASSEMBLY, PROCEEDINGS OF THE COMMITTEE ON JEWISH LAW AND STANDARDS OF THE CONSERVATIVE MOVEMENT: 1986–90, at 203 (2001) (defining as kosher all wines that meet the other technical requirements of *kashrut* regardless of the religious beliefs of those involved in their manufacture), *available at* http://rabbinicalassembly.org/teshuvot/docs/19861990/dorff_wines.pdf.

19. *See, e.g.*, KRAEMER, *supra* note 16, at 25–38; Moshe Bernstein, *Bishul Akum* [Cooking by Gentiles], 7 J. HALACHA & CONTEMP. SOC. 67 (1984).

Open questions remain debated by various rabbis. Individual devotees follow the rulings of one or the other and idiosyncratically blend elements of each. There is no widely accepted authority that can determine definitively whether a food product or food preparation practice is kosher.[20]

Though approximately 30% of American Jews consider themselves to be keeping kosher,[21] religious Jews make up less than half of the $12.5 billion kosher market in the United States.[22] Religious Muslims,[23] Hindus, and Seventh-Day Adventists frequently rely on kosher certification to indicate that so-labeled food meets their own religious dietary requirements.[24] Further, non-religious reasons motivate many kosher consumers. Vegetarians rely on kosher certification statements that a processed food does not contain animal products.[25] Vegans and consumers with certain food allergies similarly rely on kosher-certification statements that a product contains no traces of dairy.[26] Most significantly, many health and safety conscious consumers regularly infer from a product's kosher certification that it has been processed with superior quality control or that it has fewer unlabeled additives.[27]

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20. For further analysis of the complicated and decentralized processes by which individual devotees come to understand and observe all matters of Jewish law generally, including *kashrut*, see ELLIOT N. DORFF & ARTHUR ROSETT, A LIVING TREE (1988) and JOEL ROTH, THE HALAKHIC PROCESS: A SYSTEMIC ANALYSIS (1986).

21. JONATHON AMENT, UNITED JEWISH COMMUNITIES, REPORT 10: AMERICAN JEWISH RELIGIOUS DENOMINATIONS 31 (2005), *available at* http://www.policyarchive.org/handle/10207/bitstreams/10158.pdf.

22. MINTEL INT'L GROUP LTD., KOSHER FOODS — U.S. — JANUARY 2009 (2009).

23. Stanley Sacharow, *Islamic Marketing Opportunities Opening Up for Converters*, 69 PAPER, FILM & FOIL CONVERTER 58 (1995) (discussing the use of kosher certification as a proxy for Islamic dietary requirements), *available at* http://pffc-online.com/mag/paper_islamic_marketing_opportunities/.

24. AGRI-FOOD TRADE SERVICE, U.S. KOSHER FOOD MARKET BRIEF 5 (2009), *available at* http://www.ats.agr.gc.ca/amr/4975-eng.htm.

25. *Id.* at 6.

26. *Id.*

27. *See, e.g.*, Michael A. Kamins & Lawrence J. Marks, *The Perception of Kosher as a Third Party Certification Claim in Advertising for Familiar and Unfamiliar Brands*, 19 J. ACAD. MARKETING SCI. 177 (1991) (showing that, for already familiar brands, a kosher third-party endorsement leads to a more favorable product attitude and greater purchase intention).

III. SURVEY OF PRIVATE, SEMI-PRIVATE, AND PUBLIC-ENFORCEMENT REGIMES

A. PRIVATE ENFORCEMENT

For most of Jewish history, Jewish communities depended entirely on internal, private mechanisms to ensure the integrity of claims that a food was kosher.[28] Personal relationships with local food suppliers set incentives for honest dealings; local rabbis supervised daily operations; and rabbinic courts mediated disputes.[29] The earliest known incident of alleged kosher fraud in colonial America dates to 1774, when community Jewish leaders accused Hetty Hays, a Charleston, South Carolina innkeeper, of misrepresenting non-kosher food she served as kosher.[30] Ms. Hays's accusers brought a rabbi visiting from London to inspect the premises, remove all non-kosher utensils, and threaten the innkeeper into future compliance.[31]

The technological advances of the industrial revolution made private enforcement of Jewish dietary laws increasingly less tenable.[32] As kosher food began to travel greater distances from its source to the consumer, personal relationships between purchasers and producers disappeared, and the social structures that had allowed for private enforcement of kosher laws were stretched thin.[33] As a result, kosher food suppliers attempted to establish various organized mechanisms for ensuring adherence to kosher laws including self-regulating guilds; but communal divisiveness

28. Abraham O. Shemesh, *Food Deceptions and Falsification in the Ancient Food Industry and Their Legal Ramifications According to Rabbinical Literature*, 18 JEWISH L. ASS'N STUD. 244 (2008).

29. *See generally* JEREMIAH J. BERMAN, SHEHITAH: A STUDY IN THE CULTURAL AND SOCIAL LIFE OF THE JEWISH PEOPLE (1941) (describing the development, observance, and impact of dietary regulations on various Jewish communities).

30. HASIA R. DINER, THE JEWS OF THE UNITED STATES, 1624–2000, at 32 (2006); *see also* ELI FABER, A TIME FOR PLANTING: THE FIRST MIGRATION 1654–1820, at 69 (1992).

31. *Id.*

32. SAUL BERNSTEIN, THE RENAISSANCE OF THE TORAH JEW 183–85 (1985).

33. HAROLD P. GASTWIRT, FRAUD, CORRUPTION, AND HOLINESS: THE CONTROVERSY OVER THE SUPERVISION OF JEWISH DIETARY PRACTICE IN NEW YORK CITY, 1881–1940, at 8–9 (1974).

and territorial disputes limited the effectiveness of these private efforts.[34]

With the mass influx of Jewish immigrants from Eastern Europe in the 1880s, established vendors increasingly exploited recent immigrants, fraudulently selling non-kosher food as kosher.[35] One New York rabbi wrote to relatives in his native Hungary that the "charlatans, profiteers and outright crooks" of the New World made any assurance of fidelity to kosher laws "all but impossible."[36]

Today, purely private regulation remains effective only in insular Jewish communities. The need to maintain a reputation as an unquestionably kosher purveyor of foods can be strong for merchants with a sharply defined iterative customer base among whom word of violations would spread quickly.[37] Standing rabbinic courts will hear complaints and levy fines or issue intracommunal bans against commercial transaction with violators.[38] These private structures, however, fail to serve the needs of the majority of contemporary kosher consumers who lack the personal and information relationships with vendors common in insular communities.

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34. HYMAN B. GRINSTEIN, THE RISE OF THE JEWISH COMMUNITY OF NEW YORK 1654–1860, at 302–06, 404 (1945). *See also* BERMAN, *supra* note 29, at 289–93 (ascribing the mid-19th-century laxity in enforcing kosher laws to the lack of centralization in American-Jewish life).

35. *See* GASTWIRT, *supra* note 33, at 194 (describing the circumstances surrounding a kosher consumer's claim in 1911 that the "city is packed with kosher food fakers"); *see also Poultry Dealer Guilty*, N.Y. TIMES, Dec. 19, 1916, at 17 (reporting the guilty plea of a participant in a large-scale price-fixing scheme involving over fifty co-conspirators and the improper labeling of food as kosher).

36. MOSHE WEINBERGER, HA-YEHUDIM V-HA-YAHADUT B'NEW YORK [JEWS AND JUDAISM IN NEW YORK] 13 (1887). Large-scale fraud in the kosher industry continues today. One recent scandal affected thousands of consumers of kosher meat along the entire Eastern seaboard. *See* Gershon Tannenbaum, *My Machberes — The Kashrus of Chickens*, THE JEWISH PRESS (N.Y.), Sept. 13, 2006; Fernanda Santos, *Butcher Is Accused of Passing Off Chicken as Kosher*, N.Y. TIMES, Sept. 7, 2006, at B3.

37. *Cf.* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992) (describing social dynamics underlying the private commercial system established by ultra-orthodox Jewish diamond merchants).

38. *See generally* Randy Linda Sturman, *House of Judgment: Alternate Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417 (2000) (describing the function of rabbinic courts as adjudicators of commercial disputes).

B. PRIVATE ENFORCEMENT BACKED BY STATE PROTECTION

By the close of the nineteenth century, trademark protections and general anti-fraud statutes allowed the state to provide some support to private mechanisms for enforcing *kashrut*. Beginning with groups such as Zivhe Tomim in 1885, rabbinic organizations began to affix a unique label to foods the organization certified as kosher.[39] This practice blossomed throughout the twentieth century, and many Jews who observe kosher dietary laws today will no longer eat any cooked or processed foods without such a label. Perhaps the most widely recognized mark in America today is ⓤ, a protected symbol that the Union of Orthodox Jewish Congregations of America places on food that it certifies. Many other kosher certifying organizations have their own distinct marks.[40]

Organizations can sue for misappropriation of a trademark or fraudulent representation of a claim of certification, thereby implicating state enforcement regimes.[41] Treble damages and attorneys' fees can be obtained for the willful infringement of a certification mark.[42] This enforcement strategy, however, places great burdens on the usually small, non-profit rabbinic organizations, who must vigilantly protect their marks, initiate legal action against violators, and find ways to inform the individual consumer of any misrepresented products already on the market.[43] Further, trademark protection alone also does not prevent food producers from labeling their food as kosher without the inclusion of any specific mark or affixing an unadorned letter *K* to a product. Such labeling would fraudulently suggest that the food is kosher to the unwary consumer, without infringing upon a registered symbol.

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39. GASTWIRT, *supra* note 33, at 115.

40. For information about various certifying agencies and their specific marks, see Kashrus Agencies, http://www.kashrut.com/agencies/ (last visited Sept. 25, 2010).

41. Certification marks are protected under 15 U.S.C. § 1127 (2006).

42. 15 U.S.C. §§ 1117(a)–(b) (2006).

43. Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509, 567 (2004) ("One explanation for the lack of private litigation is that its costs may outweigh any benefits, especially for smaller, local [kosher supervision organizations] that only certify a handful of clients who market food nationally."); *see also* Levy v. Kosher Overseers Ass'n of Am., Inc., 104 F.3d 38, 41–42 (2d Cir. 1997) (noting the difficulties faced by local kosher certification organizations in protecting their mark).

C. INITIAL EFFORTS AT DIRECT STATE ENFORCEMENT

Responding to the pervasive fraud in the kosher food industry and the failure of general anti-fraud mechanisms to contain it, New York became the first state to enact laws criminalizing the misrepresentation of non-kosher food as kosher. As originally drafted in 1915, the kosher food statute provided, in part, that

> [a] person who with intent to defraud . . . sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon . . . "kosher" in any language is guilty of a misdemeanor.[44]

The law therefore specifically equated "kosher" with "sanctioned by the orthodox Hebrew religious requirements."

The scant evidence available suggests that, in the early years of the state's effort to regulate kosher food, religious Jewish groups across the spectrum favored direct public enforcement. Despite the statute's specific endorsement of "orthodox Hebrew religious requirements," leaders of the Conservative movement joined Orthodox Jewish groups in supporting the statute.[45] The only organized opposition on record to the New York statute in its early years came from a group of butchers regulated by the law.[46] Over the next forty years, more than a dozen additional states plus the District of Columbia enacted laws regulating kosher food.[47] Today, twenty-two states have anti-fraud laws specific to

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44. N.Y. PENAL LAW § 435(4), Laws of 1915, c. 233.

45. Letter from the President of the N.Y. Branch of the United Synagogue of America to the Governor of New York, *in* Daniel J. Elazar & Stephen R. Goldstein, *The Legal Status of the American Jewish Community*, *in* THE AMERICAN JEWISH YEAR BOOK OF 1972 3, 37 (Morris Fine et al. eds., 1972)

46. *Id.*

47. Nevertheless, a 1972 survey showed that regular enforcement of the laws only took place in California and New York. Elazar & Goldstein, *supra* note 45, at 38 (reporting responses to questions regarding enforcement data by the authors to state officials charged with enforcing kosher regulations).

kosher food on the books.[48] At the federal level, the FDA promulgated a regulation in 1984 that "[t]he term 'kosher' should be used only on food products that meet certain religious dietary requirements."[49] By 1997, however, the FDA had determined that it "ha[d] no role in determining what food is kosher."[50] The FDA consequently repealed the kosher labeling regulation, and today, claims of a product's kosher status are now governed only by the agency's non-binding Compliance Policy Guides for general food labeling.[51]

IV. THE HISTORY OF CONSTITUTIONAL CHALLENGES TO KOSHER FOOD LAWS

A. THE FIRST CHALLENGE — DUE PROCESS, EQUAL PROTECTION, AND THE NEW YORK STATE ESTABLISHMENT CLAUSE

In *People v. Goldberger*,[52] two purveyors of kosher foodstuffs prosecuted under the New York kosher food law[53] challenged its constitutionality on several grounds.[54] The appellants argued before the N.Y. Court of Special Sessions that 1) the term "kosher" in the statute was foreign and therefore unintelligible, thus making the statute unconstitutionally vague; 2) the statute violated Equal Protection doctrine because it specifically targeted

48. ARIZ. REV. STAT. ANN. §§ 36-941–42 (2009); ARK. CODE ANN. § 20-57-401 (2009); CAL. PENAL CODE § 383b (West 2009); CONN. GEN. STAT. § 53-317 (2009); GA. CODE ANN. § 10-1-393.11 (2010); 410 ILL. COMP. STAT. 645/1-2 (2009); KY. REV. STAT. ANN. § 367.850 (West 2009); LA. REV. STAT. ANN. § 40:608.2 (2008); MD. CODE ANN., COM. LAW §§ 14-901–07 (West 2009); MASS. GEN. LAWS ch. 94, § 156 (2009); MICH. COMP. LAWS § 750.297e (2009); MINN. STAT. §§ 31.651–.661 (2009); MO. REV. STAT. § 196.165 (2008); N.J. STAT. ANN. § 56:8-63 (West 2009); N.Y. AGRIC. & MKTS. LAW §§ 201-a–i (McKinney 2009); OHIO REV. CODE ANN. § 1329.29 (LexisNexis 2009); 18 PA. CONS. STAT. § 4107.1 (2009); R.I. GEN. LAWS § 21-16-1 (2008); TEX. BUS. & COM. CODE ANN. §§ 17.821–.826 (Vernon 2009); VA. CODE ANN. § 3.2-5124 (2009); WASH. REV. CODE §§ 69.90.010–.040 (2009); WIS. STAT. § 97.56 (2009).

49. 21 C.F.R. § 101.29 (1984).

50. Food and Cosmetic Labeling; Revocation of Certain Regulations, 62 Fed. Reg. 43,071, at 43,073 (Aug. 12, 1997).

51. U.S. FOOD & DRUG ADMIN., COMPLIANCE POLICY GUIDES, ch. 5 § 562, *available at* http://www.fda.gov/ICECI/ComplianceManuals/CompliancePolicyGuidanceManual/ucm119201.htm (last visited Sept. 25, 2010).

52. 163 N.Y.S. 663 (Ct. Spec. Sess. 1916).

53. N.Y. PENAL LAW § 435(4), Laws of 1915, c. 233.

54. *Goldberger*, 163 N.Y.S. 663.

one class of citizens; and 3) the statute codified religious doctrine into state law, violating the state constitution's Establishment Clause prohibiting the state government from establishing a state religion.[55]

The court dismissed the appeal and upheld the statute on all grounds. Holding that the term kosher was sufficiently comprehensible, the court wrote:

> [T]he word "kosher," by extensive use, by its recognition by lexicographers of established authority, and by this legislative adoption now before us, must be recognized as an English word; but, whether it is English or foreign, the Legislature in its plenary power has authority to deal with the subject matter, and that authority carries with it the power to use effectively the word that describes it, no matter whence derived.[56]

Responding to the Equal Protection argument, the court called the statute "a general regulation affecting all inhabitants of the state who may at any time be included within the class to which its provisions apply."[57] The court responded to appellants' state Establishment Clause claim by recasting the statute as one promoting the free exercise of religion, a right that had been hindered by the widespread fraud in the kosher food industry.[58] It observed that "the Constitution enjoins religious freedom, and men of all creeds are entitled to the protection of the law of the land in undisturbed enjoyment of such freedom."[59] Since the statute protected this right by promoting free exercise, it avoided any establishment concerns.[60]

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55. A U.S. Constitution Establishment Clause argument was not available to appellants because the First Amendment's provision had not yet been incorporated. *See* Everson v. Bd of Educ., 330 U.S. 1 (1947) (holding that the Establishment Clause of the First Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment).

56. *Goldberger*, 163 N.Y.S. at 665.

57. *Id.* at 666.

58. *Id.*

59. *Id.*

60. *But cf.* Wilson v. NLRB, 920 F.2d 1282, 1287 (6th Cir. 1990) (holding that efforts to protect the free exercise of religion from private obstacles do not constitute a compelling government interest sufficient to restrict rights granted under the Establishment Clause).

B. THE DUE PROCESS ARGUMENT — CONSISTENTLY REVISITED AND CONSISTENTLY REJECTED

Two years later, in *People v. Atlas*, another butcher prosecuted under the New York kosher food law pursued a revised version of the Due Process claim that the law was unconstitutionally vague.[61] He argued on appeal that there could be no clear definition of the word "kosher" because the term was comprised of centuries of rabbinic debates scattered across thousands of volumes of rabbinic law.[62] Further, the Jewish legal tradition from which understandings of kosher is derived contains innumerable disagreements, with different Jewish communities holding different interpretations of the term. An individual, appellant argued, could not know in advance whether he was committing a crime by selling a particular piece of meat.[63]

The per curiam opinion of the New York Court of Appeals affirmed the Appellate Division's ruling that the state legislature intended to use the term "in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under and of a product sanctioned by . . . [Orthodox Hebrew] religious requirements."[64] By understanding the term as having a trade-specific definition not dependent on Jewish law, the court held that the term was sufficiently well defined to be constitutionally valid.[65] The court, however, did not point to or supply any definition of the word "kosher" that would not rely on the corpus of Jewish law and a particular decisionmaker's rulings on how various open rabbinic debates should properly be resolved.

The next Due Process challenge to the New York kosher food law was brought in federal court. *Hygrade Provision Co. v. Sherman*[66] eventually made its way to the United States Supreme Court, marking the only occasion to date that the high court has considered the constitutionality of a kosher food statute. The ap-

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61. 170 N.Y.S. 834 (Sup. Ct. App. Div. 1918), *aff'd*, 130 N.E. 921 (N.Y. 1921) (per curiam).
62. *Id.* at 835.
63. *Id.*
64. *Id.* at 835-836.
65. *See id.*
66. 266 U.S. 497 (1925).

pellants again argued that the term "kosher" was unconstitutionally vague.[67]

Justice Sutherland's unanimous opinion[68] cited favorably the state court's dismissal of the same claim in Atlas and further noted that a violation of the law requires the seller to intentionally misrepresent non-kosher foods as kosher.[69] As long as the vendor had some reasonable basis to believe what he was selling was kosher, the malevolent intent necessary to prosecute would not be present.[70] Therefore, internal rabbinic disagreements about whether a particular product was kosher were irrelevant as the vendor would have a valid defense if he could show that he relied in good faith on any Orthodox rabbinic opinion that the item in question was kosher — even if it was not an uncontroverted rabbinic opinion. The *Hygrade* ruling undercut further Due Process challenges to the New York kosher food law[71] and those of other states modeling themselves after it.[72]

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67. Appellants also argued that the law represented an unconstitutional state infringement of the Commerce Clause by imposing a direct burden on interstate commerce. The Supreme Court swiftly rejected this claim noting that the regulation of interstate commerce was not the intent of the statute and any incidental burden remains within the police power of the state as it bears a reasonable relation to the legitimate purpose of the act. *Id.* at 502.

68. Justice Brandeis, the only Jew on the Supreme Court at the time, recused himself from deliberations. *Id.* at 503.

69. *Hygrade*, 266 U.S. at 501.

70. *Id.*

71. While the constitutionality of the New York kosher food law was not seriously challenged again until Federal Establishment Clause claims became available in 1947, the New York Supreme Court rejected an expansive reading of the law, offered to enforce an orthodox rabbinic court's ban on the sale of poultry in New York City not bearing the seal of a kosher supervising organization that the rabbinic court favored. People v. Gordon, 283 N.Y. 705, *aff'g*, 16 N.Y.S.2d 833 (Sup. Ct. App. Div. 1940). For a detailed description of the events leading up to the rabbinic ban, see S.S. & B Live Poultry Corp. v. Kashruth Ass'n, 285 N.Y.S. 879 (Sup. Ct. Spec. Term 1936), which held that a kosher poultry dealer was not entitled to an injunction against prosecution for violation of kosher laws, or a publication that poultry slaughtered by dealer was not kosher, without seal of defendant corporation, where edict prohibiting sale of kosher poultry without defendant's seal had been validly adopted and promulgated under Jewish law.

72. The definition of kosher in the initial California statute differed significantly from that of New York. CAL. PENAL CODE § 383b (West 1960). When this statute was challenged as unconstitutionally vague by a Beverley Hills kosher poultry vendor in 1961, the California Supreme Court dismissed a plain reading and chose to read the law as being equivalent in scope and definition to the New York kosher food law. Accordingly, the state high court upheld the statute as constitutional, relying on the reasoning of *Atlas* and *Hygrade*. Erlich v. Municipal Court, 360 P.2d 334 (Cal. 1961).

C. EARLY FEDERAL ESTABLISHMENT CLAUSE CLAIMS — DECADES OF UPHOLDING THE LAWS

When the U.S. Supreme Court held that the Establishment Clause applies to the states through the Due Process Clause of the Fourteenth Amendment,[73] a new means to challenge the validity of kosher food regulation emerged. The first suit to allege a violation of the Federal Establishment Clause was a challenge to a Miami Beach municipal ordinance modeled closely on the New York kosher food law.[74] Two kosher food vendors appealed their convictions under the statute by arguing that by employing the coercive power of the state to advance a particular interpretation of Jewish law, the local government was effectively establishing a state-endorsed religion. The per curiam opinion of the state appellate court provided no substantive Establishment Clause analysis. Instead, it relied heavily on *Goldberger*, the unsuccessful challenge to the New York kosher food law asserting a violation of the state Establishment Clause, which was brought sixty years before.[75] For decades it then appeared that the *Goldberger* logic, protecting kosher food laws from Establishment Clause challenges as long as the laws continued to support the free exercise of religion against obstacles (i.e., fraud) imposed by non-state actors, would hold.[76]

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73. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

74. Sossin Sys., Inc. v. City of Miami Beach, 262 So. 2d 28, 29–30 (Fla. Dist. Ct. App. 1972) (per curiam) ("We are unable to view this ordinance as a legislative enactment establishing or respecting the establishment of a religion, or as one prohibiting the free exercise of a religion to which it has reference. Rather than to prohibit the free exercise of the religion, the ordinance serves to safeguard the observance of its tenets, and to prohibit actions which improperly would interfere therewith.").

75. *See supra* Part IV.A.

76. This assumption remained unchallenged, as two separate claims alleging that the New York kosher food law violated the Federal Establishment Clause were dismissed on procedural and other grounds, before the court ruled on the constitutional issue. National Foods Inc., v. Rubin, 727 F. Supp. 104, 108–09 (S.D.N.Y. 1989) (dismissing for failure to state a claim as plaintiff failed to allege religious disagreement regarding definitions of kosher); Brach's Meat Mkt., Inc. v. Abrams, 668 F. Supp. 275, 280 (S.D.N.Y. 1987) (refraining from ruling on the constitutional question because of a pending state action).

D. RECENT ESTABLISHMENT CLAUSE CLAIMS — LIMITED INVALIDATIONS BASED ON EXCESSIVE ENTANGLEMENT AND THE IMPERMISSIBLE EFFECT OF ADVANCING RELIGION

The first successful Establishment Clause challenge to a kosher food law came in *Ran-Dav's County Kosher, Inc. v. New Jersey*,[77] where the New Jersey Supreme Court struck down a regulation governing the kosher food industry, which was promulgated in 1984 by the Division of Consumer Affairs under the authority of the Consumer Fraud Act.[78] The rule made it "an unlawful consumer practice" to sell or attempt to sell food "which is falsely represented to be Kosher."[79] In the version before the court, the term "kosher" was defined consistently as "prepared and maintained in strict compliance with the laws and customs of the Orthodox Jewish religion."[80]

The court applied the three-part test articulated by the U.S. Supreme Court in *Lemon v. Kurtzman*, requiring that any statute appearing to advance a particular religious doctrine or practice must 1) "have a secular legislative purpose"; 2) have a "principal or primary effect . . . that neither advances nor inhibits religion"; and 3) "not foster an excessive government entanglement with religion."[81] Considering excessive entanglement to be the most problematic element of the administrative scheme, the court focused almost exclusively on the test's third prong.[82] The court suggested that it would find constitutional a rule requiring businesses purporting to be under a particular form of kosher supervision to be actually under that form of supervision; the court,

77. 608 A.2d 1353 (N.J. 1992).

78. N.J. STAT. ANN. § 56:8-4 (West 2009).

79. N.J. ADMIN. CODE § 13:45A-21.2 (1984).

80. *Id.* *See also* 19 N.J. Reg. 1060(a) (1987) (statement accompanying 1987 amendments).

81. 403 U.S. 602, 612–13 (1971) (internal quotation marks omitted).

82. *Ran-Dav's*, 608 A.2d at 1359. In a much thinner analysis, the *Ran-Dav's* court found the regulations failed the effects prong of the *Lemon* test as well. *Id.* at 1364 ("Because they work both as a constraint and as an inducement on merchants who must abide by them and on consumers who cannot avoid them, the primary, if not exclusive, effect of the regulatory process necessarily is to advance particular religious tenets."). The *Ran-Dav's* court further described itself as "troubled" by the Appellate Division's holding that the purpose prong of the *Lemon* test was satisfied because regulation had the legitimate secular purpose of ensuring truth in marketing. *Id.* at 1366. Nevertheless, confident that the other prongs of the *Lemon* test were not met, the *Ran-Dav's* court declined to address the issue in detail. *Id.* at 1365–66.

however, observed that the New Jersey rule went significantly further by requiring businesses to adhere to particular kosher standards.[83] It thereby involved the state in the direct supervision of those religious standards.[84]

The next successful challenge to a kosher food regulation came in *Barghout v. Bureau of Kosher Meat & Food Control*,[85] where the Fourth Circuit invalidated a Baltimore ordinance making it a misdemeanor to fraudulently offer for sale any food labeled kosher or otherwise suggesting compliance "with the orthodox Hebrew religious rules," when the food did not in fact comply with those rules.[86] Further, the ordinance required persons involved in the preparation of kosher food to "adhere to and abide by the orthodox Hebrew religious rules and regulations and the dietary laws."[87] The challenge came about when George Barghout, the owner of Yogurt Plus, a business selling both kosher and non-kosher foods, was fined $400 for placing non-kosher hot dogs on a rotisserie next to kosher hot dogs, allowing the grease from the non-kosher meat to come in contact with the food represented as kosher.[88]

In considering whether the ordinance violated the Federal Establishment Clause, the district court applied a *Lemon* analysis. It accepted the argument that the anti-fraud purpose of the ordinance was sufficiently secular but otherwise relied heavily on the *Ran-Dav's* opinion to argue that the ordinance involved excessive state entanglement in religion and had the effect of ad-

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83. *Id.* at 1360.

84. *Id.* As evidence of the excessive state entanglement in religious matters, the court cited the fact that the Chief of the Bureau of Enforcement and all the members of the Advisory Committee authorized to advise the enforcement agency consisted entirely of Orthodox rabbis. *Id.* at 1361. The court emphasized that while state agencies may not exclude adherents of a particular religion from employment, it was exactly the religious authority and expertise of the employees that qualified them for their positions, thus demonstrating the high degree of state entanglement in religious matter. *Id.*

85. 66 F.3d 1337 (4th Cir. 1995).

86. BALTIMORE, MD., CODE art. 19, §§ 49–52 (1983).

87. *Id.* at § 50.

88. The federal district court first certified to the Court of Appeals, Maryland's highest state court, the question of whether the ordinance violated the Establishment Clause of the Maryland Constitution. The state court held that the ordinance was consistent with the state constitution. Barghout v. Mayor & City Council, 600 A.2d 841, 841–42 (Md. 1992).

vancing a particular religion.[89] The Fourth Circuit unanimously affirmed the district court's judgment adding little substantive analysis, save for a discussion in the concurring opinions regarding the appropriate standard of review.[90]

The third and most recent challenge to kosher food regulations under the Establishment Clause arose in *Commack Self-Service Kosher Meats, Inc. v. Weiss*,[91] when Commack, a kosher meat producer, contested the New York kosher food law after the company was fined for improperly labeling several packages of meat as "soaked and salted."[92] The process used by Commack for soaking and salting meat was approved by a rabbi of the Conservative movement.[93] The state Department of Agriculture and Markets, charged with enforcing the statute, determined that the process used was not "in accordance with Orthodox Hebrew requirements," as the statute at the time required.[94]

As did the *Ran-Dav's* and *Barghout* courts, the *Commack* court applied the *Lemon* test to assess the constitutionality of the law.[95] The Second Circuit began its analysis by finding that the entanglement of the state with religious authorities was "excessive."[96] Because the statute specifically required an "Orthodox

89. Barghout v. Mayor & City Council, 833 F. Supp. 540, 547–50 (D. Md. 1993), *vacated in part on other grounds*, 856 F. Supp. 250 (D. Md. 1994), *aff'd sub nom*, Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337 (4th Cir. 1995).

90. *See infra* Part V.A.1.

91. 294 F.3d 415 (2d Cir. 2002).

92. Commack also raised Free Exercise, Equal Protection, and Due Process claims against the constitutionality of the law. Brief of Plaintiffs-Appellees at 41–44, Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415 (2d Cir. 2002) (Nos. 00-9116(L) & 00-9118). However, both the district court and the appellate court only treated the Establishment Clause challenge, which they found sufficiently compelling to invalidate the law on its own. Commack Self-Service Kosher Meats, Inc. v. Rubin, 106 F. Supp. 2d 445, 449 (E.D.N.Y. 2000), *aff'd*, *Commack*, 294 F.3d at 432.

93. See *supra* Part II for a brief description of the role of soaking and salting in kosher meat processing. *See generally* BLECH, *supra* note 7, at 187–202.

94. N.Y. AGRIC. & MKTS. LAW §§ 26(a), 201(a), 201(b)(1), 201(c), 201(e)(2-a) & (3-c), 201(f), 201(h) (McKinney 1991). Though there had been minor emendations over time, the Second Circuit's ruling essentially addressed the constitutionality of the original kosher food statute from 1915, which the Supreme Court had sustained in *Hygrade* and after which almost all other state statutes and regulations were modeled. *See supra* Part IV.B.

95. See *Commack*, 294 F.3d at 425, and *infra* Part V.A for a discussion of why the *Lemon* test was applied and whether it is the appropriate standard of review. The parties did not contest the state's valid interest in protecting kosher consumers from fraud; consequently, the court only considered the excessive entanglement and primary effects prongs of the test.

96. *Commack*, 294 F.3d at 425.

Hebrew" definition of kosher, the court found that it displayed "preference for the views of one branch of Judaism" while disfavoring other definitions of kosher, including that given by the Conservative rabbi supervising Commack's meat processing.[97] The court found that the state therefore took "an official position on religious doctrine," a paradigmatic example of excessive entanglement.[98] The unanimous opinion went on to show that the New York kosher food law also had the primary effect of improperly both advancing and inhibiting religion. The court held that the law inhibited religion by preferring an "Orthodox Hebrew" definition of kosher, prohibiting "members of other branches of Judaism from using the kosher label in accordance with the dictates of their religious beliefs."[99] While inhibiting non-Orthodox forms of Judaism, the statute simultaneously advanced Orthodox Judaism by backing its interpretations of Jewish law with the imprimatur of the state.[100] Going far beyond a "perceived" endorsement of religious choice that by itself would be unconstitutional,[101] the New York statute produced "an actual joint exercise of governmental and religious authority."[102] Consequently, the *Commack* court held that the statute conflicted with the Establishment Clause's prohibition against state actions that advance or inhibit religion.[103]

In the wake of the *Commack* opinion, New York and a handful of other states revised their kosher food laws to omit any reference to a specifically "orthodox" definition of kosher.[104] Most state laws modeled after the original New York statute, defining kosher as in accordance with "Orthodox Hebrew" interpretation, re-

97. *Id.* at 427. Further, the court viewed the fact that all six rabbis appointed to a voluntary advisory board tasked with determining what was kosher were Orthodox rabbis as compelling evidence that the state had unconstitutionally delegated authority to the Board on the basis of its members' religious identities. *Id.* at 429.

98. *Id.* at 425.

99. *Id.* at 430.

100. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (noting that the Founding Fathers considered public prayer prior to a legislative session constitutional because they did not consider the act to be "symbolically placing the government's official seal of approval on one religious view" (internal citations and quotation marks omitted)).

101. Bd. of Educ. v. Grumet, 512 U.S. 687, 695 (1994).

102. *Commack*, 294 F.3d at 431.

103. *Id.*

104. *See, e.g.*, 2010 Ga. Laws 372; 2003 Ill. Laws 134; 2004 Minn. Laws 232; 1994 N.J. Laws 138; 2004 N.Y. Laws 151; 2006 Va. Acts 485.

main unchanged.[105] Two states never imported the denomination-specific language of the New York statute and instead used the more ambiguous adjective "traditional" to effect essentially the same definition.[106] This language has not yet been challenged or legally distinguished from "orthodox."

The three opinions to date sustaining constitutional claims against kosher food laws have therefore all relied on Establishment Clause challenges to laws specifically defining the term kosher as consistent with "Orthodox" Jewish practice. No law with a less denomination-specific definition has been reviewed. All of the courts invalidating kosher food laws have applied the *Lemon* test, basing their decisions on its excessive entanglement and primary effects prongs.

V. THE QUESTIONABLE CONSTITUTIONALITY OF KOSHER LAWS TODAY

A. A VIOLATION OF THE ESTABLISHMENT CLAUSE

The focus on the *Lemon* test in the recent challenges to kosher food regulations is misplaced. A court should only apply the *Lemon* test after the court has determined the law under review gives no preference to one religious denomination over another. When such a preference exists, the law is subject to strict scrutiny. To survive this rigorous analysis, a law must be shown to be narrowly tailored to serve a compelling government interest. Few kosher food regulations will survive strict-scrutiny review, because most are not sufficiently narrowly tailored to serve the state's interest in protecting consumers from fraud without unnecessarily disfavoring the religious beliefs and practices of some individuals. Further, even a court that elects to bypass this strict-scrutiny analysis still should hold most current kosher food

105. *See, e.g.*, CAL. PENAL CODE § 383b (West 2009); 410 ILL. COMP. STAT. 645/1-2 (2009); MASS. GEN. LAWS ch. 94, § 156 (2009); MICH. COMP. LAWS § 750.297e (2009); OHIO REV. CODE ANN. § 1329.29 (LexisNexis 2009); TEX. BUS. & COM. CODE ANN. §§ 17.821–.826 (Vernon 2009).

106. ARIZ. REV. STAT. ANN. § 36-941(1) (2009) (defining "kosher" as "sanctioned by and prepared under the traditional Hebrew rules and requirements or dietary laws"); 18 PA. CONS. STAT. § 4107.1(b) (2009) (defining "kosher" as "a food product having [been] prepared, processed, manufactured, maintained and vended in accordance with the requisites of traditional Jewish law").

regulations to be unconstitutional because they fail to satisfy at least the entanglement and primary effect prongs of the *Lemon* test.

1. *A Denominational Preference Test Precedes the* Lemon *Test*

When a law explicitly favors one religious group over another, the Supreme Court's First Amendment jurisprudence directs the reviewing court to analyze the law with strict scrutiny. In *Larson v. Valente*, the Court held that whenever there is a claim that a law discriminates among religious groups or among denominations within a particular religion, the reviewing tribunal must determine whether that law provides any facial preference for a particular religion.[107] In *Hernandez v. Commissioner*, the Supreme Court ruled that the *Larson* analysis must precede application of the *Lemon* test.[108] Sometimes called the "denominational preference test,"[109] the *Larson* standard requires the court to invalidate any law that prefers one religious group over another unless the law is narrowly tailored to serve a compelling government interest.[110]

However, in its *Commack* opinion, the Second Circuit subjected the New York kosher food statute to a classic *Lemon* analysis, not the *Larson* standard, when it held that the law was un-

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107. 456 U.S. 228, 252 (1982) ("[T]he *Lemon v. Kurtzman* 'tests' are intended to apply to laws affording a uniform benefit to *all* religions, and not to provisions that discriminate *among* religions." (internal citations omitted)).

108. Hernandez v. Comm'r, 490 U.S. 680, 695 (1989) (holding that a provision of the Internal Revenue Code governing charitable deductions does not create an unconstitutional preference for particular denominations despite the contention that it accords a disproportionately harsh tax status to a particular religious group that raises funds by imposing fixed costs for participation in religious practices).

109. *See, e.g.*, Simpson v. Chesterfield County Bd. of Supervisors, 404 F.3d 276, 281 (4th Cir. 2005).

110. *Larson*, 456 U.S. at 246–47 (citing Widmar v. Vincent, 454 U.S. 263, 269–70 (1981); Murdock v. Pennsylvania, 319 U.S. 105, 116–17 (1943)). The language of Justice Brennan's *Larson* opinion portrays its standard as the threshold step in an Establishment Clause analysis. The facts of *Larson*, however, may have better positioned the case for a Free Exercise analysis. In *Larson*, one disfavored religious organization was subject to taxes from which all other organizations were exempt. A burden such as this placed on one group seems closer to the Free Exercise paradigm than an Establish Clause paradigm, where typically one group is uniquely favored by state action. In fact, the opinion equivocates in places between an Establishment Clause and Free Exercise analysis. *Compare id.* at 244 *with id.* at 245. Nevertheless, *Larson* holds itself out to bring a strict-scrutiny analysis to Establishment Clause cases, 456 U.S. at 246–47, and *Hernandez* affirms this understanding, 490 U.S. at 695.

constitutional.[111] In a footnote, the court declined to opine on the plaintiff's argument that the *Larson* strict-scrutiny analysis should apply, because the court would have come to the same conclusion even under the highly deferential *Salerno* standard[112] that the state argued should apply.[113] Consequently, the court avoided settling the standard-of-review question. Curiously, the court's note dismisses without comment the Supreme Court's ruling in *Hernandez v. Commissioner* that the *Lemon* test is sufficient only for laws providing a general benefit to all religions equally.[114]

Because the law before the *Commack* court explicitly favored "orthodox Hebrew religious requirements"[115] over non-orthodox interpretations of Jewish law, the law selected among religious sects rather than providing a uniform benefit to all. Interpreting the Establishment Clause elsewhere, Justice Blackmun wrote, "Whatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate preference for one particular sect or creed . . . ."[116] Prior opinions have similarly stated that "[government] may not aid, foster, or promote one religion or religious theory against another,"[117] and that the state may not "lend its power to one or the other side in controversies over religious authority or dogma."[118]

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111. Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 425 (2d Cir. 2002).

112. United States v. Salerno, 481 U.S. 739, 745 (1987) (requiring plaintiff to show that "no set of circumstances exists under which the [statute] would be valid").

113. *Commack*, 294 F.3d at 425 n.7 ("We need not answer [questions regarding the standard of review] because we conclude for the reasons given that . . . the laws fail the test of constitutionality even using the assumptions that are most accommodating to the State."); *see also* Ran-Dav's County Kosher, Inc. v. New Jersey, 608 A.2d 1353, 1359 (N.J. 1992) ("[B]ecause the kosher regulations directly, clearly, and inescapably violate the standards of *Lemon*, we need not resolve the issue of whether the regulations constitute a *per se* violation of the First Amendment under the *Larson* test.").

114. Hernandez v. Commissioner, 490 U.S. 680, 695 ("[W]hen it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three-pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*." (internal citation omitted)).

115. N.Y. AGRIC. & MKTS. LAW §§ 201-a(1), 201-b(1) (McKinney 1991).

116. County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 605 (1989) (internal citation omitted).

117. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

118. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990).

The Second Circuit therefore mistakenly applied a *Lemon* analysis to exactly the kind of case that the Supreme Court has held requires a threshold *Larson* strict-scrutiny analysis.[119] While the particular standard used did not affect the outcome in *Commack*, as the law would have been struck down under any standard, future reviewing tribunals should not follow the *Commack* court's use of the *Lemon* test absent a prior *Larson* strict-scrutiny analysis.[120] Because of the long-standing legal principle that the Establishment Clause of the First Amendment prohibits the government from favoring one religious group over another, kosher regulations that rely on state enforcement require the demanding strict-scrutiny test.

Contrary to the position taken by the *Barghout* court, different Jewish communities define the term "kosher" differently. By selecting a definition of the term for the purposes of enforcement, the state favors the definition of one or some religious groups over others.[121] The *Barghout* court accepted a curious proposition proffered in an amicus brief that there is one standard definition of kosher with only some open rabbinic debates on peripheral matters.[122] Under this assumption, there may be significant deviation from observance of the standard in the religious practice of Jews today; however the standard itself is accepted by all Jews as the standard from which observance and non-observance is measured. The *Commack* court properly dismissed this finding and recognized that significant debates among Jews regarding kosher standards have existed throughout Jewish history.[123]

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119. In the *Commack* court's defense, much of the discussion that one would expect to find in a strict-scrutiny analysis can be found in the court's application of the entanglement prong of the *Lemon* test. 294 F.3d at 426–430. So, the failure to employ the *Larson* strict-scrutiny analysis may represent little more than a formal flaw with no substantial consequences.

120. *See* Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1346–47 (4th Cir. 1995) (Luttig, J., concurring) ("[W]e are required to first consider, and resolve, the issue of whether the ordinance facially differentiates among religions . . . .").

121. This remains true even when the at-issue kosher food law does not explicitly require the state to accept an "orthodox" definition of kosher but nevertheless does require the state to adopt a specific definition. *See supra* note 106.

122. *Barghout*, 66 F.3d at 1341 n.9.

123. Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 426; *see also* GASTWIRT, *supra* note 33, at 4 ("By the twelfth and thirteenth centuries, the laws of *kashrut* had become so interlaced with local custom and local communities differed so radically in their application of these [religious laws], that inter-communal tension in the area of *kashrut* became a common phenomenon.").

The *Commack* opinion specifically cited contemporary disagreements between many Conservative rabbis and most Orthodox rabbinic decision makers regarding the kosher status of swordfish, gelatin, cheese made with rennet, and certain wines.[124] By singling out this set of inter-movement debates, the opinion might be misread to mistakenly imply that, within contemporary Orthodox Judaism, there is relative unanimity about what qualifies as kosher. To the contrary, debates within Orthodox Judaism itself over whether a particular food or food preparation practice is kosher are rampant. With no formal hierarchy to resolve disagreements, disputes between rabbis over what is kosher commonly contribute to political divisiveness among groups of co-religionists committed to following the conflicting opinions of different rabbinic authorities.[125] These debates over ritual are inextricable from the broader theological and cultural discourse in which devotees engage.[126] The *Commack* court could have therefore rested its opinion on a stronger legal basis than it did. Had it done so, the theological and religious consequences of the

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124. 294 F.3d at 426.

125. *See generally* KRAEMER, *supra* note 16 (explaining many key developments in the history of *kashrut* as reflecting intra-communal political tensions); *see also* Gil S. Epstein & Ira N. Gang, *The Political Economy of Kosher Wars*, *in* JEWISH SOCIETY & CULTURE: AN ECONOMIC PERSPECTIVE 155–76 (Carmel Chiswick, Tikva Lecker & Nava Kahana, eds. 2007) (arguing that rabbinic decisions regarding whether a food is kosher or not can be analyzed through an economic model describing the religious and political agenda of the deciding rabbi); David Assaf, *"A Heretic Who Has No Faith in the Great Ones of the Age": The Clash over the Honor of* Or Ha-Hayyim, 29 MODERN JUDAISM 194, 207, n.46 (2009) (ascribing conflicts over determinations of *kashrut* among and within various Jewish subgroups to broader economic and political competition between disputants), *available at* http://mj.oxfordjournals.org/content/29/2/194.full.pdf+html.

126. For example, some Conservative and Orthodox Jews do not accept food prepared by members of the Chabad-Lubavitch sect of Judaism as kosher because they claim that Chabad-Lubavitch Jews have adopted heretical beliefs regarding messianism and the deification of a rabbinic leader. Simultaneously, Chabad-Lubavitch Jews will not accept food prepared by Conservative and some Orthodox Jews as kosher because such Jews, in their view, have adopted theologies inconsistent with appropriate Jewish standards. By determining whether or not to enforce regulations against representations that a food is kosher made by a member of a sect, the state must effectively decide whether the theological claims are sufficiently heretical to disqualify the food from being kosher. Such a determination has long been prohibited under First Amendment jurisprudence. *See* Watson v. Jones, 89 U.S. 679, 728 (1871) ("In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.").

invalid regulations would have been even more apparent and the need for strict scrutiny even clearer.

When a law requires the state to select particular interpretations of Jewish law to enforce it, the state necessarily commits itself to favoring some religious sub-groups and disfavoring others in doctrinal matters. The fact that the law might not necessarily name the particular favored or disfavored groups makes it no less facially preferential.[127] As such, a strict-scrutiny analysis is necessary.

2. *Application of* Larson*'s Denominational Preference Test*

Strict-scrutiny analysis requires the reviewing tribunal to invalidate an under-review law unless it finds that law to be narrowly tailored to serve a compelling government interest that outweighs the individual right affected by the law.[128] Few Establishment Clause cases have undergone a strict-scrutiny analysis, complicating comparative analysis regarding what constitutes a compelling state interest in this context. However, the Free Exercise cases to which strict scrutiny has been applied do not suggest that protection against consumer fraud would qualify. The state's ostensible interest in regulating kosher labeling practices is to protect consumers by preventing and punishing fraud in the sale of kosher products.[129] While this constitutes a legitimate state interest, there is no precedent to support the proposition that a reviewing court would find this a *compelling* state interest sufficient to restrict a constitutional right.

The closest parallel can be found in *Larson* itself. The statute at issue in *Larson* was the Minnesota Charitable Solicitation Act, which was "designed to protect the contributing public and charitable beneficiaries against fraudulent practices in the solicitation of contributions for purportedly charitable purposes."[130] Because the Court found the law so overbroad as to fail its narrow tailoring analysis, the Court never reached the issue of whether

127. Larson v. Valente, 456 U.S. 228, 246 (1982) (noting that the law under review "clearly grants denominational preferences" even though it mentions no particular religion by name).

128. *See supra* note 110.

129. *See, e.g.*, Hygrade Provision Co. v. Sherman, 266 U.S. 497, 501 (1924); Barghout v. Bureau of Kosher Meat & Food Control, 66 F.3d 1337, 1345 (4th Cir. 1995).

130. *Larson*, 456 U.S. at 231.

the interest would qualify as compelling.[131] At the other end of the spectrum, the *Hernandez* Court did find the maintenance of a fair and sound tax system to be a compelling government interest.[132] The at-issue law, however, was interpreted to concern the failure of the federal government's financing system, not simply the reduction of obstacles to perpetrating consumer fraud in a specialized consumer market.[133]

Even assuming that the prevention of fraud in the kosher consumer market would represent a compelling state interest, most of the contemporary statutes are not so sufficiently well tailored to furthering that interest, that they could survive a strict-scrutiny analysis. The laws modeled after the original New York kosher food statute rely on the state to ensure that kosher food is indeed kosher. Even when such a determination is not specifically limited to Orthodox interpretations of kosher and when the state makes this determination itself without delegating authority to clergy, this kind of statute involves the state directly in deciding religious matter unnecessarily.[134]

The state can ensure that consumers have accurate and sufficient information to make decisions about purchasing food labeled as kosher by passing laws that merely assure that a product purported to be certified as kosher by a particular authority is indeed so certified. Following the decisions in *Ran-Dav's*, *Barghout*, and *Commack*, Georgia, New Jersey, New York, and Virginia amended their kosher food laws.[135] The revised laws require

131. *Id.* at 248.
132. Hernandez v. Comm'r, 490 U.S. 680, 699–700 (1989).
133. *See id.*
134. Nine states have halal food regulations. CAL. PENAL CODE § 383c (West 2009); 410 ILL. COMP. STAT. 637/5 (2009); MD. CODE ANN., COM. LAW § 14-3601 (West 2009); MICH. COMP. LAWS § 750.297f (2009); MINN. STAT. §§ 31.658–.661 (2009); N.J. STAT. ANN. § 56:8-98 (West 2009); N.Y. AGRIC. & MKTS. LAW §§ 201-e, 201-f (McKinney 2009); TEX. BUS. & COM. CODE ANN. § 17.881(Vernon 2009); VA. CODE ANN. § 3.2-5124 (2009). None of the statutes in effect facially prefer one school of Islamic thought over another in interpreting what qualifies as halal food. However, at least one scholar suggests that the laws may have the practical effect of favoring interpretations of halal by mainstream Muslims over members of minority sects. Milne, *infra* note 139, at 80–82. Given a state's need to adjudicate these theological differences when determining how to enforce the laws, halal food laws should be subject to the same *Larson* strict-scrutiny analysis appropriate for most kosher food regulations. For a discussion of halal food generally, see MIAN N. RIAZ & MUHAMMAD M. CHAUDRY, HALAL FOOD PRODUCTION (2004) and AHMAD H. SAKR, UNDERSTANDING HALAL FOODS: FALLACIES AND FACTS (1996).
135. 2010 Ga. Laws 372; 1994 N.J. Laws 138; 2004 N.Y. Laws 151; 2006 Va. Acts 485.

only that the packaging or the vendor itself display information explaining to the consumer the basis for the claim that the food is kosher.[136] Such information would include the name and contact information of the certifying authority. It could also be expanded to include a Web address for a database of additional information about the authority's standards. This would allow the individual consumer to determine for herself whether that authority's definition of kosher conforms to her specific needs in purchasing kosher food.[137]

There is no evidence at present suggesting that such mandatory disclosure statues are insufficient to protect consumers from fraud.[138] Thus, a mandatory disclosure regime may, constitutionally, displace a direct state enforcement scheme: in order for a direct state enforcement scheme to survive strict scrutiny, the government would need to show that direct enforcement and state determination of what food qualifies as kosher will better protect consumers from fraud than mandatory disclosure laws working in concert with general consumer protection laws. Scholars agree that such mandatory disclosure statutes are constitutionally permissible.[139]

3. *Application of the* Lemon *Test*

This Note has argued that a strict-scrutiny analysis must precede the *Lemon* test[140] and that most contemporary kosher food laws would not survive such an analysis.[141] Nevertheless, because the three courts that have struck down kosher food laws to date have all applied the *Lemon* test, and because there is some open

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136. N.J. STAT. ANN. § 56:8-63 (West 2009); N.Y. AGRIC. & MKTS. LAW §§ 201-a–i (McKinney 2009); VA. CODE ANN. § 3.2-5124 (2009).

137. For a model statute of this kind, see Mark A. Berman, *Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?*, 26 COLUM. J.L. & SOC. PROBS. 1, 71–73 (1992).

138. *But see* Sigman, *supra* note 43, at 587–90 (questioning the effectiveness and desirability of mandatory disclosure laws while admitting the absence of empirical evidence to support the point).

139. *See, e.g.*, KENT GREENAWALT, ESTABLISHMENT AND FAIRNESS, 253–54 (2008); Elijah L. Milne, *Protecting Islam's Garden from the Wilderness: Halal Fraud Statutes and the First Amendment*, 2 J. FOOD L. & POL'Y 61, 83 (2006).

140. *See supra* Part V.A.1.

141. *See supra* Part V.A.2.

question as to the applicability of the *Larson* standard,[142] the question remains whether any kosher food laws which require the state to determine whether a particular product is kosher or not can survive all three prongs of the *Lemon* test.[143] This Note argues that they cannot. While the state's interest in preventing fraud qualifies as secular, such laws have both the primary effect of advancing religion and excessively entangling the state in matters of religious doctrine.

a. Secular Legislative Purpose

Although the state's interest in preventing consumer fraud does not qualify as a compelling government interest sufficient to restrict constitutional rights,[144] the interest is nevertheless sufficiently secular to satisfy the first prong of the *Lemon* test. The Supreme Court has stated that a statute under review need not have an "'exclusively secular'" purpose, as long as it demonstrates a plausible secular purpose.[145] A law will only fail the secular-purpose prong of the *Lemon* test if "there [i]s no question that the statue . . . was motivated wholly by religious considerations."[146]

As noted above, only a minority of kosher consumers purchase kosher products for devotional reasons.[147] In fact, it is reasonable to assume that many religiously motivated kosher consumers may be more knowledgeable about kosher standards than other kosher consumers and therefore better able to spot fraudulently labeled products. As such, kosher foods laws may, in practice, provide a greater benefit to non-religiously motivated consumers who purchase kosher food for exclusively secular reasons. As a result, the law has a sufficient secular purpose to satisfy this prong of the *Lemon* test.

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142. *See supra* Part V.A.1.

143. The *Lemon* test requires that any statute appearing to advance a particular religious doctrine or practice must 1) "have a secular legislative purpose"; 2) have a "principal or primary effect . . . that neither advances nor inhibits religion"; and 3) "not foster an excessive government entanglement with religion." Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (internal citation and quotation marks omitted).

144. *See supra* Part V.A.2.

145. Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984).

146. *Id.* at 680. *But see* Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 YALE L.J. 1611, 1620–23 (1993) (suggesting that Establishment Clause jurisprudence requires an "express secular purpose").

147. *See supra* Part II.

b. A Primary Effect That Neither Advances nor Inhibits Religion

Even under the relaxed articulation of the primary-effects prong of the *Lemon* test articulated in *Agostini v. Felton*,[148] kosher food laws that establish direct state enforcement regimes result in the state promoting one or some understandings of kashrut over others. Regulatory schemes that do not specify adherence to one particular definition of kosher, but instead employ non-denominational, overlapping, broad definitions, still advance the religious values of some sub-groups in Judaism while inhibiting others. The state cannot sanction one or more definitions of kosher without creating a situation in which kosher food producers may be forced to accept a meaning of kosher inconsistent with their own religious views in order to comply with the law.[149]

For example, as noted above, meat certified as kosher by members of the Chabad-Lubavitch sect meets the technical requirements of kosher food preparation.[150] However, because some Jews view the sect's theological beliefs as heretical, they do not accept a Chabad-Lubavitch kosher certification as valid. Simultaneously, members of the Chabad-Lubavitch sect themselves often decline to accept the kosher certification of rabbinic authorities from many communities outside of their own.[151] If a state accepts food processed under Chabad-Lubavitch supervision as kosher for the purposes of law enforcement, it promotes the sect's theological claims and inhibits that of those who protest. If the state declines to accept the food as kosher, the primary effect of preferring one religious group over another changes only in the details of which group's religious values are advanced or inhibited. Either way, the theological conclusions of some are supported by the force of law, while those of others are restricted.

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148. 521 U.S. 203 (1997). In *Agostini*, the Supreme Court refined the primary-effects analysis, noting that government benefits to religious organizations and their members are not necessarily unconstitutional as long as they are allocated "on the basis of neutral, secular criteria that neither favor nor disfavor religion, and [are] made available to both religious and secular beneficiaries on a nondiscriminatory basis." *Id.* at 231.

149. *See* Commack Self-Service Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 430 (2002).

150. *See supra* note 126.

151. *See generally* JEROME R. MINTZ, HASIDIC PEOPLE: A PLACE IN THE NEW WORLD, 51–59 (1992).

Some supporters of kosher food laws have argued that state determinations of what qualifies as kosher do not advance or inhibit the views of any religious sub-group because "'kosher' merely reflects *consumers*' understanding of the term [which] has a particular meaning in the commercial context."[152] Put differently, the claim is that kosher has a meaning in industry trade language, distinct from its religious meaning, about which consumers can have reasonable understandings. The fact that such a trade definition correlates to a particular religious definition does not by itself cause a statute employing that definition to violate the Establishment Clause.[153] Instead, the statute's primary effect is to ensure proper use of the term in commercial settings.

However, this argument falsely assumes a stable and comprehensible meaning of kosher. Instead, kosher is best understood as a fluid, dynamic term encompassing concepts of ritual purity, cultural identity, and the role of Jewish law in an individual's devotional practice. Some consumers may hold an unjustified belief that inquiry into a food's kosher status is limited to factual determinations about its technical preparation. This misapprehension, however, does not make the state's enforcement of a consumer understanding of other definitions of kosher any less preferential. In fact, the consumer understanding that the state chooses to enforce may itself be based on the decidedly doctrine-specific definitions that the state has enforced in the past, rather than some independent standard.[154] As such, devotees whose own religious beliefs include definitions of kosher that do not comport with those enforced by the state could feel that the state is endorsing a religious doctrine other than their own.[155]

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152. Brief of Intervenor-Appellants at 29–30, *Commack*, 294 F.3d 415 (2d Cir. 2002) (Nos. 00-9116(L) & 00-9118) (internal citation omitted).

153. *See* McGowan v. Maryland, 366 U.S. 420, 442 (1961) (holding that a statute does not violate the Establishment Clause simply because it "happens to coincide or harmonize with the tenets of some or all religions.").

154. *See* GREENAWALT, *supra* note 139, at 251 n.32.

155. Non-Orthodox Jewish organizations made exactly such a claim to the Second Circuit in *Commack*. Brief Amici Curiae in Support of Appellees of the American Jewish Congress et al. at 6–8, *Commack*, 294 F.3d 415 (2d Cir. 2002) (Nos. 00-9116(L) & 00-9118).

c. Excessive Government Entanglement with Religion

When the state asserts that a particular food product is not kosher, it takes an official position on a matter of religious doctrine. In so doing, it directly violates the Establishment Clause's prohibition against government "sponsorship [of religion], financial support [for religion], and [the] active involvement of the sovereign in religious activity."[156] The *Commack* court found that the New York kosher food laws ran "afoul of 'the core rationale underlying the Establishment Clause[, which] is preventing "a fusion of governmental and religious functions."'"[157] This constitutionally prohibited fusion persists whenever the state positions itself to decide matters of religious doctrine.

The three courts that have invalidated kosher food laws to date have all cited the delegation of civil authority to religious leaders as significant evidence that the statutes created excessive entanglement.[158] Nevertheless, statutes that do not delegate determinations on what qualifies as kosher to rabbinic authorities must instead rely on government officials to interpret the relevant religious principles themselves. By "weigh[ing] the significance and the meaning of disputed religious doctrine,"[159] the state agents make constitutionally impermissible theological judgments themselves. Whether through delegation or directly, the excessive degree of government entanglement in religion required by these schemes exceeds constitutional limits. In the words of one California state judge, "the determination of whether food is kosher is an ecclesiastical question unsuitable for adjudication in civil courts."[160]

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156. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). The excessive-entanglement analysis blurs into the primary-effects analysis. Exactly because kosher food laws that establish direct state enforcement unnecessarily entangle the government in decisions regarding doctrinal matters, the primary effect of the laws are to both advance and inhibit the religious values of various sub-groups. The excessive-entanglement analysis also overlaps significantly with the inquiry into whether strict scrutiny is applicable, since most kosher fraud statutes provide denominational preferences by judging religious disputes.

157. *Commack*, 294 F.3d at 428 (alteration in original) (quoting Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982)).

158. *See supra* Part IV.D.

159. Presbyterian Church in Am. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 452 (1969) (Harlan, J., concurring).

160. Korn v. Rabbinical Council of Cal., 195 Cal. Rptr 910, 914 (Ct. App. 1983).

B. A VIOLATION OF THE FREE EXERCISE CLAUSE

Although the only successful challenges to kosher food laws thus far have come on Establishment Clause grounds, some complainants have also alleged that the laws violate the First Amendment right to the free exercise of religion.[161] Supervising kosher food production and making determinations as to whether a particular food is kosher constitute clerical functions that rabbis customarily perform in Jewish communities.[162] This function is directly impeded when a rabbi has to perform differently or restrict his engagement in order to comply with the law.[163]

A rabbi who accepts all wine as kosher would not be able to provide kosher supervision to a restaurant serving local wine in a state with a law that defines kosher according to "Orthodox Hebrew" or "traditional Jewish" standards. Such a restriction prevents that rabbi from applying Jewish law for his community as he sees fit. Some rabbis of the Reform movement argue for broad scale redefinitions of the term kosher to denote that a food product has been processed and prepared in an ethically sound manner that is consistent with environmental sustainability, fair labor practices, transparent business dealings, and a high-regard for animal wellbeing.[164] These recently proposed definitions of kosher would permit adherents to eat foods that do not meet the ritual requirements typically associated with kashrut. Regulatory regimes which rely on more traditional definitions of kosher would effectively inhibit devotees with these novel beliefs from fully expressing their unorthodox religious convictions.

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161. *See, e.g.*, First Amended Complaint at 7–8, Lewis v. Irvin, No. 2009cv173206 (Ga. Super. Ct. Aug. 7, 2009), *available at* http://www.aclu.org/files/pdfs/religion/lewis_v_irvin_complaint.pdf.

162. *See, e.g.*, JEWISH DAILY BULLETIN (N.Y.), Apr. 30, 1934 (quoting the head of the Union of Orthodox Rabbis describing the supervision of *kashrut* as "purely and traditionally a rabbinic function"); GASTWIRT, *supra* note 33, at 5 (observing that from the Middle Ages religious leaders of the Jewish community "had as much of an obligation as a right to supervise kashrut").

163. *But see* Catherine Beth Sullivan, *Are Kosher Food Laws Constitutionally Kosher?*, 21 B.C. ENVTL. AFF. L. REV. 201, 240–41 (1993) (rebutting the applicability of a Free Exercise argument to kosher food laws).

164. Aaron Gross, *Continuity and Change in Reform Views of Kashrut 1883–2002*, CCAR JOURNAL, Winter 2004, at 6; Rachel S. Mikva, *Adventures in Eating: An Emerging Model for Kashrut*, CCAR JOURNAL, Winter 2004, at 55.

One reading of the Supreme Court's Free Exercise jurisprudence of the past few decades might suggest that kosher food laws need not be crafted in a manner that would allow those with minority religious beliefs to lawfully engage in practices based on those beliefs. In *Employment Division, Department of Human Resources v. Smith,* the Supreme Court rejected the claim that a law denying unemployment benefits to employees discharged for ingesting narcotics must include an exception for those who use peyote for religious purposes.[165] The Court held that generally applicable criminal laws that incidentally burden a religious practice are not constitutionally required to include a religious-practice exemption.[166] It is possible that a reviewing court might extend this holding to a Free Exercise claim against kosher food laws, and thus not require an exception for devotees of religious sects whose definitions of what is kosher diverge from the definition enforced under the law. As a general criminal law that applies to all without facial distinctions, the fact that the rights of some to practice as they wish are restricted might be constitutionally permissible.[167]

However, kosher food labeling laws are distinct from the general anti-drug laws at issue in *Smith* and thus might be struck down on Free Exercise grounds in a way entirely consistent with *Smith*'s central holding. The drug use regulated in *Smith* implicates public safety concerns because drugs impair the judgment of users, sustain criminal organizations involved in distribution, and often lead to addiction. The benign religious use of peyote accounts for only a fraction of the total drug use. Though possibly imprudent, it is reasonable for a legislature to determine that making distinctions about various forms of drug use would impede law enforcement. In contrast, religious practice is central to the preparation, certification, and consumption of kosher food.[168]

Kosher certifiers are usually clergy and have extensive training in the religious laws they are applying.[169] The act of kosher

165. 494 U.S. 872 (1990).

166. *Id.* at 878–79.

167. *See* Gerald F. Masoudi, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 692 (1993).

168. *See supra* Part II.

169. Information regarding the rabbinic ordination and training of many leading North American kosher certifiers can be found in the Biography section of *The Kosher*

slaughtering itself involves a prayer and is thus devotional. Kosher food laws cannot properly be considered generally applicable criminal laws subject to the holding in *Smith*. While they may not facially discriminate, their primary impact is on religious devotees and those who rely on religious definitions for other purposes. Despite Smith, such laws would still be subject to the observation in *United States v. Ballard* that the First Amendment "embraces the right to maintain theories . . . which are rank heresy to followers of the orthodox faiths."[170] Kosher food regulations that rely on defining what is kosher, therefore, violate the Free Exercise Clause of the First Amendment.

VI. CONCLUSION

In recent years, though many remain in force, statutes that specifically define kosher as equivalent to "Orthodox" Jewish practice have consistently been held to violate the Federal Establishment Clause. Courts to date have subjected such laws to the *Lemon* test; even though, as this Note argues, their clear facial preferences require a threshold strict-scrutiny review under *Larson*. Though no such law has been reviewed to date, laws that do not specify an "Orthodox" definition of kosher but require the state to define the term "kosher" in any manner to make possible direct enforcement should also undergo an effectively fatal strict-scrutiny review. Fraud in the kosher food industry can, however, be effectively regulated by mandatory disclosure laws similar to those currently in place in New York, New Jersey, and Virginia. These laws ensure that food certified as kosher has in fact been so certified. The interested consumer can then inquire to his or her satisfaction whether the certifying authority is applying standards consistent with the consumer's religious or other needs. This removes the state from directly enforcing particular definitions of kosher and thereby removes the state from active involvement in disputed doctrinal matters.

Supervision Guide, *available at* http://www.kashrusmagazine.com/ksg/Old%20and%20deleted/ksg_index.html (last visited Sept. 26, 2010).

170. 322 U.S. 78, 86 (1944).