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ABSTRACT—This article considers whether state constitutionalism provides greater possibilities for workplace religious accommodation than is currently available to religious minorities within federal law under Title VII of the Civil Rights Act of 1964. We approach this question via a case study of the controversy over religious accommodation for practicing Muslims employed by the JBS Swift and Company meatpacking plant in Grand Island, NE. The case study consists of analyses of the requirements for religious accommodation under federal law, examination of the reasons why religious accommodation under federal law was not achieved in the Grand Island case, and analysis of Nebraska constitutional law on the subject of religious free exercise. We find that the language in the Nebraska Constitution regarding protection of religious practice provides grounds for Muslims and other religious minorities in Nebraska to seek religious accommodations in the workplace through state government venues that they have been unable to achieve under federal law.

Key Words: accommodation, free exercise of religion, Muslims, Nebraska, state constitutionalism, Title VII, workplace

INTRODUCTION

This article considers whether state constitutionalism provides greater possibilities for workplace religious accommodation than is currently available to religious minorities within federal law under Title VII of the Civil Rights Act of 1964. In matters pertaining to pluralism, particularly religious pluralism, the dominant approach is to examine federal law and the U.S. Constitution for guidance. But while the parameters of our constitutional rights are set by federal authorities, the states may provide broader protections to these basic rights under their own constitutions, provided that they do not offend against the U.S. Constitution. For this reason, state law has a vital role to play in resolving tensions between majoritarianism on the one hand, and the values of religious pluralism and liberty on the other.

We approach this question via a case study of the controversy over religious accommodation for practicing Muslims employed by the JBS Swift and Company meatpacking plant in Grand Island, NE. First, we summarize the facts of the Grand Island case. Second, we consider the federal requirements for religious accommodation. Third, we examine how religious accommodation for the Muslim employees at the plant was framed by the news media and public opinion. Fourth, we examine two competing constitutional frameworks for resolving tensions between economic interests and fundamental rights. Finally, we consider whether Nebraska's state constitution provides a suitable framework to secure religious liberty.

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CASE BACKGROUND

Often short of laborers, packinghouses offer employment opportunities to a diverse array of new settlers, including practicing Muslims from Somalia. The JBS Swift and Company meatpacking plant in Grand Island, NE, became the locus for tensions between Muslim employees, predominantly Somali refugees, and other employees over religious accommodations that the Muslim employees sought in September 2008 during their holy month of Ramadan.

After hundreds of Muslim employees at the Grand Island plant staged a walk-out in protest for break time in which to pray, representatives of the Muslim employees negotiated an agreement with the plant managers and the

workers' union, United Food and Commercial Workers Union Local 22, to move the dinner break for workers on the evening B-shift 15 minutes earlier so the Muslim employees could pray and break their daylong fast shortly after sunset. The announced agreement provoked a much larger counterprotest by other workers, including Caucasian, Latino, and Christian Sudanese employees. The counterprotesters complained about favoritism toward the Muslim workers. The walk-out by the counterprotesters led to a temporary plant shutdown. The agreement with the Muslim employees was subsequently withdrawn, leading some of the Muslim workers to again walk off the job or quit in protest. According to the workers' union, 86 employees, mostly Muslim, were fired due to unauthorized absences from work during the controversy.

The need for workers seems to suggest that the meatpacking industry is willing to accommodate the religious requirements of its employees. Meatpacking is physically demanding and dangerous work (Nebraska Appleseed Center 2009). The nature of the work shapes the boundaries of accommodation, because the workers on shift must take their breaks all at the same time. The accommodation negotiated in the Grand Island case entailed a change in the work schedule that affected all employees on the shift, not just the Muslim employees. Although the management and the union were willing to make the change, the other employees resented being forced to a change they did not seek or desire. The other workers' refusal to agree to the change made the accommodation impossible and caused hardship to the plant in work stoppage, reductions in personnel, and verbal altercations between the opposing groups that disrupted plant operations.

RELIGIOUS ACCOMMODATION UNDER FEDERAL LAW

Freedom of religion under federal law is protected by the First Amendment. Its two clauses focus on complementary aspects of religious liberty, for the establishment clause seeks to define the limits on government's activities pertaining to religion, while the free-exercise clause seeks to define the extent of the individual's right to religious practice. The issue of workplace religious accommodation lies along the intersection of these two aspects of religious liberty, raising such questions as these: How far does the individual's right of religious free exercise extend into the workplace? How far may the government go in obliging private employers to accommodate the religious practices of their employees? In regulating religious accommodation in the workplace, does the government entangle itself so extensively in the policing of religious belief and practice that the result is an establishment of religion? In order to understand the context for religious accommodation under Title VII, we first must understand the U.S. Supreme Court's interpretations of the establishment and free-exercise clauses. We turn now to a brief consideration of the relevant First Amendment case law.

In defining the extent of the right to free exercise of religion, the Court applied a compelling interest test in *Sherbert v. Verner* (374 U.S. 398 [1963]). The petitioner in the case, Ms. Adeil Sherbert, was denied unemployment compensation after being discharged from her job for refusal to work on Saturday, the day of Sabbath in the Seventh-Day Adventist Church of which she was a member. The Court ruled that the state of South Carolina imposed a burden on Ms. Sherbert's exercise of her faith with its restrictive qualifications for unemployment benefits, and that such a burden could only be justified by a compelling state interest achieved by narrowly tailored means; the Court found that no compelling state interest was present in Ms. Sherbert's case. The *Sherbert* rule was used subsequently in several additional cases in which state unemployment benefits were denied to employees who were terminated over conflicts between their work responsibilities and their religious beliefs (*Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 [1981]; *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 [1987]; *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 [1989]).

The *Sherbert* compelling-interest test was transformed into a test for intentional discrimination in *Employment Division, Department of Human Resources of Oregon v. Smith* (494 U.S. 872 [1990]). In the *Smith* case, two Native Americans were denied unemployment compensation after being discharged from their jobs for use of peyote in their church's religious rituals. The use of peyote was illegal under Oregon state law, even for religious purposes. The Court found that a generally applicable law, such as Oregon's drug law, was valid despite the burden that it may place on an individual's religious practices, as long as the law did not intentionally discriminate based on religion. So whereas under *Sherbert*, incidental burdens on religious free-exercise were deemed unconstitutional unless the means were narrowly tailored to achieve a compelling state interest, since *Smith*, incidental burdens on religious free-exercise are permissible; only religious bigotry made into law violates the U.S. Constitution.

As Duncan (2005:1185–86) has observed, the *Smith* Court "transformed" rather than overturned the precedent

in *Sherbert*. For example, if a state permits unemployment compensation based on an individualized evaluation of whether the applicant had "good cause" to refuse work, to deny benefits to an applicant who refused work for religious reasons is to demonstrate intolerance for religion. Thus the law defining eligibility for unemployment benefits would be neither neutral nor generally applicable, and so subject to strict scrutiny. Duncan believes that the *Smith* ruling holds promise for religious-liberty petitions against "public schools, state universities, governmental employers, and state agencies. [Because w]herever there are rules in government schools and bureaucracies, there is almost always a process for seeking a discretionary waiver of (or exemption from) those rules" (Duncan 2005:1187–88). When government agents are given discretion in the granting of exemptions, a paramount question will arise as to whether religious bases for seeking exemptions are considered equally with secular bases.

The principle that the government is to maintain neutrality regarding religion is central to jurisprudence on the establishment clause. The controlling case for establishment issues is *Lemon v. Kurtzman* (403 U.S. 602 [1971]). The Court's opinion in that case developed a three-pronged test to determine religious establishment, now called the "Lemon Test." To pass constitutional muster, actions of government must (1) have a secular purpose; (2) in their principal effect, neither advance nor inhibit religion; and (3) not create "excessive entanglement" between government and religion. The challenge for religious-accommodation statutes lies in the third prong of the Lemon Test, since it is possible that scrutinizing the faith of those requesting accommodation in order to determine whether the request is legitimate might cross the line into "excessive" entanglement of the government into religious matters. In the *Lemon* case itself, state laws providing financial aid to church-affiliated schools to support the instruction of secular subjects were deemed unconstitutional, due in part to the excessive entanglement into the church's business that was expected from the state's need to ensure that its money was spent as the statute prescribed.

The requirement for employers to provide religious accommodation to their employees derives from Title VII of the Civil Rights Act of 1964, which was clarified by the 1972 amendments to Title VII, particularly Section 701(j). Reasonable religious accommodation is mandated, unless it would create "undue hardship on the conduct of the employer's business" (42 U.S.C. 2000e(j) [1970 ed. Supp. V]). The exact parameters of the protection for religious belief, practice, or observance remain uncertain, because the legislature provided little guidance on what constituted "reasonable" accommodation or what hardships should be regarded as "undue."

The U.S. Supreme Court interpreted undue hardship expansively in *TransWorld Airlines v. Hardison* (432 U.S. 63 [1977]). In denying religious accommodation to a TransWorld Airline (TWA) employee whose religious beliefs forbade him to work on Saturday, his religion's day of Sabbath, the Court found that it would constitute an undue hardship for TWA to circumvent a seniority system that was part of the collective bargaining agreement with the employees' union in order to assign another employee to work Mr. Hardison's Saturday shift. The Court stated:

> It was essential to TWA's business to require Saturday and Sunday work from at least a few employees even though most employees preferred those days off. . . . [T]o give Hardison Saturdays off, TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath. (80–81)

So in the Court's estimation, Hardison's religious requirement to keep the Sabbath carried no additional weight or force than the nonreligious reasons that other employees had for wishing to have Saturdays off.

Central to the Court's reasoning in *TWA v. Hardison* was a concern about "unequal treatment of employees on the basis of their religion" (84). As the quotation above makes clear, the Court viewed it as unreasonable for another employee to be required to work a Saturday shift against his/her preferences in Hardison's place. To reinforce the point, Justice White ends the Court's opinion as follows: "[W]e will not readily construe the [Title VII] statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath" (85). Based on the reasoning the Court employed in this case, it appears that any accommodation that affects another employee may be deemed unreasonable; an exception would be if the accommodation involved finding another employee to *volunteer* to swap shifts (81).

Justice Marshall, in his dissenting opinion in *TWA v. Hardison*, finds the Court's lack of concern for religious pluralism troubling. He challenges the Court's determination that it is impermissible for an employer to allocate privileges on the basis of an employee's religious beliefs:

> The accommodation issue by definition arises only when a neutral rule of general applicability conflicts with the religious practices of a particular employee. . . . [T]he question is whether the employee is to be exempt from the rule's demand. To do so will always result in a privilege being "allocated according to religious beliefs," ante, at 85, unless the employer gratuitously decides to repeal the rule in toto. (87–88)

Implicit in Marshall's dissent is a complaint that the Court interprets the requirements of accommodation too narrowly. It follows that, if employers are not required to exempt employees from generally applicable workplace rules in order to accommodate religion, then employees like Mr. Hardison are forced to choose between their jobs and their faith.

Although the language of Title VII seemingly would require employers to bear some hardships, just not "undue" ones, the Court's holding in *TWA v. Hardison* blurs to the point of erasing this distinction. In its reversal of the decision of the Court of Appeals, the Court also refutes the appeals court's suggested means of providing accommodation to Mr. Hardison, including permitting him to work a four-day week or paying premium wages to another employee to incentivize volunteers to work the less-desirable Saturday shift. In rejecting these options as unreasonable, the Court stated: "Both of these alternatives would involve costs to TWA, either in the form of lost efficiency in other jobs or higher wages" (84). The Court's reasoning suggests that any additional costs for TWA constitute an undue hardship.

The Court's interpretation of the reasonableness and undue hardship standards under Title VII is of course reflected in the Equal Employment Opportunity Commission's (EEOC) compliance manual on religious discrimination. The compliance manual instructs on the undue hardship standard as follows: accommodation creates an undue hardship "where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work" (Equal Employment Opportunity Commission 2008). The EEOC explicates undue hardship in the context of scheduling changes and shift swapping as follows: "it would pose an undue hardship to require employees *involuntarily* to substitute for one another or swap shifts, [however] the reasonable accommodation requirement can often be satisfied without undue hardship where a volunteer with substantially similar qualifications is available to cover" (Equal Employment Opportunity Commission n.d., "Questions and Answers," emphasis in original). Following the Court's direction, the EEOC has defined any involuntary change in work scheduling in order to accommodate the religious needs of an employee to be an undue hardship on the employer.

A Freedom of Information Act request to the St. Louis district office of the Equal Employment Opportunity Commission produced the following information regarding Title VII complaints about religious discrimination in the state of Nebraska. Between October 1, 2003, and September 30, 2009, there were 358 allegations of religious discrimination made to the Nebraska Equal Opportunity Commission and 178 formal charges were filed. Eighty-six of the charges are still open, and 92 have been closed. Of the closed charges, 88 were closed by a no-cause finding being issued, one was an administrative closure, two were closed because the complaining party withdrew or failed to cooperate, and one was closed by issuance of a Notice of a Right to Sue, which indicates that the complaining party was given permission to file a lawsuit against their employer but that the EEOC found an insufficient basis to pursue the claim. These statistics demonstrate that complaints about religious discrimination against Nebraska employers nearly always resolve in favor of the employer, in keeping with the expansive interpretation of undue hardship that the Court and EEOC employ. It is important to recognize that overall, few Title VII charges are resolved in the complaining party's favor. The EEOC's national statistics for fiscal year 2009 report that, of the 68,710 charges filed, less than one in five (19.9%) were closed with a favorable outcome for the complaining party (merit resolutions) (Equal Employment Opportunity Commission n.d., Title VII charges). No doubt some of the other 80.1% of charges genuinely were without merit, but the test used to weigh these charges also clearly favors the employer.

Prenkert and Magid (2006) develop what they term a "Hobson's choice model" as a framework for determining how religion should be accommodated. Their model prescribes a review to establish the sincerity of the employee's religious belief, practice, or observance. It also prescribes that the employer produces concrete evidence of undue hardship. Under their framework, a reasonable accommodation would weigh the evidence of hardship against the evidence of the significance of religion to the employee. The difficulty with such a balancing test is that hardship for the employer could be easily quantified in

economic terms, while the religious sincerity of the employee or the consequences to the employee of violating the tenets of his or her religion in order to meet obligations of employment would be difficult or impossible to quantify. This disparity makes it unlikely that "weighing" hardship against sincerity could produce predictable protections for workers seeking religious accommodation. In addition, as previously mentioned, an attempt to evaluate the employee's sincerity may run afoul of the third prong of the Lemon Test, entangling government in religion to the extent of violating the establishment clause.

More helpfully, Prenkert and Magid's model recommends disentangling charges of disparate treatment from religious accommodation. They note that the "notion of neutrality toward religion, which is the hallmark and goal of disparate treatment, is present in situations calling for accommodation. As a result, it remains important to keep the two claims distinct" (Prenkert and Magid 2006:510). In situations calling for accommodation, the religion-neutral, generally applicable work rule or policy conflicts with the employee's religious belief, practice, or observance. Exempting the employee from the rule or policy will not be religion-neutral, as Justice Marshall also noted in his dissent to *TWA v. Hardison*. When disparate treatment is conflated with religious accommodation, the effect is to undermine the reasoning in support of accommodation. The Supreme Court, in its 1990 *Smith* decision, ruled that the free-exercise clause does not require the granting of religious exemptions from generally applicable laws. This reasoning implies the same principle for workplace accommodation: neither are employers required to exempt employees from generally applicable workplace rules or policies. However, there is one area of discrimination law in which accommodation is regarded as necessary to equality in the workplace rather than being regarded as special or disparate treatment. In this regard, accommodation within the context of the Americans with Disabilities Act (ADA) provides a useful comparison.

Christine Jolls has argued that the disparate impact liability under Title VII overlaps with accommodation under ADA, because contrary to disparate treatment claims, disparate impact "occurs when employers rely on facially neutral practices that cause disproportionate harm to a particular group of employees and are not justified by job relatedness and business necessity" (Jolls 2001:647). There is a clear similarity between the two types of claim in that the policy at issue is neutral and claimants need not demonstrate intent to discriminate. However, a crucial difference remains:

> The standard judicial remedy in a Title VII disparate impact case requires the employer to change the policy or standard for everybody, not just the protected group. . . . By contrast, a successful ADA reasonable accommodation case requires the employer to take special steps to [benefit] a particular group, but not for everybody. (Schwab and Willborn 2003:1238)

The accommodation requirement in ADA places greater burdens on employers than does the accommodation requirement under Title VII. As Schwab and Willborn (2003) observe:

> Under Title VII's disparate impact doctrine, the courts explicitly look for economic costs. If found, the analysis ends and the employer wins. . . . The ADA, at its core, requires employers to absorb these costs unless they are unreasonable or create an undue hardship; Title VII, at its core, avoids imposing these costs on employers. (1246)

To achieve its goal of integrating persons with disabilities as full participants in the workforce and the society, the ADA acts as an affirmative action policy, requiring employers to treat qualified employees with disabilities more favorably than others, even if they cost more to employ or are less productive (Schwab and Willborn 2003:1204). Title VII seeks to eliminate bias against individuals based on characteristics such as race, sex, religion, national origin, or other characteristics that are deemed irrelevant to employment, but not to function as affirmative action for individuals from those groups.

Even though the ADA statute mimics the language of Title VII regarding "reasonable accommodation" and "undue hardship," the standards for accommodation of disabled persons are quite different from the standards for accommodation based on religion. As Schoenbaum explains, both statutes prohibit employers from making adverse decisions about employment based on a prospective employee's disabilities or protected traits. This prohibition is defensible as a means to prevent discrimination in the hiring process, but it obstructs accommodation once the person is employed:

> The limitations on preemployment inquiries construct who the applicant is to the employer, determining which characteristics are relevant to the employment relationship and which

> are relegated to the realm of the personal. Removing these facets of people's lives from consideration creates a very particular vision of the model employee—white, male, straight, middle-class, not primary caregiver, not disabled, of an unobtrusive religious faith, speaking English as a primary language—because these are the default traits that are assumed to fit the structure of the overwhelming majority of American workplaces today. (Schoenbaum 2007:120)

The prohibition on preemployment inquiries is supposed to foster impartiality, but in practice it may "disguise how the particularized views of dominant groups appear universal" and make accommodation requests "appear as particularized claims for special interests rather than elements that have been ignored by the supposedly neutral standard" (Schoenbaum 2007:122). In this regard, an advantage of the ADA standards for reasonable accommodation is that after the hiring decision, the ADA reaffirms the relevance of the person's trait—disability—to the employment relationship "by requiring employers to accommodate employees' traits that fall outside the stereotype of the model employee" (Schoenbaum 2007:141). The ADA defines employment discrimination as, among other things, a failure to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability" (quoted in Emens 2008:877). Title VII, of course, also prohibits discrimination based on religion, using both a similar structure and similar language to the ADA statute. But because of the Court's expansive rendering of "undue hardship" for employers under Title VII, in practice the ADA accomplishes what Title VII does not—it makes clear that accommodation is essential to achieving the goal of *equality* within the workplace rather than construing accommodation as *special treatment* for a particular group of employees.

As was discussed earlier in the case background section, JBS Swift and Company was prepared to make a reasonable accommodation to the plant's Muslim employees, but the agreement was abandoned due to a backlash from other plant employees who regarded the accommodation as special treatment for the Muslim employees. The consequences of the other employees' opposition to the accommodation created hardship for the plant; the accommodation itself did not. Thus it is important to understand how the religious accommodation issue was perceived in the local community. The following section provides some empirical information on these matters.

NEWS FRAMING AND PUBLIC OPINION ABOUT RELIGIOUS ACCOMMODATION

Local News Coverage of the Controversy

Because the primary obstacle to religious accommodation for the Muslim workers at the Grand Island plant was opposition to the accommodation from non-Muslims, it is important to understand how the controversy was covered in the local press. Perceptions about issues are shaped by the manner in which information about the issues is framed. Local news reporting gives us a systematic means of examining how information about the controversy was framed within the Grand Island community.

The data reported in this section consist of content analyses of the news articles and editorials about the JBS Swift and Company Grand Island plant controversy that were published in the sole local newspaper, the *Grand Island Independent*. The articles were located on the *Grand Island Independent* website, which contains a searchable archive. A search was conducted using the terms "JBS Swift Muslim," which returned 19 valid articles. (Duplicate articles from later editions, letters to the editor, and articles in which the plant controversy was not the focus were eliminated from analysis, though letters to the editor were examined separately for insights into how the public responded to this news coverage—see below.)

Each article was coded for the presence or absence of particular content: (1) an explanation of the requirements for religious accommodation under Title VII; (2) an explanation of the religious observances required of practicing Muslims during Ramadan; (3) claims about hardship to the plant from providing religious accommodation to Muslim workers; (4) characterization of the accommodation agreement as inequitable to other employees; (5) characterization of the controversy as an interracial or interreligious conflict; and (6) connection of the controversy to immigration raids on the meatpacking industry.

Only one article (5%) provided an explanation of the requirements for religious accommodation under Title VII. The absence of this content from the immense majority of the articles suggests that religious accommodation for the Muslim workers was not framed as a legal obligation for the plant. The community may have been more supportive of religious accommodation for the Muslim

workers if it had been better informed of the federal law that prompted the request for accommodation from the Muslim employees and the attempted agreement negotiated by the plant management and the workers' union.

Less than one-third (32%) of the articles provided an explanation of the religious observances required of practicing Muslims during Ramadan. The community may have been more supportive of religious accommodation for the Muslim workers if they had been better informed of the religious significance of Ramadan to Muslims and of the reasons why the Muslims needed to pray and to end their fasting at sunset, rather than later in the evening at the time the dinner break was usually scheduled. By contrast, nearly two-thirds (63%) of the articles included claims about hardship to the plant from providing religious accommodation to Muslim workers. These results demonstrate that the local news coverage of the controversy was not balanced; the coverage favored reasons to oppose the accommodation over reasons to support it.

A majority (53%) of articles characterized the accommodation agreement as inequitable to other employees at the plant. This framing reinforced the idea that the religious accommodation amounted to favoritism of the Muslim employees. The value of majoritarianism was elevated over the value of religious pluralism.

Slightly less than a majority (47%) of articles framed the controversy as an interracial or interreligious conflict. It was more common for articles to identify the counterprotesters simply as "non-Muslims" rather than to describe the counterprotesters as well as the workers seeking religious accommodation in racial or religious terms. While this characterization seems defensible for the purpose of brevity, a simplifying descriptor of a group that was both racially and religiously diverse, the effect of this framing is also to elevate the value of majoritarianism. If both groups involved are described in religious and/or racial terms, then the reader is primed to evaluate the controversy in the context of pluralism. But when only one group is described in religious or racial terms, the reader is primed to evaluate the controversy in the context of majoritarianism—it's "us" versus "them."

Only one article (5%) in the *Grand Island Independent* connected the controversy at the plant to immigration raids on the meatpacking industry. And in that article, the only connection was through a claim from one of the striking workers, who was quoted as saying that plant management had used immigration status to try to silence some of the Latino counterprotesters (Overstreet 2008). In coverage that the Grand Island controversy received from news outlets *outside* the local community, the immigration frame was more common. An *Omaha World-Herald* article included immigration in a list of the factors complicating the controversy: "religion, culture clashes, refugee resettlement, immigration, union contracts, and factory demands in an increasingly diverse American work force" (Burbach 2008). And a *New York Times* story also gave the immigration frame prominence in its coverage, starting with its headline "A Somali Influx Unsettles Latino Meatpackers." The article's central message is encapsulated in this quotation: "But the dispute peeled back a layer of civility in this southern Nebraska city of 47,000, revealing slow-burning racial and ethnic tensions that have been an unexpected aftermath of the enforcement raids at workplaces by federal immigration authorities" (Semple 2008). Here we see that the nonlocal coverage framed the controversy as an interracial conflict between Somalis and Latinos and identified the immigration raids aimed at Latino workers as a precipitating cause.

It is uncertain why the local paper's coverage eschewed the immigration frame. But opposition to illegal immigration is prevalent in Republican-dominated areas of the country such as Nebraska: A Pew Research Center national survey from March 2006 showed that Republicans were substantially less likely than Democrats to say that illegal immigrants should be allowed to stay in the United States permanently (Pew Research Center 2006). Considering this opposition, it is likely that the use of an immigration frame would have made the public less sympathetic toward the Latinos' side in the controversy and thus possibly more sympathetic toward the Somalis' side.

We wish to be clear that the preceding analysis makes no claims about the reporters' or editors' intentions in covering this controversy. We observe the patterns in the coverage and find their messages to be skewed against religious accommodation, but this bias is likely to be unintentional. The conventions of news reporting may lead to interpretations and constructions that appear so natural that they are invisible to the reporters themselves (Edelman 1988).

Public Opinion about Muslims and Religious Accommodation

The Pew Research Center's annual Religion and Public Life Survey demonstrates that the non-Muslim public tends to see Islam as different from their own beliefs (Pew Research Center 2009). Sixty-five percent of the respondents not affiliated with Islam described Islam as very or somewhat different from their own beliefs. And those

who regarded Islam as different from their own beliefs were also more likely to say that they had an unfavorable view of Muslims. Sixty-five percent of those who thought Islam was similar to their own religion reported a favorable view of Muslims; among those who thought Islam was different from their own religion, only 37% were favorable toward Muslims.

Though the respondents were able to offer opinions as to the similarity or difference of Islam to their own religion, the public's level of knowledge about Islam is not high. Only slight majorities of respondents (53% and 52%, respectively) were able to answer correctly that Allah is the name Muslims use for God or that the Koran is the Islamic equivalent to the Bible, and less than a majority (41%) answered both questions correctly (Pew Research Center 2009). These data illustrate why it would have been important for the local news coverage to provide readers with information about Ramadan, its required observances, and its significance to practicing Muslims. It is clear that the mass public has a limited understanding of Islam.

Letters to the editor published by the local newspaper give us a systematic means of examining public perceptions of the controversy within the Grand Island community. The data reported in this section consist of content analyses of letters to the editor that were published in the *Grand Island Independent*. Three letters directly addressed the JBS Swift and Company controversy, and all three took positions opposed to the religious accommodation for Muslim workers. One characterized the Muslim workers as "trying to impose their religion" on others, and while the letter writer praised the Muslim workers for their strong beliefs, he also asserted that "Catholics, Jews, Evangelicals, Seventh Day Adventists," and any other religious groups' adherents do not expect to "just stop [their work] at a specified time to pray" (Letter 2008b). Another queried: "Didn't these people know the working hours of Swift when they accepted employment?" (Letter 2007). And he wondered whether Swift allowed its employees who are adherents of other religions "to take time off to practice their various rituals and rites." These letters reflect the framing of the *Independent*'s news coverage of the controversy, emphasizing hardship to the plant and characterizing any religious accommodation as favoritism for the Muslim workers and inequitable to other workers. Another letter writer described herself as "disgusted" with the actions of the Somali protesters at JBS Swift, questioning their claims of requiring special religious accommodation ("Muslims do not have a specific time to pray"), the sincerity of their religious faith, and their loyalty to the company (Letter 2008a). This writer praised other Muslims at the plant ("both Arabic and European") and described Islam as a "peaceful religion," but she strongly condemned the Somali workers and their requests for religious accommodation.

Perhaps this controversy did not capture the attention of the broader community enough to motivate extensive letter-writing or other widespread demonstrations of community opinion. But those few who were motivated to write were all clearly opposed to JBS Swift providing a religious accommodation to its Muslim employees. In this regard, the community opinion is consistent with the opposition expressed by the JBS Swift and Company plant employees whose counterprotests forced management to rescind its offer of religious accommodation. It is clear that they regarded religious accommodation as special treatment or favoritism toward the Muslim employees rather than a means of achieving equality in the workplace for employees who were particularly harmed by the later timing of the B-shift's dinner break.

CONSTITUTIONALISM, EFFICIENCY, AND VALUES

The tension apparent in religious accommodation cases is between economic efficiency and the protection of a fundamental right. In a simple and homogeneous community, this tension may be easily resolved. In a complicated and diverse community, matters are not so easy. As Laurence Tribe has noted, the U.S. Supreme Court has increasingly adopted a utilitarian approach that tends to favor economic efficiency (Tribe 1985). The Court's interpretations of the reasonableness and undue hardship standards under Title VII reflect this approach. But as Tribe argues, utilitarian jurisprudence effectively undermines the purpose of judicial review, a written constitution, and particularly an articulation of fundamental rights: "That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency" (Tribe 1985:613). Even when a religious accommodation results, the process of attempting to weigh on a common metric the hardship on the employer in comparison to the employee's sincerity of religious belief, practice, or observance seems to slight the very idea of fundamental rights. As Tribe explains:

> Being "assigned" a right on efficiency grounds, after an appraisal of the relevant cost curves, hardly satisfies the particular human need that can be met only by a shared social and legal

> understanding that the right belongs to the individual because the capacity and opportunity it embodies are organically and historically a part of the person that she is, and *not* for any purely contingent and essentially managerial reason. (Tribe 1985:596, emphasis in original)

In the JBS Swift case, the responses of the other employees at the plant as well as the community (as represented by the news framing and letters to the editor) demonstrate the lack of a shared social understanding that a right to free exercise of religion is essential, a problem compounded by what Tribe terms "the inadequacy of technocratic jurisprudence" (599).

Laurence Tribe's framework would require constitutional interpretation from judges cognizant of their constitutive role: "[C]onstitutional choices affect, and hence require consideration of, the way in which a polity wishes to *constitute* itself. In making such choices, we reaffirm and create, select and shape, the values and truths we hold sacred" (Tribe 1985:595, emphasis in original). But this role for the courts is not embraced by all. As any observer of judicial politics in the United States will recognize, constitutional scholars and judges themselves have varying perspectives on the proper approaches to constitutional interpretation and on the proper responsibilities of the courts relative to other political actors. The framework espoused by Tribe is challenged by others, notably Frank Easterbrook.

In his reply to Tribe, Frank Easterbrook argues that "we get nowhere by listing values unless we have both a metric by which to assess the claims the parties make and a legitimate rule of decision" (Easterbrook 1985:626). According to Easterbrook, the benefit of economic analysis, even when it is incomplete, is that it provides information about the likely effects of the Court's decisions. In Easterbrook's framework, absent clear social consensus and/or more specific directives from the political branches, the judiciary lacks the authority to decide to prioritize religious pluralism over economic efficiency. However, a utilitarian approach to jurisprudence is itself a decision to prioritize economic efficiency. Because the "costs" to employers of making an accommodation can be readily quantified and the "costs" to employees of violating their faith cannot, a quest for efficiency rigs the outcome against religious accommodation.

The debate about how to balance economic interests with the protection of liberty and diversity, sketched here in the exchange between Lawrence Tribe and Frank Easterbrook, echoes across a range of issues. These are difficult questions, and citizens as well as lawmakers and scholars are confounded by the challenge of how best to reconcile competing goods. It is important to be cognizant of the trade-offs as the search for better public policy continues.

STATE CONSTITUTIONALISM AND RELIGIOUS LIBERTY: THE NEBRASKA EXPERIENCE

If constitutions serve as contracts for the polity to pursue its political, social, and economic rights and liberties, then it is appropriate to compare constitutions in order to determine which constitutional texts and practices may provide the polity with the greatest possible freedom and security. A.E. Dick Howard underscores the importance of comparative constitutionalism, particularly in the area of human rights:

> It is hard to imagine drafters of a new constitution going about their task unconcerned about human rights standards. . . . And judges, wherever they come down on the uses of comparative data, cannot escape thinking about the question of whether they should look only to domestic sources or also to those from other countries or those based on international law. (Howard 2009:18)

While much attention focuses on national constitutions, much can also be gained by examining state constitutions. Indeed, elsewhere Howard emphasizes the theoretical importance of a state constitution: "A state constitution is a fit place for the people of a state to record their moral values, their definition of justice, and their hopes for the common good. A state constitution defines a way of life" (Howard 1998:14). Thus Howard's description of a state constitution reflects Tribe's argument that the *constitutive* function of constitutional interpretation must not be neglected or forgotten. Of course, it is incumbent upon public officials to ensure that a social contract so constituted includes all. One complexity of the social contract at the state level concerns the incorporation into the community of new members, particularly when those members increase the diversity of the community. As is evident in the Grand Island case, the incorporation of refugees from Somalia into the central Nebraskan community has strained tolerance for diversity. Does Nebraska's constitution define the good life to include full membership and justice for these newest members of

its polity? We turn now to a consideration of Nebraska's state constitution.

One of the earliest constitutional cases involving religion in the state of Nebraska was *State ex rel. v. Scheve* (65 Neb. 853 [1903]). This case held that it was the duty of the state to "protect every religious denomination in the peaceable enjoyment of its own mode of public worship" (878), echoing the constitutional language on religious freedom (Neb. Const. art. I, sec. 4 [1875]). This case underscores that the Nebraska Constitution does not allow the state to discriminate among religions, and beyond a mere requirement of neutrality, the state has a duty to protect religious practices. Thus religious pluralism constituted a feature of Nebraskans' self-definition from its founding, yet subsequent decisions were not so inclusive, particularly when the religious practices of newer residents entailed worship in another language.

In the years that preceded World War I, citizens of the United States were psychologically and politically prepared to respond to international events with nationalistic enthusiasm. Many people feared that German Americans suffered from divided loyalties (Gaffney 2001). Nebraska was no exception, and the constitutional history of Nebraska's language law reveals an ongoing tension over the treatment to be extended to new residents who persisted with "foreign" ways.

In *Nebraska District of Evangelical Lutheran Synod of Missouri v. McKelvie* (104 Neb. 93 [1919]), the court upheld Nebraska's foreign language law, which prohibited the teaching of any subject in a language other than English and included private and parochial as well as public schools in the restriction (Chapter 249, Laws 1919). Foreign-language-speaking parents, certain church corporations, and private schools requested an injunction to restrain enforcement of Chapter 249, Laws 1919. The issues of the case included the rights of parents to direct the religious and educational upbringing of their children. In addressing the underlying purpose of the law, the Nebraska Supreme Court stated:

> It is a matter of general public information, of which the court is entitled to take judicial knowledge, that it was disclosed that thousands of men born in this country of foreign language speaking parents and educated in schools taught in a foreign language were unable to read, write or speak the language of their country, or understand words of command given in English. It was also demonstrated that there was a local foci of alien enemy sentiment, and that, where such instances occurred, the education given by private or parochial schools in that community was usually found to be that which had been given mainly in a foreign language. (97)

Finding that the act was intended to address these concerns, the court interpreted the language law in conjunction with the compulsory education act, Chapter 155, Laws 1919. That statute contained a specific provision stating that the act should not be construed so as to interfere with religious instruction in private or parochial schools. As a result, the court held that the purpose of the language law was to abolish instruction in foreign language in elementary schools in subjects that were required to be taught under the law. The court determined that nothing in the law prohibited religious instruction in a foreign language, provided that such instruction did not interfere with the teaching of those subjects legally required to be taught to children.

In narrowing the scope of the Nebraska language law, the court balanced the liberty interest of parents in directing the religious and educational upbringing of their children, while upholding the limitation on instruction in a foreign language. In so doing, cultural pluralism was preserved to a certain extent, while the passions of the citizenry were tempered.

Meyer v. Nebraska (107 Neb. 657 [1922]) was a second challenge to the constitutional legitimacy of the Nebraska language law. In that case, Robert T. Meyer, a parochial schoolteacher, provided instruction to a student in the German language using a book of biblical stories. Meyer asserted that German language instruction was necessary for children to understand and practice the religion of their parents. In finding Meyer guilty, the opinion of the court provides a glimpse into the popular sentiment that prevailed during the era:

> The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that . . . [their] sentiments [are] foreign to the best interests of this country. (661–62)

Drawing a distinction between religiously motivated conduct and religious beliefs, the court determined that the legislation was constitutional, finding that the burden on religious conduct was outweighed by the governmental purpose espoused by the statute.

On appeal, the U.S. Supreme Court repudiated the Nebraska legislation limiting instruction in a foreign language (*Meyer v. Nebraska*, 262 U.S. 390 [1923]). The Court noted that parental rights and religious liberty were included within the purview of the 14th Amendment. Liberty interests included within the 14th Amendment could not be infringed by legislative action that was arbitrary or without reasonable relation to a legitimate state interest. Recognizing the legislative purpose of the Nebraska language law, the Court stated:

> That the state may do much, go very far, indeed, in order to improve the quality of its citizens . . . is clear; but the individual has certain fundamental rights which must be respected. . . . [A] desirable end cannot be promoted by prohibited means. . . . The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . . But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. (401–2)

The state government's decisions regarding Nebraska's language law serve as a reminder that state government is not always the best venue for a jurisprudence accepting of diversity. Local passions were eventually tempered by federal institutions, consistent with the constitutional framework originally designed by the framers. Yet elements of Nebraska's constitutionalism do offer the promise of inclusivity with respect to religion.

Despite the restrictive applications of the Nebraska language law, Nebraska's constitution is unusually expansive in its protection of religion. The Nebraska Constitution states an affirmative duty to protect religion: "It shall be the duty of the Legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own public worship and to encourage schools and the means of instruction" (Neb. Const. art. I, sec. 4 [1875]). This passage provides a normative dimension favorable to religious pluralism. As Calabresi and Agudo (2008:40) noted, Nebraska's state constitution (as well as those of Texas and Ohio, which contain similar provisions) is distinctive:

> These clauses are noteworthy because they provide for a positive duty on government to foster religious free exercise, rather than producing only a negative bar on government interferences with religious free exercise. These clauses also protect the freedom of worship, which may involve action, and not simply freedom of conscience or belief.

Nebraska's current constitutional structure offers a blueprint for securing religious pluralism and extending religious liberty protections even to those, such as the Muslim employees of JBS Swift and Company, whose requirements for worship do not mesh well with the established practices and routines of the majority. If public worship for Muslims during the month of Ramadan requires that worshippers daily break their fast and pray at or near sunset, and if adjusting the timing of dinner breaks to near sunset does not interfere with the religious worship of other employees, protection for the worship of Muslims may require that an accommodation be made. Since the Nebraska Constitution lays a duty on the legislature to pass legislation that protects the freedom of worship for all religions, the legislature could mandate greater religious accommodation than is available to employees under Title VII, provided that it takes care not to offend against the Lemon Test for establishment of religion. The Nebraska Constitution provides a basis to promote religious accommodation as essential to the achievement of equality within Nebraska's workplaces.

The language in article I, section 4, of Nebraska's constitution, laying a duty on the legislature to "encourage schools and the means of instruction," was used in a recent case to argue that the state constitution provides for a right to adequate education—the religious aspect of the section was not raised. In *Nebraska Coalition for Education Equity and Adequacy v. Heineman* (273 Neb. 531 [2007]), the court concluded that the question was not justiciable, because there was no clear standard for determining what an adequate education is (Miewald et al. 2009:56). Should a case be brought to argue the religious aspects of the section, the court could do likewise and find the question to be nonjusticiable as a political question, or perhaps the court would order the legislature to fulfill its constitutionally prescribed duty to protect religion.

FUTURE CONSIDERATIONS AND CONCLUSIONS

As the matter stands, the Muslim employees of JBS Swift and Company in Grand Island, NE, have not been able to secure accommodation for their religious requirement to pray and break their fast at sunset during their holy month of Ramadan. The plant management and the workers' union was willing to make the accommodation, whether motivated by a commitment to the value of religious pluralism or, more likely, a desire to retain workers in a competitive industry that suffers from labor shortages. The religious accommodation was derailed by opposition from other plant workers and by federal policies that prioritize economic efficiency and majoritarian interests.

Individual and societal acceptance of diversity is often difficult to secure, as was witnessed in this case through local news coverage that framed the issue in terms of hardship to the plant and inequitable treatment of other workers, giving its readers reasons to oppose religious accommodation, a perspective echoed in the letters to the editor on the controversy. And while local passions ought to be tempered by federal institutions, consistent with the constitutional framework originally designed by the framers, the U.S. Supreme Court's inclination toward a utilitarian approach and the absence of stronger legislative direction on religious accommodations under Title VII make relief through appeals to federal authority unlikely.

Federal institutions have often served to control potential shortcomings of state constitutionalism, as the U.S. Supreme Court did in the *Meyer* case. However, Nebraska's state constitution includes the legislative duty to protect religion, a stronger potential means of securing religious liberty than is provided by the federal constitution, subject of course to the legislature's fulfillment of this duty. Thus Muslims in Nebraska might fare better in seeking protections for their religious liberty in state venues. Although a federal structure is not a cure-all for tyranny of the majority, federalism is a structural means to limit government power and protect individual rights. At times, the protection is obtained by guaranteeing the uniformity of laws across the states, removing issues from the purview of state governments, when the states would be inclined to discriminate. At other times, the protection is obtained by devolving authority to the states and allowing the states to adopt more expansive protections for rights than are provided by the national government. Nebraska's affirmative duty to protect religion holds the promise of religious liberty for recent immigrants from Somalia. What remains is a reaffirmation of the community's commitment to religious pluralism as a feature of the definition of Nebraska's good life. Other states could benefit from a comparison to the constitutional workings of Nebraska so as to ensure religious liberty protections for the newest residents of the Great Plains and beyond.

ADDENDUM

As this article was going to press, there was a new development in the Grand Island meatpacking plant controversy that served as our case study. On August 31, 2010, the U.S. Equal Employment Opportunity Commission (E.E.O.C.) filed lawsuits in federal court against JBS Swift & Company's Grand Island, Nebraska, meatpacking plant as well as the company's plant in Greeley, Colorado. The suits allege that JBS Swift violated Title VII and engaged in a pattern of discrimination against its Somali Muslim employees based on their religion, race, and national origin. The E.E.O.C.'s complaint asserts that JBS Swift failed to reasonably accommodate the requests of the Muslim employees to take breaks from work that would permit them to pray according to the requirements of their faith and that the company retaliated against some Muslim employees by terminating their employment when they protested the lack of religious accommodation. In a press release, the E.E.O.C. reported that it had received 85 charges filed by employees of the Grand Island plant that claimed discrimination based on religion, race, color, or national origin stemming from the 2008 controversy (retrieved from http://www1.eeoc.gov//eeoc/newsroom/release/8-31-10.cfm). The lawsuit filed against JBS Swift was the result of investigations of these charges conducted by the E.E.O.C. and the Nebraska Equal Opportunity Commission. The lawsuit now is pending in the U.S. District Court in Omaha. How the court will rule in the case is still uncertain. The case is *EEOC v. JBS USA, LLC d/b/a JBS Swift & Company* (D. Neb.).

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