Commack Self-Service Kosher Meats, Inc. v. Rubin: Are Kosher Food Consumers No Longer Entitled to Protection From Fraud and Misrepresentation in the Marketplace?

Jared Jacobson

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview

Recommended Citation
Available at: https://scholarship.law.stjohns.edu/lawreview/vol75/iss3/7

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact lasalar@stjohns.edu.
COMMACK SELF-SERVICE KOSHER MEATS, INC., V. RUBIN: ARE KOSHER FOOD CONSUMERS NO LONGER ENTITLED TO PROTECTION FROM FRAUD AND MISREPRESENTATION IN THE MARKETPLACE?

JARED JACOBSON†

INTRODUCTION

Over ninety years ago, the federal government began to recognize the consumer's right and need to be protected from widespread deception in the open market. This protection has taken many forms, and has been extended by federal legislation into various areas of the market. For example, such legislation has had a distinctively strong influence on the food industry, particularly in the area of kosher food regulation. In fact, regulation of the kosher food industry has sparked litigation in both federal and state courts. Specifically, constitutional

† J.D. Candidate, June 2002, St. John’s University School of Law, B.A., Boston University.

1 See Fed. Trade Comm’n v. Algoma Lumber Co., 291 U.S. 67, 78 (1934). The Supreme Court addressed a consumer’s right to be protected from deceptive practices stating, “[The public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance.” Id.

2 See, e.g., Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301–397 (1997) (stating that the former Food and Drug Act of 1906 was originally enacted in order to prevent the placement of misbranded and adulterated articles of medicine and food).

3 See, e.g., Hygrade Provision Co. v. Sherman, 266 U.S. 497, 498 (1925) (involving due process and equal protection challenges to New York State kosher fraud laws); see also Barghout v. Mayor and City Council, 600 A.2d 841 (Md. 1992) (questioning whether intent to defraud is required under Maryland kosher fraud laws); Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992) (holding New Jersey kosher fraud law is unconstitutional); Erlich v. Mun. Court of the Beverly Hills Judicial Dist., 360 P.2d 334, 335 (Cal. 1961) (inquiring whether the word kosher is too vague to justify criminal liability); People v. Atlas, 170 N.Y.S. 834, 835–36 (Sup. Ct. 1918) (arguing the meaning of “kosher” is too vague for criminal prosecution), aff’d, 130 N.E. 921 (N.Y. 1921).
challenges have been made to various state kosher fraud laws.

Recently, in *Commack Self-Service Kosher Meats, Inc. v. Rubin*, the United States District Court for the Eastern District of New York heard a challenge to New York State’s kosher fraud laws.

---


5 See *Hygrade Provision Co.*, 266 U.S. at 501–02 (hearing a challenge to the New York Kosher Fraud Statute using the word “kosher” and the phrase “[orthodox Hebrew religious requirements],” and finding that neither was unconstitutionally vague); see also Gerald F. Masoudi, Note, *Kosher Food Regulation and the Religion Clauses of the First Amendment*, 60 U. CHI. L. REV. 667, 673–74 (1993) (noting that “[t]he Supreme Court has considered the constitutionality of kosher food laws only under the Commerce Clause” and that “[o]nly one state court has overturned a kosher food law on a constitutional challenge”) (citing *Hygrade Provision*, 266 U.S. at 497). The Religion Clauses were not applicable to the states until *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Two courts have fully considered Establishment Clause challenges to kosher fraud laws. For a further discussion of these courts’ considerations, see *Barghout v. Bureau of Kosher Meat and Food Control*, 66 F.3d 1337 (4th Cir. 1995) and *Ran-Day’s County Kosher, Inc. v. State*, 608 A.2d 1353 (N.J. 1992).


7 N.Y. AGRIC. & MKTS. §§ 201-a to -h (McKinney 2000). Section 201-a provides, in pertinent part:

A person who, with intent to defraud, sells or exposes for sale any... food... and falsely represents the same to be kosher... or as having been prepared under... the orthodox Hebrew religious requirements,... without displaying... the words 'we sell kosher meat and food only... we sell non-kosher meat and food only...[or] we sell both kosher and non-kosher meat and food' as the case may be, is guilty of a class A misdemeanor, except that a person who with intent to defraud sells... meat... and falsely represents the same to be kosher... provided said meat... in violation has a retail value in excess of five thousand dollars... is guilty of a class E felony.

*Id.* Section 201-a notes further that “[p]ossession of non-kosher meat and food, in any place of business advertising the sale of kosher meat and food only, is presumptive evidence that the person in possession exposes the same for sale with intent to defraud...” *Id.* Section 201-b provides for penalties if a person “with intent to defraud, sells... in any hotel, restaurant, or other place... food or food products, and falsely represents the same to be kosher... or as having been prepared under... the orthodox Hebrew religious requirements...” *Id.* Section 201-c prohibits the fraudulent identification of food and food products and provides in pertinent part: “No person shall... [w]illfully mark, tag...
The Court held New York State’s kosher fraud laws on their face violated the Establishment Clause of the First Amendment to the United States Constitution.

In Commack Self-Service Kosher Meats, Inc., the plaintiffs, proprietors of a butcher shop in Commack, Long Island, had received citations from The New York State Department of Agriculture and Markets (the “Department”) alleging violations of the state kosher laws. The most recent alleged violation occurred in February 1993, when Department Inspector P. Schnell cited plaintiffs for “attempting to sell as kosher poultry label... or by any other means... represent... as kosher... food or food products not kosher....” Id. Section 201-d describes the penalties for violation of the statutes. See id. Section 201-e sets forth regulations concerning labeling and record keeping. See id. Section 201-e (2-a) provides that “[i]n the event that non-prepackaged fresh meat or poultry is sold and delivered off-premises as Kosher... [i]t... shall have affixed to [it] a label or the printed words ‘not soaked and salted’ or ‘soaked and salted’ as the case may be.” Id. Section 201-e (3-c) provides that:

Any person or firm owning or operating a slaughterhouse which produces meat or poultry which is offered as kosher... shall keep records... subject to inspection by the department, regarding time, place, date, person or organization supervising the slaughter of the animal and the number of animals slaughtered in accordance with orthodox Hebrew religious requirements.

Id. Section 201-f mandates certain tagging and preparation requirements for “all meat or poultry which is sold... and is represented as having been prepared in accordance with orthodox Hebrew religious requirements....” Finally, section 201-h provides for the unlawful labeling of “food or food products with the words parve or pareve or in any way to indicate that the food... may be used or consumed indiscriminately with meat, poultry or dairy products according to Orthodox Hebrew requirements” where it would be impermissible to do so. Id. Additionally, section 26-a(1), establishes a nine-member advisory board to “advise, counsel and confer with the commissioner on matters of policy in connection with the administration and enforcement of laws and rules relating to kosher meats, meat preparations, and food products....” Id. § 26-a(1), (4).

8 Id. §§ 201-a to -h.
9 The Establishment Clause of the First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....” U.S. CONST. amend. I.
10 See Commack Self-Service Kosher Meats, Inc., 106 F. Supp. 2d at 445. Although plaintiffs challenged the constitutionality under both the United States and New York State Constitutions, this Comment is limited to discussion of the federal Constitution. The court in Commack Self-Service Kosher Meats, Inc., relying on Agostini v. Felton, 521 U.S. 203 (1997), concluded that, “even taking Agostini beyond its school aid context, the entanglements involved here between religion and the State are not only excessive, in themselves, but they have the unconstitutional effect of endorsing and advancing religion.” See Commack Self-Service Kosher Meats, Inc., 106 F. Supp. 2d at 459.
11 N.Y. AGRIC. & MKTS. §§ 201-a to -h.
that did not bear the proper labeling." 

Plaintiffs were cited for similar violations in July 1986, January 1987, and April 1988. In response to the most recent alleged violation, on January 16, 1996, plaintiffs filed a complaint against the Department seeking a preliminary injunction against enforcement of the statutes. Plaintiffs claimed New York State's kosher fraud laws define "kosher" food as food that is "prepared in accordance with orthodox Hebrew religious requirements" and in so doing, they violate the Establishment Clause of the First Amendment of the United States Constitution. Plaintiff's application for a preliminary injunction was denied on June 18, 1998. The defendant and intervenors later sought summary judgment dismissing plaintiffs' complaint, arguing that enforcement of the kosher fraud laws is necessary to protect consumers from fraud in this specialized area of the food industry, and does not violate the Establishment Clause.

The significance of kosher food fraud depends on what "kosher" means to consumers of kosher food. The word "kosher"
means “fit” or “proper” under Jewish dietary laws. These dietary laws were derived from the Bible, have been followed by Jewish people for thousands of years. Although members of the Jewish faith generally agree as to what constitutes kosher food and what proper kosher food preparation is, occasional disputes arise as to whether particular foods are kosher, or have been prepared according to specific required procedures. Any disagreements, however, have not troubled states in enacting legislation defining “kosher” within their respective kosher fraud laws. A consensus exists among consumers that “kosher” refers to undisputed Orthodox Jewish standards. Whether a

21 These Jewish dietary laws primarily dictate what animals, birds, and fish may be eaten and the manner in which they must be prepared for consumption. Further, the laws mandate that meat must not be consumed or cooked together with milk or other dairy products. The word “kashrut” is the Hebrew word for kosher. 6 ENCYCLOPEDIA JUDAICA 26, 27 (1996).

22 See, e.g., Leviticus 11:44-45. Levitticus reads, For I, the LORD, am your God; and you shall make and keep yourselves holy, because I am holy. You shall not make yourselves unclean, then by any swarming creature that crawls on the ground. Since I, the LORD, brought you up from the land of Egypt that I might be your God, you shall be holy, because I am holy. Id.; see also Leviticus 7:26 (“And ye shall eat no manner of blood, whether it be fowl or of beast, in any of your dwellings.”).

23 For example, the modern view is that “only those birds for which there is a tradition that they are ‘clean’ are permitted.” 6 ENCYCLOPEDIA JUDAICA 27 (citations omitted). “The Committee of Laws and Standards of the Rabbinical Assembly of America (Conservative) has ruled that both sturgeon and swordfish are permitted, whereas in England the Ashkenazi authorities forbid sturgeon while the Sephardi permit it.” Id. (citations omitted).


25 See Commack Self-Service Kosher Meats, Inc., 106 F. Supp. 2d at 445; see also Amicus Curiae Brief of The National Jewish Commission on Law and Public Policy at 8, Barghout v. Bureau of Kosher Meat and Food Control, 66 F.3d 1337 (4th Cir. 1995) (No. 94-1918) (stating that “even though some branches of Judaism sanction the consumption of non-kosher food, all accept the same code of Jewish law as the source of kosher dietary requirements . . . .”); Amicus Curiae Brief of the Anti-
particular individual actually understands or is even aware of this consensus concerning what constitutes "kosher," she nevertheless must trust the vendor's interpretation of the dietary laws as if she possessed the knowledge herself. Consequently, with this general level of understanding in the minds of both Jewish and non-Jewish consumers alike, it becomes of utmost importance that the representations of merchants be accurate regarding the product they are "exposing" for sale so as to meet these consumers' expectations in the marketplace.

Judge Gershon held that New York State's kosher fraud laws could not be enforced without violating the Establishment Clause of the United States Constitution. She began her discussion by quickly rejecting defendant's contention that "kosher laws are essentially registration statutes," which "merely require vendors to conform their products to general

Defamation League of B'nai B'rith at 8, Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353 (N.J. 1992) (No. 32-525) (stating that there are certain standard violations that are recognized by all who follow the Jewish dietary laws, such as a kosher restaurant serving pork or where the same plates are used for both meat and dairy products); Joseph P. Fried, Court Ruling Highlights Divergences On "Kosher", N.Y. TIMES, Aug. 5, 2000, at B3. The Fourth Circuit Court of Appeals in Barghout, noted that "[t]he mere fact that various sects may have different interpretations does not create an intra-faith dispute as to the basic meaning of what is and is not kosher." Barghout, 66 F.3d at 1341 n.9. The Barghout Court concluded that the "record [was] totally inadequate to determine whether there [was] a meaningful intra-faith dispute over the meaning of kosher." Id.

See Sheila Himmel & Cecilia Kang, Chef Suspended as D.A. Investigates, SAN JOSE MERCURY NEWS, Feb. 23, 2000 (pointing out that even Jewish people who do not strictly adhere to the Jewish dietary laws would agree that pork is not kosher).

N.Y. AGRIC. & MK'TS. § 201-a (McKinney 2000); see also 15 U.S.C. § 1451 (2000) (declaring that it is essential for consumers to have access to accurate information).

See Karen Ruth Lavy Lindsay, Comment, Can Kosher Fraud Statutes Pass the Lemon Test?: The Constitutionality of Current and Proposed Statutes, 23 DAYTON L. REV. 337, 338 (1998) ("[C]onsumers typically rely upon representations that particular foods are kosher, the goal of kosher food laws has been to prevent consumer fraud."). Nelson Pugh, director of marketing in Florida's State Department of Agriculture commented, "[C]onsumers have an expectation of what is kosher" and added that "[o]ur obligation is to assist them." Id.; see also Shirish Date, Florida's Kosher Food Campaign Questioned; Backers: State Program Doesn't Push Religion, PALM BEACH POST, June 10, 1999, at 1A.

U.S. CONST. amend. I; see also supra note 9.

See Commack Self-Service Kosher Meats, Inc., 106 F. Supp. 2d at 455 ("Even where the . . . laws describe some specific procedures . . . the procedures refer back to orthodox Hebrew religious requirements . . .")

Id. at 451.
consumer expectations." Judge Gershon's narrow analysis of the kosher fraud laws focused entirely on the Establishment Clause, while finding it unnecessary to give any significant weight to the defendant's constitutional and legitimate end—to preserve the integrity of the market and protect consumers from being cheated.

Judge Gershon applied the three-pronged Lemon test formulated in Lemon v. Kurtzman in order to determine whether or not the statutory provisions violated the Establishment Clause. Under the Lemon test, the statute first must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive entanglement with religion. Judge Gershon preliminarily concluded that New York State's kosher fraud laws "were enacted at least in part to protect consumers of kosher products from fraud," thus satisfying the first prong of the test. Judge Gershon, however, found problems under the second and third prongs of the Lemon test, stating that the laws "foster excessive entanglement and advance religion because they require the State to affirmatively assume ongoing obligations of enforcement of purely religious laws, inevitably requiring the State to rely on religious authority and interpretation to properly enforce them." Judge Gershon

32 Id. at 455.
33 See id.
34 403 U.S. 602 (1971).
36 Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968) (holding that a statute allowing public schools to lend books to private sectarian schools had a secular purpose).
38 Commack Self-Service Kosher Meats, Inc., 106 F. Supp. 2d at 452–53 ("The purpose of the statute, manifestly, is to prevent and punish fraud . . . ") (quoting People v. Atlas, 170 N.Y.S. 834, 835–36 (1st Dep't 1918)).
ultimately concluded that New York State's kosher fraud laws were unconstitutional under the Establishment Clause.⁴₀ In response to the Commack Self-Service Kosher Meats, Inc. decision, New York State Governor George Pataki commented that the purpose of “[t]hese laws [was to] protect New Yorkers from consumer fraud,” and directed the state’s Department of Agriculture and Markets to appeal the decision.⁴¹

It is submitted that Judge Gershon was incorrect in holding New York State’s kosher fraud laws unconstitutional. Furthermore, Judge Gershon erred in dismissing defendant’s consumer protection argument, affording it inadequate consideration in light of the potential ramifications of her decision. A correct analysis would have focused on the right of all consumers, irrespective of their individual religion, to be protected from fraud and misrepresentation when purchasing food from merchants in the marketplace.

This Comment asserts that the right to be protected from fraud and misrepresentation extends to all individuals. The State has an interest and obligation to protect its citizens from being deceived as to what food products they are purchasing from merchants, including those products that are represented as kosher. Governmental regulation of kosher food is necessary to protect the general public from consumer fraud. This Comment will first explain what prompted New York State to enact the statutory provisions in question, and then explain why it is necessary in today’s marketplace to maintain them. This Comment will then analyze the kosher fraud laws under each prong of the Lemon test. Finally, it will conclude that given the constitutionality of the kosher fraud laws and the necessity to protect American citizens from being deceived, it is within the government’s constitutional power and responsibility to enforce these laws.

I. THE STATE’S INTEREST IN PREVENTING CONSUMER FRAUD

The Kosher food industry in the United States is a fifty billion-dollar industry.⁴² In 1979, only 1,000 products were

---

⁴¹ Fried, supra note 25, at B3.
⁴² See Date, supra note 28, at 1A (reporting on the substantial annual growth of kosher food in the United States); see also Suein L. Hwang, Kosher-Food Firms Dive Into Mainstream, WALL ST. J., Apr. 1, 1993, at B1 (reporting the 1992 U.S. sales of
marked with a kosher seal of approval. In 1989, the number of products bearing a kosher seal of approval soared to 17,500. Compared to growth in overall food sales, kosher food growth numbers are significantly higher: ten percent versus one percent or two percent. "A certificate guaranteeing rabbinical supervision, can now be found on thousands of mass-produced foods, especially in Israel and the United States. Airlines, hotels, restaurants, and catering firms throughout the world supply [kosher] food on a regular basis." Basic business motivation is the primary reason for the increased number of kosher certified products and food processors seeking kosher certification.

The fact that selling kosher products can amount to a significant financial benefit, along with the fact that it is "extremely difficult, if not impossible, for even an expert to tell" when kosher laws have not been followed simply by looking at all products that have been given the seal of kosher certification). Reported sales to consumers who specifically sought out the kosher seal of approval were $35 billion. Id. The kosher seal of approval is a symbol that a food processor places on the label of the product to inform the retailer and ultimate consumer that the product has been inspected by a supervising rabbi. See Caroline E. Mayer, Who's Keeping Kosher Now? Manufacturers Value Rabbi's Seal of Approval, WASH. POST, Sept. 27, 1989, at E1. There are in total about fifty different symbols representing the designation of kosher food. Id. at E2.

44 See id.; see also Lindsay, supra note 28, at 343 (noting the large increase in the sale of kosher food between 1989 and 1993); Hwang, supra note 42, at B1 (noting that the number of kosher certified products rose from 18,000 in 1989 to 23,600 in 1993).
45 See Date, supra note 28, at 1A. Other figures estimate that the kosher food market has grown about twelve to fifteen percent annually. See Ellen Simon, Kosher Foods Grow More Popular, Profitable; Muslims, Vegetarians Put Food in Mainstream, THE TIMES-PICAYUNE, Feb. 12, 2000, at B4.
46 Lindsay, supra note 28, at 342.
47 See Mayer, supra note 42, at E2 (noting that many food processors typically seek kosher certification for business purposes). One rabbi notes, "It's a marketing system, a profit-making endeavor." Id. Many food processors attempt to distinguish themselves from the rest of the kosher food market by attaching their own kosher seal of approval. For example, Rabbi Menachem Genack's seal of approval, a circle with a U inside, is the best known and most widely used kosher food symbol. Id.; see also Hwang, supra note 42, at B1 (pointing to a study done by Dannon Yogurt Company, that expected an annual sale of $2 million, due to the Circle U placed on some of its products and noting that Empire Kosher Poultry Inc.'s sales jumped fourteen percent to $7 million by entering their frozen pizzas and prepackaged luncheon meats into the kosher food market). "With companies very aggressive in terms of trying to gain market share, even the smallest edge... is significant." Mayer, supra note 42, at E2.
the finished product on a grocery store shelf is a perfect recipe for fraudulent mislabeling by vendors.\textsuperscript{48} Consequently, it is tremendously profitable for a vendor to represent her food as kosher. This financial impetus compounded by the fact that most consumers are unable to verify that a product is in fact kosher, provides vendors with an incentive to misrepresent products as "kosher."\textsuperscript{49}

A. Who is the kosher food consumer?

It has been estimated that approximately 6 million Americans consciously seek kosher food in the supermarket.\textsuperscript{50} Yet only 1.5 million of them are of the Jewish faith.\textsuperscript{51} To illustrate the vast number of kosher food consumers, it may be beneficial to begin by providing examples of some other moderately sized classes of consumers who follow certain aspects of the Jewish dietary laws, such as Muslims, Seventh Day Adventists, and Rastafarians.\textsuperscript{52} While many Jewish kosher food consumers regularly purchase food to comply with religious dietary requirements, the great majority of kosher food consumers make their decision based on criteria other than their religion.\textsuperscript{53} In fact, the majority of kosher food consumers

\textsuperscript{48} Stephen F. Rosenthal, Note, Food For Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment, 65 GEO. WASH. L. REV. 951, 954 (1997) (citations omitted); see also Catherine Beth Sullivan, Comment, Are Kosher Food Laws Constitutionally Kosher?, 21 B.C. ENVTL. AFF. L. REV. 201, 208 (1993). ("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."); see generally HAROLD P. GASTWIRT, FRAUD, CORRUPTION, AND HOLINESS: THE CONTROVERSY OVER THE SUPERVISION OF JEWISH DIETARY PRACTICE IN NEW YORK CITY 1881–1940 (1974) (James P. Shenton ed. 1974).

\textsuperscript{49} See Ran-Dav's County Kosher, Inc. v. State, 608 A.2d 1353, 1356 (N.J. 1992) ("Because of those higher prices, and because most consumers cannot determine whether foods labeled as 'kosher' were prepared under 'kosher standards,' unscrupulous vendors can reap substantial profits by misleading consumers into believing their products are kosher.") (citations omitted).

\textsuperscript{50} Mayer, supra note 42, at E2.

\textsuperscript{51} See id.; see also Hwang, supra note 42, at B1 (reporting that only forty percent of Hebrew National's frankfurter consumers are Jewish).

\textsuperscript{52} Mayer, supra note 42, at E2. It is a common practice among many religions to refrain from eating pork. See id.; Mark A. Berman, Kosher Fraud Statutes and the Establishment Clause: Are They Kosher?, 26 COLJM. J.L. & SOC. PROBS. 1, 11 (1992) (noting that "adherents of religions with dietary restrictions similar to Judaism's" are also kosher food consumers). But see Date, supra note 28, at 1A ("A full fifty percent buy kosher for no religious reason at all . . . ").

\textsuperscript{53} See Berman, supra note 52, at 11.
purchase kosher food because they believe it to be of a greater quality than non-kosher food. Perhaps those who hold this view do so because of their belief that kosher products are awarded a heightened degree of attention in the preparation process. Many individuals purchase kosher food for dietary reasons, relying on certain representations made in order to avoid serious health injury, such as those who are lactose-intolerant or allergic to certain types of seafood. For example, an allergist noted that a person with an allergic condition "could have itching all over their body, hives, collapse, [or] lose blood pressure" from consuming shellfish. Other kosher food consumers seek out kosher food for health and sanitary purposes. Such dietary purposes further illustrate that consumers of kosher food are not necessarily Jewish, and are not selecting kosher food for any particular religious purpose.

54 See Mayer, supra note 42, at E1 ("A growing number of non-Jews have been buying kosher because of the perception that it is better quality and healthier . . . . It's like a Good Housekeeping seal of approval."). Id. According to Menachem Lubinsky, president of Integrated Marketing Communications, a New York kosher-food marketing company, many consumers purchase kosher food, "because they perceive it to be cleaner or purer or healthier." Date, supra note 28, at 1A.

55 See Lindsay, supra note 28, at 344 (citing Shahar v. Bowers, 836 F. Supp. 2d 859, 862 (N.D. Ga. 1993)); see also Mayer, supra note 43, at E1 ("I'm not Jewish and neither is my wife. But I do know that if I'm out and see 'kosher' on a product, . . . I will pick up that product because I know someone is watching.").

56 See Ran-Dav's County Kosher, Inc. v. State, 579 A.2d 316, 324 (N.J. Super. Ct. App. Div. 1990), rev'd, 608 A.2d 1353 (N.J. 1992) (noting that many people who are allergic to certain foods such as shellfish, rely on kosher food representations to avoid eating these foods); see also Mayer, supra note 42, at E2 ("Fish is fit to eat as long as it has fins and scales. That rules out shrimp, crab, lobsters, and other shellfish."); Bill Kent, You Don't Have To Be Jewish, N.Y. TIMES, Apr. 4, 1999, (N.J. Wkly.), at 4NJ (commenting on the increased demand for kosher food and the reasons for which it is being purchased). One who is lactose-intolerant is able to eat kosher pizza and other foods that are tofu-based rather than made with dairy products. See Amy Westfeldt, Kosher Means Trendy, JERUSALEM POST, Nov. 24, 1998, at 10.

57 HIMMEL & KANG, supra note 26, at (quoting allergist Steve Astor of Mountain View, and further noting some of the dangers inherent in misrepresenting certain foods such as pork).

58 See People v. Atlas, 170 N.Y.S. 834, 836 (1st Dep't 1918) (noting that certain people in the general public may purchase kosher food because they believe that "greater care and cleanliness" went into the kosher food preparation process than may be expected otherwise); see also Mayer, supra note 43, at E2 (indicating that health-conscious individuals may seek out kosher food labeled parve because it contains no animal fat).

To assist consumers of kosher food in their selections, numerous supervisory agencies headed by rabbis certify food that is kosher with a particular symbol, for instance the letter "K" and the letter "U." For Jewish consumers of kosher food, many Orthodox communities take an active role in policing the food of their localities, including notifying the consumers when the food has been fraudulently misrepresented as kosher. For example, many kosher food consumers in Orthodox Jewish communities only consume food products that possess certifying marks approved by their individual rabbi. This practice of self-regulation serves as a form of protection from kosher food fraud for a limited number of kosher food consumers, a practice that obviously does not help individuals outside an Orthodox community. Consequently, it appears that the largest group of kosher food consumers—the health-conscious, allergy sufferers, Muslims, Seventh Day Adventists, or those seeking out what they consider to be higher quality food—will be forced to rely on representations made by vendors that products are in fact kosher as advertised. In consideration of the foregoing discussion, it becomes evident that the consumers who are most likely to be affected by kosher fraud, the non-Jewish kosher food consumers, are least likely to be able to protect themselves from it.

B. Necessity of Government Regulation

At both the federal and state level, tremendous steps

---

60 According to Rabbi Yosef Wikler, publisher of Kashrus magazine, which lists all kosher certifying agencies, there are 202 kosher endorsers, eighty percent of which are controlled by what he terms "the big four": the Orthodox Union, which endorses approximately seventy-five percent of the food products; the KOF-K Kosher Supervision; Organized Kashruth Laboratories; and Star K Kosher Certification. See Carole Paquette, Challenge to Kosher Laws Raises Some Deeper Issues, N.Y. TIMES, Feb. 26, 1996, (Long Island Wkly.) at 16; see also Lindsay, supra note 28 and accompanying text.

61 See generally GASTWIRT, supra note 48 (explaining the difficulties in ensuring kosher food quality on a large scale).


63 See 15 U.S.C. § 55 (2000) (prohibiting "false advertising"); 21 U.S.C. § 607 (providing that "labeling receptacles or coverings of meat or meat food products inspected and passed; supervision by inspectors"). Congress's objective was clear when it stated in its congressional declaration of policy:
towards preventing consumer fraud have been taken. The purpose behind consumer protection law is to protect the general public from purchasing deceptively represented products. In the eyes of many consumers, most of whom are unable to verify the quality of the products they are purchasing, "perception is reality." The New York State kosher fraud laws serve as a safeguard for the unknowing consumer, imposing penalties on those who do not abide by the consumer protection laws. On the federal level, Congress created the Federal Trade Commission (FTC) in 1914 in an effort to ensure fair competition in the marketplace. In 1938, Congress expanded the role of the
FTC to include ensuring “unfair or deceptive acts or practices in commerce.” 71 This was, “a significant amendment showing Congress’s concern for consumers as well as for competitors.” 72 New York State enacted its own laws to protect consumers from fraud in 1970, modeled on the federal example, which included the power of the Attorney General to enforce the laws. 73 Subsequently, an amendment was added creating a private cause of action for consumers. 74 It is evident that the law respects promises made to buyers and that the aim of these statutes, both on the federal and state level, is to protect promises made to buyers and to prevent dishonesty in the marketplace. 75 It is essential to the efficiency of the marketplace that consumers in fact receive what they have chosen to purchase. 76 “Consumers have the right to an honest marketplace where trust prevails between buyer and seller.” 77 Consumers of kosher food are equally vulnerable to deceptive consumer practices and are no less entitled to protection from fraud than are consumers of any other product being sold on the market. 78

72 Id. (“When the Commission was created by Congress in 1914, it was directed by 5 [of the Federal Trade Commission Act] to prevent ‘unfair methods of competition in commerce.’”).
73 See N.Y. GEN. BUS. § 349(a) (Consol. 1970); N.Y. GEN. BUS. § 350 (Consol. 1970); see also supra note 62.
74 The Statute was amended in 1980 to provide a private cause of action. 1980 N.Y. Laws 346.
76 See Colgate-Palmolive Co., 380 U.S. at 386–87 n.16 (“[A] buyers real concern is with the truth of the substantive claims or promises made to him, . . . .”); see also HIMBL & KANG, supra note 26 (“[E]veryone expects to be served exactly what a menu claims.”).
78 See Defendant-Intervenors’ Memorandum of Law in Support of Defendants-Intervenors’ Motion for Partial Summary Judgment at 16, Commack Self-Service Kosher Meats, Inc. v. N.Y. State Dep’t of Agric. and Mkts., 106 F. Supp. 2d 445 (E.D.N.Y. 2000) (noting that “kosher food consumers are not excluded from the protection of the consumer fraud laws simply because they depend on a religiously defined term and “are entitled to rely on the representations of vendors about their products”). In the kosher food context, a label signifying rabbinical supervision and proper preparation is essential. “It is generally accepted that it is a deceptive practice to state falsely that a product has received a testimonial from a respected
The injury suffered by deceived consumers of kosher food is no different from that suffered by any victim of deceptive advertising. At a minimum, all deceived consumers get defrauded out of the additional money they were willing to spend to receive what they considered to be a product of greater value. Whatever reasons a consumer may have for purchasing particular products, be it kosher food or nutritional supplements, the state has an interest in protecting its residents from unscrupulous vendors who, without government intervention, will surely take advantage of the unknowing consumer. Therefore, there are important policy reasons behind the state regulating the sale of kosher food, and furthermore, the state has the authority to offer such protection. Courts have consistently recognized the importance of the protection the kosher fraud source. Colgate-Palmolive Co., 380 U.S. at 389 (citing as an example Niresk Indus., Inc. v. Fed. Trade Comm'n, 278 F.2d 337 (7th Cir. 1960); see also Frank Bruni, Constitutionality of State’s Kosher Laws is Challenged, N.Y. Times, Feb. 8, 1996, at B1 (noting the position of proponents of the state’s role in kosher inspections: “[T]he government needs to protect the buyers of products labeled kosher just as it protects the buyers of products labeled low-salt and low-fat”). One kosher food consumer, who is Presbyterian, comments that “[t]he question I should not have to ask is, am I getting what I’m paying for. If I’m not, then the person who is selling this product to me is committing fraud.” Bill Kent, You Don’t Have To Be Jewish, N.Y. Times, Apr. 4, 1999, § 14NJ (N.J. Wkly.), at 4.

See Rosenthal, supra note 48, at 960 (discussing the dual purpose that kosher fraud laws serve—both to protect Jewish consumers from spiritual harm as well as to protect all kosher food consumers from economic harm). The potential harm may be much more severe in certain cases. See, e.g., Richard A. Merrill, Reducing Diet-Induced Cancer Through Federal Regulation: Opportunities and Obstacles, 38 VAND. L. REV. 513 (1985) (noting the federal government’s initiative in creating regulatory agencies is to monitor human exposure to possible carcinogenic substances); see generally Stephen H. McNamara, So You Want To Market a Food and To Make Health-Related Claims—How Far Can You Go? What Rules of Law Will Govern the Claims You Want To Make?, 53 FOOD & DRUG L.J. 421, 422 (1998) (discussing the federal regulatory rules that authorize what health-related claims may be placed on labels by companies in advertising foods, “including not only conventional food products but also medical foods, dietary supplements, ‘functional foods,’ ‘nutraceuticals,’ and other [food] products . . . .); see also supra note 52.

See Commack Self-Service Kosher Meats, Inc. v. Rubin, 106 F. Supp. 2d 445, 459 (E.D.N.Y. 1996) (recognizing kosher food consumers position that they “have a ‘pocketbook interest’ to the extent that they are willing to continue paying higher prices provided the products they are purchasing are indeed kosher”).

See supra notes 44–45 and accompanying text.

See supra note 71 and accompanying text; see also People v. Atlas, 170 N.Y.S. 834 (1st Dep’t 1918) (stating that “[i]t needs no argument to show that it is competent for the Legislature within its general police power to enact legislation to prevent and punish fraud and imposition”) (citations omitted).
laws provide consumers, and have consistently upheld these laws against challenges until recent years. Judge Gershon's decision is inconsistent with both the majority of courts' interpretation of kosher fraud statutes, as well as with the general purpose behind deception laws.

II. NEW YORK STATE'S KOSHER FRAUD LAWS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

New York State's Kosher Fraud Statute defines "kosher" as "prepared in accordance with orthodox Hebrew religious requirements." In Commack Self-Service Kosher Meats, Inc., Judge Gershon correctly began her analysis of the kosher fraud laws by applying the Lemon test, which is the hurdle over which the laws must climb if they are to survive the constitutional challenge of the Establishment Clause. Judge Gershon concluded that the statute on its face did not satisfy the second and third prongs of the Lemon test, and therefore violated the Establishment Clause. In fact, Judge Gershon misapplied the Lemon test because the statutory provisions governing kosher food in New York satisfy all three prongs of the test, and further the statutes do not violate the principles of the Establishment Clause; therefore they are constitutional on their face.

A. The Establishment Clause

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting the


84 N.Y. AGRIC. & MKTS. § 201-a(9) (McKinney 2000).

85 See supra notes 34–35 and accompanying text.

establishment of religion...". In 1947, the Supreme Court incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment, thereby extending the Establishment Clause restrictions on the federal government to the states. In County of Allegheny v. ACLU, Greater Pittsburgh Chapter, the Supreme Court asserted the meaning of the Establishment Clause:

"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."

To begin with, one must keep in mind when analyzing the government's role in enforcing laws that may have a beneficial effect on a particular religion, that there is a difference between governmental actions which establish religion and those which accommodate persons who are practicing their religion. "The Constitution does not 'require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any.'"

The Supreme Court affirmed this concept in Jones v. Butz. In Jones, the Court upheld an exception for kosher slaughtering from the general requirements of the Humane Slaughter Act. The Court found that, "defining humaneness...with the method of Jewish ritual slaughter" was not an attempt by the government to establish religion. Similarly, the kosher fraud laws merely define a means of enforcement in relation to the Jewish religion. Thus, the kosher fraud laws serve as consumer protection statutes, and do not disserve the purpose the framers had in mind when contemplating the Establishment Clause.

---

87 U.S. CONST. amend. I.
88 See Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947) (citation omitted).
90 Id. at 590-91 (citation omitted). For a summation of the facts in this case, see infra notes 114-115 and accompanying text.
92 Ran-Dav's County Kosher, Inc., 608 A.2d at 1370 (Stein, J., dissenting) (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)).
B. The Lemon Test

The benchmark used to determine whether a statute is constitutional under the Establishment Clause is the three-prong test created in *Lemon v. Kurtzman*. For a statute to pass constitutional muster under *Lemon*: (1) it must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive entanglement with religion. To satisfy the first prong of the *Lemon* test, the statute must have a “secular legislative purpose.” The Supreme Court of the United States has noted that for a statute to fail the first prong, there must be “no question that the statute...was motivated wholly by religious considerations...[even if] the benefits to religion [are] substantial...” Consequently, it is not a violation of the Establishment Clause for a statute to be “motivated in part by a religious purpose.” The legislative motivation behind New York State’s kosher fraud laws was to protect consumers from false representations in the marketplace, and hence, was not “motivated wholly by religious concerns.” The Committee was cognizant of the fact that many merchants were attempting to pass off their non-kosher food products as kosher, as well as attempting to hide this fact from the kosher inspectors, and therefore the Committee created a presumption of intent to defraud within the statute when non-kosher meat was found in a kosher establishment. This eye towards the efficient enforcement of the consumer protection laws is evidenced by the Committee’s attempt through the laws to “eliminate a vice that

97 See id. (citations omitted).
98 Id. at 612.
100 Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (invalidating a state statute under the “secular purpose” prong because the legislative history reflected that the statute’s sole purpose was to return prayer to the classroom); see also Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 335 (1987) (stating that it is not a requirement that the law be “unrelated to religion”); Lynch, 465 U.S. at 680 (1984) (upholding a city’s right to include a creche in its annual Christmas display, because, viewing the display as a whole, the Court found a legitimate secular purpose, i.e., celebrating a traditional holiday).
102 See GOVERNOR’S BILL JACKET, 1945, Ch. 844, p.5. “The presumption created by the statute would facilitate conviction of violators and tend to effectuate enforcement of the so-called ‘kosher’ law.” Id.
has been growing in recent years"—the state's difficulty in policing the kosher food industry.\textsuperscript{103} Merely referring to the religious term "kosher" to serve a legitimate secular purpose is not inconsistent with the "purpose" prong. As Judge Gershon conceded, "[t]he Challenged Laws were enacted at least in part to protect consumers of kosher products from fraud."\textsuperscript{104} Thus, the secular purpose prong of the \textit{Lemon} test is satisfied.\textsuperscript{105}

The "primary effects" prong of the \textit{Lemon} test, the second hurdle, has created a greater barrier to kosher fraud laws seeking constitutional status. Under \textit{Lemon}, the "principal or primary effect [of the statute] must be one that neither advances nor inhibits religion."\textsuperscript{106} Judge Gershon held that the kosher fraud laws violated the "primary effects" prong of \textit{Lemon}, reasoning that the procedures that must be followed in adherence to kosher food preparation "refer back to orthodox Hebrew religious requirements,"\textsuperscript{107} and therefore, "have the unconstitutional effect of endorsing and advancing religion."\textsuperscript{108}

Though the statute requires one to "refer back to orthodox Hebrew religious requirements,"\textsuperscript{109} it does not \textit{necessarily} endorse the Jewish religion.\textsuperscript{110} Reliance on Jewish dietary laws does not make the primary effect of the statute to advance or endorse Judaism.\textsuperscript{111} Legislation may be based on religious
principles, and still be secular in nature thus satisfying the purpose of the Lemon test. This principle was illustrated in County of Allegheny v. ACLU, Greater Pittsburgh Chapter. In that case, the Court allowed a Jewish menorah to be placed in a holiday display, and explained that even an explicitly religious reference may be allowed if it conveys a secular message and does not endorse any particular religion. Similarly, the kosher fraud statute's primary effect is secular in nature in that it is designed to prevent deceptive behavior and in so doing, protect the general public.

Judge Gershon relied on Board of Education of Kiryas Joel Village School District v. Grumet, reasoning that the kosher fraud laws created an "impermissible advancement of [a] religious belief." In Grumet, the Court struck down a New York statute that had created an independent school district, populated entirely by members of the Satmar Hasidic sect of Judaism. The Court found that "while the statute did not expressly delegate governmental authority based on religious criteria, it effectively did so, and thus was unconstitutional." The effect of the New York statute in Grumet, which was directed at one individual religious group, is unlike those of the impermissible effect of the statute is lacking if the "reason or effect merely happens to coincide or harmonize with the tenets of some ... religion"); see also Sossin Sys., Inc. v. City of Miami Beach, 262 So. 2d 28, 29–30 (Fla. Dist. Ct. App. 1972) (upholding a challenge to a Florida ordinance that regulated kosher food fraud, reasoning that the ordinance's effect was merely to "serve to safeguard the observance of its tenets," and not to establish a religion). In Sossin, the Court reasoned that the legislative motivation behind the enactment of the consumer protection laws was not to establish a religion, but to protect kosher food consumers from being deceived. Id. at 29.

113 See id. at 617–20. In this case, the Court found that a menorah exhibited in a Hanukah display was not a violation of the Establishment Clause because the menorah's message was not exclusively religious. Id. at 613; see also Lynch, 465 U.S. at 671 (holding that a creche containing both secular and religious representations had no impermissible effect).
117 Id.
118 Id. (citing Grumet, 512 U.S. at 698–99).
kosher fraud laws, which confer an important benefit on the general public as a whole. Considering Jewish people nationally consume less than thirty percent of kosher food, it is hardly accurate to conclude that the primary effect of the kosher fraud laws is to endorse the Jewish religion. Moreover, Orthodox Jewish Communities receive only a minor benefit, if any, from the kosher regulations. When the incidental effects the kosher fraud laws have on the Jewish religion are balanced against the overall purpose and primary effect of the statutes, the consumer protection laws outweigh any suggestion of an advancement of religion. The primary effect of the kosher fraud laws is consistent with the secular purpose the laws were enacted to serve: to protect a large class of consumers from fraud, and not just individuals associated with a particular religion.

The third and final prong that must be satisfied under Lemon states that the “statute must not foster ‘an excessive government entanglement with religion.’” Judge Gershon held that an excessive government entanglement with the Jewish religion existed, reasoning that “the laws of kashrut are intrinsically religious” and “the state itself takes on the traditional religious supervisory role.” It is well settled, however, that “[s]ome limited and incidental entanglement between church and state authority is inevitable in a complex modern society.” The entanglement that the kosher fraud laws arguably foster is at most “limited and incidental.”

To begin with, Judge Gershon mischaracterizes the state’s role in preventing kosher fraud when she explains that the state “takes on the traditional religious supervisory role” in enforcing

---

119 See supra text accompanying notes 62–63.
121 Commack Self-Service, 106 F. Supp. 2d at 455 (quoting Ran-Dav’s County Kosher, Inc. v. State, 608 A.2d 1353, 1363 (N.J. 1992)).
122 Id. at 455 (quoting Ran-Dav’s County Kosher, 608 A.2d at 1373); see also N.Y. AGRIC. & MKTS. § 26-a (McKinney 2001) (laying out the composite, function and duties of the state created advisory board on kosher law enforcement).
124 See Ran-Dav’s County Kosher, 608 A.2d at 1373 (Stein, J., dissenting) (emphasizing that it is “excessive entanglement” which is proscribed) (quoting Roemer v. Bd. of Pub. Works, 426 U.S. 736, 766 (1976)).
the kosher fraud laws. In the court's reasoning, it relied on the rationale employed in Ran-Dav's County Kosher Inc. v. State of New Jersey. In that case, the New Jersey Supreme Court invalidated New Jersey's kosher fraud regulations, holding them unconstitutional under the Establishment Clause. The court reasoned that because the statutes were based on religious doctrine and required the state to enforce the laws, excessive entanglement necessarily existed. This position is ill founded because the statute does not require the state inspector to have any particular religious knowledge in order to enforce the laws. Moreover, because the standards to be applied are clear on their face, the state need not subjectively impose its own interpretation of what is "kosher." In Commack Self-Service Kosher Meats, Inc., the government official responsible for enforcing the kosher fraud laws testified in his deposition to his role in kosher law enforcement:

Q: What criteria do you as director establish for yourself and those under your supervision within the kosher law enforcement division for determining what is kosher and what is not kosher?

A: What the marketplace considers and identifies as kosher is most important. It is definitely not based on any studies of religious matters.

Judge Gershon rejected defendant's argument that the laws simply require vendors to conform their products to "general

125 Commack Self-Service Kosher Meats, Inc., 106 F. Supp. 2d at 455.
126 Ran-Dav's County Kosher, 608 A.2d at 1373.
127 See id. at 1355 (stating that "there are differences of opinion concerning the application and 1356").
128 See id.
129 See Mathis Chazanov, Keeping Kosher; Rules Tougher After Major Store Loses Its Certificate, L.A. Times, Aug. 3, 1990, at B1. Chazanov writes, "(G)overnment inspectors are not concerned with the rituals and ancient rabbinical rulings that govern the preparation of kosher food. Instead, they check the records that butchers keep to prove they bought their merchandise from kosher producers or packing houses." Id.
130 See supra notes 23–25 and accompanying text.
consumer expectations,” and thus do not require religious doctrine to be interpreted. The court reasoned that the expectations to which the vendors must conform are “interpretations of religious law,” and therefore create an excessive entanglement in their enforcement. This argument is without merit. Kosher food regulations are simply concerned with whether food products represented as kosher comply with various identification requirements, such as labeling and advertising. As long as the government inspector is not herself interpreting religious doctrine, the government’s limited role in merely enforcing the interpretation, provided it is for a secular purpose, is incidental to the religious aspect of the legislation, and thus creates no excessive entanglement. Therefore, to avoid an excessive entanglement under Lemon, it is necessary that the government inspector ensure the representations made by merchants conform to consumers’ expectations as to what constitutes kosher, but go no further than to serve this function. If this role is performed correctly, excessive entanglement will not result.

CONCLUSION

In holding that New York State’s kosher fraud laws violated the Establishment Clause of the First Amendment, Judge Gershon not only misapplied the Establishment Clause test, but of greater concern, completely disregarded the policies that underlie consumer protection law and the practical realities which modern society must face. Kosher food consumers constitute a broad and growing class of American citizens, the great majority of whom it appears, do not identify their kosher purchasing needs with any particular religion. The original purpose and current rationale behind kosher fraud legislation is to protect consumers from fraud. It is necessary and constitutionally within the state’s enforcement power to protect

---

133 Commack Self-Service Kosher Meats, Inc., 106 F. Supp. 2d at 455.
134 Id.
135 See id.
136 See Ran-Dav’s County Kosher, Inc. v. State, 608 A.2d 1353, 1373 (N.J. 1992) (Stein, J., dissenting) (“The inquiry is essentially the same as that conducted by an inspector evaluating compliance with health and safety regulations.”).
137 See id. (Stein, J., dissenting) (noting how the New Jersey kosher food regulations appear to be a “relatively unintrusive form of monitoring . . . rather than religious judgments”).
kosher food consumers from fraud, as it protects consumers of other products being marketed. Consequently, without government protection, a large class of people will inevitably fall prey to the deceptive practices that will become widespread throughout the kosher food industry.