Accommodating Conscience

Alan Patten
Princeton University
apatten@princeton.edu

Paper for Delivery to Montreal Colloquium on Liberal Neutrality, May 2008

1. The Priority View

This paper explores a problem concerning the scope of one of the liberties that is cherished and defended by liberals – the liberty of conscience. Almost everyone agrees that the liberty of conscience includes the liberty of belief. A liberal state should not punish or penalize people for holding heterodox beliefs, nor is such a state permitted to prescribe for everyone what to believe about a certain topic. This view of liberty of conscience not only enjoys widespread support as a normative principle, but is also firmly entrenched in the American constitutional tradition. As Justice Robert Jackson of the Supreme Court famously put it in a 1943 decision: "If there is one fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein".[1]

An altogether more difficult question about the liberty of conscience is whether it also includes a liberty of action or practice. Is the liberty of conscience adequately protected if people enjoy the liberty to believe what they like, but are prevented by the state from fulfilling obligations imposed by their conscientious beliefs? At first glance, it is tempting to think that a satisfactory account of liberty of conscience must stop at liberty of belief. After all, people can hold all sorts of crazy religious, ethical and philosophical beliefs and take themselves to be subject to a bewildering variety of sometimes odd or disturbing obligations in virtue of those beliefs. Nobody thinks that the state ought – in the name of liberty of conscience –

to extend an exemption from its murder laws to cults that believe in infant sacrifice. On the other hand, famously, the First Amendment to the U.S. Constitution protects the free "exercise" of religion and not merely the freedom of religious belief. Moreover, there is a long tradition in American law of accommodating conscience – that is, of designing laws in such a way as to facilitate the fulfillment of obligations of conscience.[2] The Draft Acts of 1864 and of 1917, and the Selective Service Act of 1940, all extended exemptions from combat service to certain classes of conscientious objectors. The National Prohibition Act, passed in 1919 following the 18th Amendment to the Constitution, included an exemption for sacramental wine.

If we look to the American experience for some orientation, we find two broad approaches to the problem of identifying the scope of the liberty of conscience. Both avoid the extreme of saying that liberty of conscientious action should enjoy no protection at all and the opposite extreme of saying that it should enjoy the same absolute protection as liberty of belief. Under the first approach, the state is permitted to make laws that interfere with the fulfillment of obligations of conscience but only if those laws are supported by an appropriately strong justification. The liberty to fulfill one's obligations of conscience is regarded as a very great value and thus as something that properly takes priority over a range of other purposes that the state might otherwise quite legitimately pursue. Its priority is not absolute, however. Under some conditions, the state will have a very weighty and urgent reason for adopting a policy that conflicts with conscientious action, and it is permitted to do so. I call this approach the *priority view*.

A competing approach agrees with the priority view that the state should not have *carte-blanche* to make laws that interfere with the fulfillment of obligations of conscience. Under this second approach, however, the limit on the state is not expressed in terms of the quality or strength of the reasons that the state might have for adopting such a law. Rather, it is expressed in terms of two formal

conditions that a law interfering with conscientious action must satisfy: the neutrality condition and the non-discrimination condition. According to the neutrality condition, the state must not adopt a law impeding the fulfillment of an obligation of conscience if the intention in adopting the law is to disfavor the particular conscientious view in question. And, according to the non-discrimination condition, a law (or scheme of laws) that is impeding the fulfillment of a particular conscientious view must not, at the same, make a special accommodation for some other conscientious concern. Insofar as the state decides to accommodate some, it must accommodate all. Together these conditions provide some protection to the liberty of conscientious action, but not blanket protection. They do not protect such action from impediments that are incidental to (rather than the intended consequence of) a non-discriminatory law. I'll refer to this approach as the *formal view*.

The priority view is reflected in the Supreme Court's interpretation of the Free Exercise clause in a landmark 1963 case, *Sherbert v. Verner*.[3] Considering a South Carolina unemployment insurance law that denied benefits to people who were unavailable to work on Saturday for religious reasons, the Court introduced a "compelling state interests" test. The test forbade the government from making a law that has the effect of interfering with religious observances and practices unless the law is designed to promote a compelling state interest. Since the Court did not consider all valid reasons of public policy to be compelling state interests, the test, in effect, mandated government to protect the liberty of conscientious action under some conditions. Even though South Carolina had valid reasons of cost and efficiency for denying benefits to Sabbatarians, the decision required them to extend the benefits, thereby making it possible for Sabbatarians to fulfill their obligations of conscience without forgoing the benefits of the law.

However, in an equally historic 1990 decision, *Employment Division v. Smith*, the Court abandoned the compelling state interest test enshrined in *Sherbert* and

adopted a new doctrine that reflected what I am calling the formal approach.[4] *Smith* concerned an Oregon statute that placed a blanket prohibition on the consumption of peyote, a drug that happened to be used by members of the Native American Church of America for sacramental purposes. In a controversial 6-3 decision, a majority on the Court led by Justice Scalia sided with the Oregon government against the claims of religious users of peyote. In the majority's view, Oregon had crafted a "valid and neutral law of general applicability". That being the case, Smith and his co-religionists were not entitled to any kind of accommodation or protection. The references to "neutrality" and "general applicability" echo the formal approach. As subsequent decisions would make plain, the Court was, in effect, saying that so long as a law is adopted with a neutral intention and does not selectively accommodate some concerns but not others, there is no violation of the Free Exercise clause implied by the fact that that law incidentally interferes with the fulfillment of an obligation of conscience.[5]

As far as the Constitution is concerned, then, the pendulum has swung away from the priority view and towards the formal one. Given the institutional role of the Supreme Court in interpreting the Constitution, this may not be a bad thing. It might be argued that the Court is better equipped as an institution to verify whether the conditions of the formal approach are satisfied (neutrality and non-discrimination) than it is to assess the quality or strength of the state's reasons for adopting a given policy. Even if we accept this argument, however, we should still be interested in identifying the correct normative standard for thinking about the scope of liberty of conscience. We do not just care about identifying that standard for reasons of constitutional interpretation. The question whether a policy, law, or proposal for institutional design is just or unjust is not equivalent to the question whether it is constitutional or unconstitutional and remains of great importance even once the issue of constitutionality has been resolved. Moreover, not everyone will accept the

claim that the Court is ill-equipped to make judgments about the quality or strength of the state's reasons. Justice O'Connor, for one, in her concurrence in *Smith*, suggested that the courts had done a pretty good job of applying the compelling state interests test in cases since *Sherbert*.[6] Once this assumption about the appropriate institutional role of the Court is called into question, the normative question I am interested in may end up being relevant to the constitutional one after all.

Turning then to the normative question, we find that the formal view also has some prominent supporters amongst political philosophers. A particularly forceful statement of such an approach can be found, for instance, in Brian Barry's *Culture and Equality*.[7] Like the *Smith* court, Barry does not condone policies that single out religion for unfavorable treatment.[8] He also concedes that, under some circumstances, a "pragmatic" case can be made in favor of exemptions, which are one particularly controversial form of accommodation.[9] At the same time, and again like the *Smith* court, Barry rejects the view that there is any principled case to be made in favor of accommodations. In Barry's view, liberals who think that their principles require them, on occasion, to defer to certain conscientious commitments are making a mistake.

Barry's skepticism about accommodations stems, in part, from a concern with the costs that are involved. Those costs are often not trivial. To exempt conscientiously motivated parents from a legal obligation to ensure that their children receive an adequate education would be to impose a potentially enormous burden on those children, who may be denied some of the tools necessary for leading a worthwhile life. To exempt Sikhs from a law requiring that safety helmets be worn on construction sites would be to expose those persons to a heightened risk of serious head injury. And so on.

But Barry's deeper point is that there are no considerations within liberal theory that can plausibly be regarded as mandating accommodations of conscience. If the state decides not to build an accommodation into an otherwise valid, neutral, and generally applicable policy, there is no basis in liberal principles for anybody to mount a complaint. To think that there is such a complaint, Barry contends, is to adopt an impact-based conception of what the state owes to its citizens, one that requires the state to avoid policies that impact burdensomely on some of its citizens. This conception, Barry argues, is obviously indefensible.[10] *Every* law imposes a burden on at least some citizens. The law of rape imposes a burden of sorts on those who would like to engage in non-consensual sex. Progressive tax laws have a more burdensome impact on the wealthy than on the poor. And so on. The mere fact that a law is more burdensome on citizens with particular beliefs, preferences, or circumstances than it is on others cannot be sufficient for regarding that law as objectionable. What the liberal state does owe the various conscientious views of its citizens, in Barry's view, is neutrality. But neutrality, according to Barry, is a matter of equal treatment. It is not a matter of ensuring that nobody feels burdened by the law.[11]

My object in the present paper is to argue that we should prefer the priority view to the formal view. In light of the debate alluded to earlier, I will remain agnostic about whether the formal view is preferable as a matter of constitutional interpretation.[12] My claim is that it is inadequate as a normative standard and that we should prefer the priority view. The argument for this claim will unfold in three steps. First, I consider and reject a threshold objection suggesting that the priority view is superfluous, because the formal view already justifies all the accommodations of conscience that any liberal state would want to offer. Second, I isolate a class of cases in which the priority view but not the formal view would protect the liberty of conscientious action and then develop an argument for thinking that the priority

view's handling of these cases is normatively preferable. Finally, I consider and respond to the major objection that has been offered by legal theorists and political philosophers (including Barry) to the priority approach, which says, roughly speaking, that the priority view involves a form of unfairness.

The idea that neutrality rather than accommodation is the approach most deeply grounded in liberal principles is commonly voiced. As we have seen, the idea played an important role in *Smith*, and is echoed in Barry's discussion.[13] An implication of the main argument of this paper is that neutrality, understood in one particular way, plays a less pivotal role than is sometimes suggested in settling questions about the claims of conscience. If my account is correct, the fact that the state adopted some non-discriminatory policy with a neutral intention does not dispose of the question of whether the state has unjustifiably interfered with the liberty of conscience. In the concluding section, however, I briefly sketch an alternative way of understanding neutrality in which that idea reasserts a guiding role in thinking about the claims of conscience in a liberal democracy. The alternative I have in mind continues to think about neutrality in terms of intentions but incorporates into the criteria for identifying an intention as neutral the requirement that the policy be compatible with basic considerations of justice, including those identified by the priority view.

2. Is the Priority View Superfluous?

One possible reason for resisting the priority view is based on the thought that the formal approach already justifies all of the accommodation claims that any liberal state would want to grant. The priority view is superfluous, on this view, and, since it is apt to be misinterpreted and misapplied, it is better to do without it. The point of departure for this argument is the observation that the neutrality and non-discrimination conditions are each amenable to a variety of interpretations. Most

relevantly for purposes of the objection, they can be read expansively, so that they end up mandating a set of accommodations that overlaps significantly with the set that would be required by the priority view, rendering the latter superfluous.[14]

Since my claim is that the formal view is inadequate in comparison with the priority view, it would obviously be a problem if the two views ended up having much the same results (and even more of a problem if the formal view supported the accommodations that were justifiably supported by the priority view but not the ones that were unjustifiably supported by it). Examining both the non-discrimination and neutrality conditions in turn, however, I shall argue that the priority view is not superfluous. The various ways in which the two conditions might be interpreted expansively are either implausible or rely (more or less tacitly) on a prior acceptance of the priority view. Either way, it is important to consider whether the priority view should be accepted or not.

(a) The Non-Discrimination Condition

As we have seen, the non-discrimination condition forbids the state from making special allowances for some conscientious concerns and not for others. The main interpretive issue relating to this condition is how to identify instances in which the problematic special allowances are present. One area that needs clarification, for example, is whether a statute could count as discriminatory only in virtue of selective special allowances that *it* makes, or whether discrimination might also be present in virtue of a pattern of special allowances across several different statutes. In my vocabulary, the latter view is more “expansive”, since it implies that there are more ways for the state to violate the non-discrimination condition and thus more cases in which it will need to extend an accommodation to avoid such a violation.

On this question of interpretation, the more expansive reading does seem preferable to me. Whether legislators decide to express a policy with respect to some

kind of concern entirely within a single statute or to spread the expression of the policy out over several statutes is likely to depend on factors that, from a normative point of view, are relatively superficial. To make these factors crucial to judgments about the presence or absence of discrimination would be to attach entirely too much importance to them. It would be like prohibiting people from asking more than one question at a seminar but then allowing them to insert several distinct parts into their single question.

Once it is granted that the statutory scheme as a whole is the appropriate unit to consider in making judgments about discrimination, a further more difficult question of interpretation arises. It immediately becomes necessary to have criteria for deciding when two or more statutes are relevantly comparable. If communion wine is exempted from various laws relating to the sale and consumption of alcohol, but laws prohibiting the ingestion of peyote make no exemption for religious uses, are these statutes relevantly similar for the purposes of judging that peyote-users have been discriminated against? Or does the fact that a sip of communion wine is not intoxicating, while the whole point of the Native American Church's ritual ingestion of peyote is to become intoxicated, mean that they are relevantly different?[15]

It seems hard to resolve this issue without some sense of the underlying reason why the non-discrimination condition matters. Why, in general, would it be bad for the state to make special allowances for some concerns but not others? One kind of answer stresses the burdensome nature of not being able to fulfill one's concerns. These burdens explain why it is problematic for the state not to accommodate certain concerns. But this, in simplistic form, is the intuition underlying the priority view. If it is to be a clear alternative to that approach, the point of the non-discrimination condition must instead have to do with the comparative treatment of the different concerns: the fact that special allowances are made *for*

some but not others. This comparative dimension is better explained in terms of an idea of equal respect. On this view, making special allowances for some but not others is a violation of equal respect because it expresses, or relies on, a judgment that some concerns are less valuable than others. According to this account, when Oregon exempts sacramental wine but not religious uses of peyote, it is expressing, or relying on, a judgment that the religious beliefs and practices of the Native American Church are inferior to those of mainstream Christianity.

If this is the right account of why the non-discrimination condition matters, however, then overly expansive readings, which compare cases with significant dissimilarities, are problematic. The more dissimilarities that one allows between cases, the less plausible it is to conclude that the disparate treatment of the cases necessarily expresses, or relies on, a judgment that a particular concern is of inferior importance. As the peyote case illustrates, the points of dissimilarity allow for alternative explanations. From the facts that I have mentioned it would surely be over-hasty to conclude that the decision to exempt sacramental wine but not peyote from drug and alcohol legislation must indicate that the legislature regards the religious beliefs and practices of the Native American church as inferior to those of mainstream Christianity. There is a perfectly plausible alternative explanation for the variation in treatment, which points to a valid (if controversial) legislative concern to prohibit the intoxicating use of certain substances. One might regard this as a weak reason for adopting a policy that criminalizes a central aspect of a religious practice, but this would be to think in terms of the priority approach. Unless one's understanding of equal respect already incorporates prioritarian considerations, there is no reason to think that the state violates equal respect just because it acts on a weak or controversial reason.

A third area of dispute relates to what exactly should be considered a "concern" for the purposes of applying the condition. Is the principle violated if the

state makes special provisions in its statutes for handicaps, or allergies, or for other medical conditions, but not for burdens on particular beliefs and commitments (be they religious or secular)?[16] Or is the principle violated only if special allowances are made for some particular religious or secular beliefs and commitments and not others? Consider a police force that requires its officers to be clean-shaven and makes an exception for officers with a medical condition (folliculitis) that is aggravated by shaving. Would the fact that the force makes this particular special allowance mean that it would be discriminatory for it not to also make a special allowance for officers who take themselves to be under a religious obligation to wear a beard?

For reasons similar to those offered with respect to the previous case, I do not think that a highly expansive interpretation is particularly plausible here. When legislators make an accommodation for medical conditions but not for burdens of conscience this *may* reflect a judgment that the particular conscientious views in question are somehow inferior to mainstream views. But there are other possible explanations.[17] Many liberal egalitarians treat medical conditions as giving rise to different kinds of claims on the state than beliefs and preferences. The former are treated as handicaps, which anyone would wish to be rid of, while the latter are considered part of an individual's personality and as something for which the individual is properly held responsible. One does not need to be persuaded by this argument to recognize it as a view that might well have motivated legislators. One cannot conclude from the facts mentioned in the grooming example, for instance, that there is any disrespect towards people who wear beards for religious reasons. There are other possible explanations for the variation in treatment.[18]

A final dimension of the interpretive question concerns whether any actual benchmark of comparison must be present in the existing law. Some writers who focus on the non-discrimination condition suggest that the principle would be

violated, not merely if the *actual* statutes that are in force make special allowances for some concerns but not others, but also if, *counterfactually*, the state would have made a special allowance in its legislation for a particular concern if the group pressing for the accommodation had been a different one.[19] Take a case in which legislators and most members of the public are not well-informed about the group and are not disposed to take its concerns very seriously. The claim is that we do not need a benchmark in actual law to judge that this group is discriminated against. It just needs to be true that an accommodation would have been extended had the group that was impacted been a more mainstream one.

The problem with relying on the counterfactual test to make the non-discrimination condition more expansive, however, is that it will often be indeterminate and/or inconclusive. The test will be indeterminate when it gives conflicting answers depending on which "mainstream" group is selected as the benchmark of comparison. It will be inconclusive when, even once the relevant benchmark is identified, it is unclear whether the state would have accommodated the benchmark group. It is plausible to suppose that, for certain pieces of legislation, at least some mainstream groups would have sufficient political power that they could extract an accommodation from the political process. But it is also imaginable that legislators would resist giving any group an accommodation out of a concern to avoid a dangerous precedent or out of a principled sense that giving a powerful group an accommodation would be unfair to other groups. The problem with expanding the sweep of the non-discrimination condition through the counterfactual test, then, is that too much weight is given to factors that may be morally arbitrary (the selection of the relevant benchmark) and/or idiosyncratic (how officials would behave in response to the concerns of particular groups).[20]

One could try to avoid the second of these problems, at least, by changing the counterfactual question slightly. Instead of asking "how would legislators as

political actors (subject to all sorts of idiosyncratic influences) have responded to the concerns of a benchmark mainstream group?", one might ask instead "how would they as rational and reasonable agents concerned to do what is right have responded to those concerns?". But once one asks what it would be reasonable for them to do, and not just what they would have done, one immediately needs some standards of reasonableness. If one assumes that prioritarian considerations figure in those standards, this would beg the question I want to explore. If, instead, one makes more minimal assumptions about the standards of reasonableness, then it is not clear that this version of the test will be any more conclusive than the previous one.

To conclude this part of the discussion, then, I do not think that expansive readings of the non-discrimination condition provide a good reason for concluding that the priority view is superfluous. The expansive interpretations are either implausible, because they lose sight of the non-discrimination principle's underlying concern with equal respect or because they rely on a test that is indeterminate and/or inconclusive, or they rely on a tacit acceptance of the priority view and thus assume the very point that is claimed to be superfluous.

(b) The Neutrality Condition

The neutrality condition forbids legislators from adopting a policy *in order to* prevent people from acting on a particular conscientious belief. For instance, the condition forbids legislators from adopting an animal slaughter regulation in order to stop a particular religious group from carrying out its traditional practices, although it permits them to adopt policies that are intended to prevent cruelty to animals or to protect public health. Is it possible to interpret this condition so expansively that it would mandate many of the same accommodations as the priority approach? At first glance, it is hard to see how this could be. The neutrality condition does not seem to mandate any accommodations at all, let alone an expansive set of them. It simply

rules out certain policies (those done with the wrong kind of intention) altogether. To see how an expansive reading of the condition might be possible, but also why the possibility of such a reading would not be grounds for rejecting the priority view, we need to consider the vexing problem of how a proponent of the neutrality condition goes about identifying the intention behind a particular policy.

We can get a sense of the problem by considering for a moment how courts tend to make judgments of neutrality in cases involving religion.[21] They typically start, at least, by looking at the text of the law in question and asking whether it contains any religious classification. A law might, for instance, extend a benefit or disability to everyone who falls into the religiously defined class, or it might single out religion as such or make reference to concepts that are associated with religion (such as rituals or sacrifices). Laws or policy pronouncements that do contain language of this kind have been regarded as non-neutral.

This approach seems reasonable as far as it goes, but it is hardly likely to generate an expansive set of cases in which the state is found to have departed from neutrality. In fact, intuitively, the approach is likely to under-count departures from neutrality because of the problem of textual "gerrymandering". If the textual standard were to be adopted, legislators who wanted to favor or disfavor a particular religious view would soon learn that if they are careful to avoid certain words when they draft legislation there will be no basis for judging the policies they support to be non-neutral. For instance, legislators concerned to suppress the animal sacrifice practices of the Santeria religion might outlaw animal slaughter under a specific set of conditions that make no reference to Santeria or religion but that, in practice, would only ever be satisfied by a Santeria ritual.

This sort of law might fail a different test of neutral intentions, which examines the fit between the restrictions imposed by the law and the neutral purpose that it purports to advance. If the specific provisions of a law bear no

relation to the neutral purpose for which that law is said to have been adopted, it may be reasonable to conclude that legislators did not really have that purpose in mind but instead had a non-neutral intention. This is what the Supreme Course concluded in the Santeria case.[22] A "fit" test along these lines might catch a few more violations of the neutrality condition, but it is still likely to leave those violations undercounted. The gap between the restrictions that would be implied by a neutral purpose and those that are implied by a non-neutral one may not be as striking as they were in the Santeria case. And even if there is a strikingly imperfect fit between the neutral purpose and the specific provisions of the law, it need not follow that there must be some non-neutral purpose hovering in the background. There may in some cases be competing neutral considerations that can explain away the imperfect fit.

Courts have recognized these difficulties and have sometimes looked to the legislative history of a statute for further evidence of intention. It may be apparent from the political process that resulted in the legislation that an intention to impede a particular conscientious practice was a major factor. In its opinion in the Santeria case, for instance, a majority on the Court cited evidence not only of religious classifications and poor fit but also of legislative history to support its conclusion that ordinances impeding the practice of the Santeria religion were not neutral in intention. The account of the legislative history mentioned reports about expressions of hostility towards Santeria by city counselors and members of the public during the debates leading to the passage of the ordinances.

This approach is likely to broaden the set of cases that count as violating neutrality only very slightly. To be sure, there may be cases in which a dominant intention to disfavor a particular view is discernible. In these situations, almost everyone who supports the policy is motivated by a desire to disfavor the view, or has some instrumental reason for backing the policy (e.g. to respond to the

preferences of constituents, to maintain party unity) that involves deferring to those who are motivated by such a desire. But, in other cases, the diversity of motives found amongst supporters of the policy is such that there is no way in principle to identify *a* singular legislative motive.[23] One cannot say that the neutrality condition has been violated in these cases, because one cannot say that the policy was adopted with a non-neutral intention.

As long as the neutrality condition relies on a psychological conception of intention, it will fairly difficult (although not impossible, as the Santeria case illustrates) for the state to violate it. There does not seem to be any danger that the work done by the neutrality condition would have much, if any, overlap with the priority view.

The situation is somewhat different if one approaches the problem of identifying intentions in a non-psychological fashion. Rather than ask what policy-makers had in mind when they made a certain policy, one might ask instead ask what reason there is now for supporting that policy. On this approach, one can say that a policy is adopted with a neutral intention only if there exists a reasonably plausible rationale for adopting it that does not involve an aim of disfavoring a particular conscientious view.[24]

The key question about this approach to identifying intentions then becomes how to decide whether there is a reasonably plausible, neutral rationale. In particular, do we say that a neutral rationale fails the reasonable plausibility test if it does not satisfy the priority view – that is, if it advances a trivial or only moderately important reason for a policy that interferes with the fulfillment of an obligation of conscience? If the answer is no, then the neutrality condition still does not threaten to overlap much with the priority view. If the answer is yes, however, then the distinction between the formal and priority views does become blurred. Policies that do not satisfy the priority view could not be supported with reasonably plausible

neutral rationales and thus would also not satisfy the neutrality condition. Of course on this interpretation there is an overlap only because the priority view has been incorporated into the neutrality condition. This hardly shows the priority view to be superfluous.

For the purposes of the remainder of the paper, I will assume that intentions are identified using one of the less accommodationist approaches outlined above. That is, they are identified textually, or by the "fit" test, or psychologically, or by rational reconstruction but without any assumption that a failure to follow the priority view would automatically mean a departure from neutrality. To assume the more accommodationist approach would be to beg the question to which I now turn.

3. A Defense of the Priority View

Nothing I've said so far is intended as a criticism of the formal view or as a justification of the priority view. The point so far is that the formal view provides less protection to the freedom of conscientious action than does the priority view. For all that has been said, it may be that less protection is normatively preferable to more.

The gap between the two views arises in cases where the state adopts a non-discriminatory law that impedes the fulfillment of an obligation of conscience for a neutral but trivial or only moderately important reason. The formal view would not protect liberty of conscience in this kind of case. The fact that the non-discrimination and neutrality conditions are satisfied means that the law is permissible. The priority view, by contrast, would protect liberty of conscience: protecting obligations of conscience takes precedence over advancing trivial or only moderately important reasons.

Although I will not argue it in detail here, it seems plausible to think that both *Sherbert* and *Smith* involve cases that fall into this gap. It is true, as the majority opinion notes, and as proponents of the formal view emphasize, that South Carolina

law did extend an accommodation to workers who objected on religious grounds to Sunday work.[25] The South Carolina law at issue in Sherbert violated the non-discrimination condition and thus Sabbatarians could reasonably demand an accommodation even under the formal approach. But imagine that South Carolina law did not accommodate Sunday worshippers. The refusal to accommodate Sabbatarians (or for that matter Sunday worshippers) arguably would be an example of a case falling into the gap between the formal and priority views. The design of the unemployment insurance scheme in such a way as to refuse any religious (or conscience-based) accommodation might well have been the product of neutral intentions. Legislators may have reasoned that such a design would be simplest to administer and would maximize the benefits payable to those who become unemployed for completely involuntary reasons by minimizing the number of people who are entitled to make a claim on the system. As a neutral and non-discriminatory policy, such a law would have satisfied the formal view and no accommodation would be required. But if one regards administrative efficiency and maximizing benefits as goals of only moderate importance, then the priority view would not be satisfied and an accommodation would be required.

Things are even more straight-forward in the peyote case. Here the reasons for a blanket prohibition involved concerns about drug abuse and about the government's capacity to control the sale of peyote to users beyond those who have a reason of conscience for consuming it. As the dissenting judges in *Smith* noted, however, other states had extended an exemption for religious uses of peyote in their relevant statutes, without grave consequences under these headings. It is possible that government has a strong fairness-based reason to avoid exemptions as such (I consider this later in the paper) but setting this aside for the moment it seems plausible to think that any reasons the government might have to refuse to accommodate religious users of peyote would be trivial or only moderately

important. Again this seems to be an example of a case falling into the gap between the formal and priority views.

Having some sense of where the two views diverge, let us now turn to the question of justification. Which of the two views is normatively preferable? This section of the paper reviews some fairly standard reasons for thinking that the priority view is the preferable one. Suppose that we call "fundamental" an interest that is urgent and weighty enough that it ought to be given priority over trivial and moderately important considerations. I proceed by distinguishing and briefly describing three features of conscientious commitments that support the contention that people have a fundamental interest in being able to fulfill such commitments. The first feature is the *non-negotiable* character of conscientious commitments; the second is the fact that they express *moral agency*; and the third is their *recognitional salience*. Each of the features suggests that commitments of conscience matter in a special way for those who have them and that they ought, accordingly, to be extended a privileged status in the state's reasoning about law and policy. Many conscientious commitments share all three features, although others may only have one or two of them. Sharing more of the features means that, at the level of normative principle, a commitment has a stronger claim on special status.[26]

Non-Negotiable Character. As Rawls emphasizes in his various discussions of the basic liberties and their priority, conscientious beliefs often present themselves as serious and non-negotiable obligations.[27] Part of what it means to hold such beliefs is to take the obligations that they involve as having strict precedence over one's other ends and commitments. If someone thought that his obligations could be traded off against money and convenience, for instance, then that would be a sign that he did not really hold the beliefs that give rise to those obligations.

This non-negotiable character of conscientious commitments points to several reasons for thinking that people have a fundamental interest in being able to fulfill their obligations of conscience. First, it is likely to be psychologically painful for people to be put in a position where they are unable to honor their obligations of conscience. They may agonize over their situation and be left with a lasting sense of failure or guilt.[28] Second, the position they find themselves in may strain their commitment to the institutions to which they are subject, making it impossible for them to feel fully "at home" under those institutions and making it harder for others to count on their willing support for those institutions.[29] Third, people may find that their obligations of conscience are socially enforced by members of their community of conscience, making them vulnerable to a range of different disadvantages if they violate those obligations.[30] And, fourth, the strict precedence attached to fulfilling the obligations associated with certain beliefs suggests that those who hold those beliefs cannot reasonably be expected to accept a trivial or only moderately important rationale as justifying a law that prevents them from fulfilling those obligations. A rationale for a restrictive policy that appealed to a goal or value of only moderate importance would rely on an ordering of values that people holding the restricted commitment would reject and, for a range of commitments, reasonably so. In this sense, laws that conflict with conscientious conduct and that are backed up by only a trivial or moderately important rationale fail one of the standard liberal tests of legitimacy.

Moral Agency. Part of the dignity of human life lies in developing one's own ethical, religious, and philosophical compass, and then charting one's own course according to that compass.[31] When the state punishes people for holding certain beliefs, or tries to prescribe a particular belief for everyone, it denies the first aspect of this ideal of moral agency. And when it impedes the fulfillment of obligations of

conscience it undermines the second, making it costly or impossible for people with a given set of beliefs to guide themselves by their own ethical, philosophical and religious standards. This latter impediment undermines moral agency even when its imposition is incidental to the pursuit of some different and otherwise valid goal. When Oregon prohibited peyote, it had a valid (if controversial) rationale that did not target the Native American Church. But although the Oregon law did not target Smith and his co-religionists, it still made it difficult for them to live a life according to their own ethical standards. Religious users of peyote could reasonably complain that they had been denied the liberty to follow a life according to their own ethical compass.

Recognitional Salience. A commitment is recognitionally salient if it is implicated in important social patterns of mutual recognition. For better or worse, religion is one of the dimensions along which people tend to recognize and classify one another. Individuals are regarded by their fellow citizens *as* members of particular religious groups (or as atheists, etc) and may be assumed to have certain traits and dispositions that stereotypically go with the group in which they are classified. Even though these assumptions are often invidious, they can make individuals dependent, in part, on the flourishing and respectful treatment of the group to which they are assigned. It can be disadvantageous in various ways to be recognized as a member of a group that is accorded a low social status.

The state plays a role in this process, in part, by encouraging or discouraging various patterns of classification and recognition, but also through its treatment of particular groups. When a group's beliefs are targeted by the state for unfavorable treatment this is likely to reinforce a prevailing sense that members of the group have an irrational tendency to cling to worthless beliefs and practices. Moreover, arguably, this social message is not only conveyed by policies that deliberately target

a particular group's beliefs. Policies that have the effect of interfering with the fulfillment of a group's beliefs and that are adopted for a trivial or only moderately important reason also reinforce a negative perception of the group. Such policies imply a public ranking that places trivial or moderately important goals above the serious commitments and concerns of members of the affected group. The suggestion is that those commitments and concerns are not, in fact, of much value or that the people who hold them are not to be regarded as full members of the political community.

There are other features of conscientious commitments that might also be invoked in explaining why people have a fundamental interest in being able to act on such commitments. For instance, following Mill, conscientious conduct might be regarded as an "experiment in living" which has value to other people as an example. Faced with examples of successfully followed alternative ways of life, individuals are enabled to think critically and reflectively about their own ends. These other arguments help to explain why there ought to be a general presumption in favor of liberty of conduct, but they do not explain why the liberty of *conscientious* conduct ought to be regarded as something especially important. The three features mentioned in the text above, by contrast, do pick out something special (although not necessarily *uniquely* special) about conscience. Looking ahead, they help therefore with the fairness objection to be considered in the next section.

4. Is the Priority View Unfair?

To summarize the argument so far, I have been making two main points. First, that there is a gap between the formal and priority views. The formal view does not condemn non-discriminatory laws that impede the fulfillment of conscientious obligations for reasons that are neutral, but trivial or only moderately important,

whereas the priority view does condemn such laws. Second, that there are good reasons to regard the priority view as normatively superior to the formal view. Individuals have a fundamental interest in being able to fulfill their obligations of conscience and this interest suggests that someone denied the possibility of fulfilling their obligations for reasons that are trivial or only moderately important would have a legitimate grievance.

Assuming that they have been persuaded by these two points, at this point a proponent of the formal view might change tack. They might concede that the state should not interfere with obligations of conscience for a reason that is trivial or only moderately important, but argue that the state always or almost always has a strong reason for refusing to extend an accommodation. On this view, the priority view is not so much wrong as irrelevant. Contrary to my earlier suggestion that the priority view would seem to justify accommodations in the *Sherbert* and *Smith* cases, the argument now is that this is not so. The state had strong reasons in these cases, and in all others, for refusing to extend an accommodation.

Why might the state have a standing strong reason to resist calls for accommodations other than those demanded by the formal view? An important theme in the legal and philosophical literature critical of accommodations is that accommodations are unfair. If this claim were indeed true, then it would seem to explain why the state might have such a reason. In this closing part of the paper, I want to consider two versions of the unfairness claim. The first contends that accommodations of conscience are unfair to those who are not extended an accommodation but who have a non-conscientious objection (e.g. an objection based on preference) to a particular law. The second claims that accommodations of conscience are unfair to those who are expected to absorb the costs of providing them. In response to both objections, I acknowledge that fairness considerations

may narrow the range of accommodations that would be justified by the priority view, but they hardly indicate that that view would be irrelevant.

(a) Unfair Privileging of Conscience?

The first version of the unfairness objection charges, then, that it is unfair to accommodate people with a conscientious objection to a law but not those with some other form of objection. It would be unfair, for instance, to accommodate those with a religious reason for wanting to consume peyote but not those who would like to consume it for recreational purposes. It would be unfair to accommodate Sunday-worshippers but not Sunday-football-fans. And so on.

I offer two responses to this form of the challenge. First, it is important to notice that not *all* forms of accommodation give rise to the unfairness being alleged. The objection really only applies against one particular form that accommodations can take, namely exemptions. An accommodation, in my terminology, is any kind of measure or arrangement that is designed to facilitate the fulfillment of conscientious obligations and commitments, and which is judged by policy-makers to carry with it at least some cost. An exemption, by contrast, involves applying different rules to different people depending on the content and character of their beliefs. Although the terms are often used interchangeably, exemptions are really a sub-class of accommodations. This can be seen by considering a proposal made by Kent Greenawalt's concerning conscientious objection. Rather than give an exemption from military service to conscientious objectors, Greenawalt suggests a scheme that offers everyone the choice between a term of military service and a longer term of civilian service. Since part of the point of Greenawalt's preferred policy is to allow conscientious objectors to fulfill their obligations of conscience, the policy counts as an accommodation in my vocabulary even though it does not involve an exemption.

The unfairness being alleged only arises with exemptions. Only with exemptions does one get a more burdensome set of rules applying to some persons and a less burdensome set to others just because of a difference of beliefs. Other forms of accommodation work with a uniform application of some single set of rules. An accommodation might just involve giving everyone the liberty to do the things that are valued by some people for conscientious reasons – e.g. allowing everyone to use peyote. Or, more cleverly, as in Greenawalt's proposal, it might involve devising a single set of rules applying to everyone that allows people to opt in or out of a constraint but imposes a cost for opting out that discourages people from choosing that option for frivolous reasons.

This first response is consistent, then, with conceding the unfairness of exemptions. The point is that, even conceding this point, there is still reason to suppose that the priority view would mandate a meaningful set of accommodations. A second, stronger response maintains that exemptions themselves are not necessarily unfair. I argued earlier that commitments of conscience have one or more of a variety of features that make it appropriate to give them a privileged status in the state's reasoning about law and policy. When people are prevented from doing something that they would like to do for some reason other than a reason of conscience, these features may not be present. Compare, for instance, the person who feels obliged not to work on Sunday for religious reasons with someone who prefers not to work because they enjoy watching football. Although we may end up thinking that the best policy is to give everyone a day of rest of their choosing, we can recognize that the two individuals have different sorts of interests at stake. The desire to watch football does not typically present itself as non-negotiable moral obligation, does not express a person's moral agency, and does not have recognitional salience. It is not clear, in short, that it is always unfair to apply a

different set of rules to different people in virtue of the character and content of their respective beliefs.

It is true that people may have non-conscientious commitments that do have one or other of the features associated with conscientious commitments. They may feel non-negotiable obligations and attachments to their family members. They may have a strong cultural attachment, which has recognitional salience and which may present itself as non-negotiable. But these commitments, on my view, *do* correspond with significant, perhaps fundamental interests, and thus should count as strong candidates for exemptions and other kinds of accommodations.[32] My claim is that commitments of conscience ought to enjoy a special status; it is not that they ought to enjoy a *uniquely* special status.

(b) Unfair Costs?

Turning to the second objection, the claim here is that accommodations are unfair to those who are expected to absorb the costs of providing them. The objection is not to the application of different rules to different people depending on their beliefs. If the objection is correct, it would have force even against an accommodation that was offered through a uniform set of rules. Suppose that the main reason for requiring all motorcycle-riders to wear a helmet is to reduce the medical costs absorbed by the rest of society arising from accidents. The argument against accommodations (e.g. for Sikhs), on this view, would be that helmet-less riders are failing to do their fair share to reduce these costs. This objection would have force – if indeed it does – whether or not the accommodation takes the form of an exemption.

Brian Barry makes an objection of this kind in a passage of his book *Culture and Equality*. Exemption demands, he argues, are made by people who think that the burdensome impact of a law on their ability to act on their beliefs and preferences entitles them to some form of special or different treatment. This form of argument

parallels the claim made by people with “expensive tastes” for additional income so that they can achieve the same level of preference-satisfaction as those with cheaper tastes. Barry thinks it is absurd to say that justice requires subsidizing expensive tastes. When someone makes this claim, they are really just demanding more than their fair share of resources. If the claim is absurd for the general case of expensive tastes, then it must also be absurd for the particular case of people with a preference involving obligations of conscience.[33]

It is a mistake, however, to suppose that all accommodation claims, or even all exemption claims, involve a demand for more than a fair share of resources or less than a fair share of social burdens. It is true that some accommodation claims do involve unfairness, and arguably these claims should not be granted by the priority view. People should be held responsible for their conscientious convictions (unless they regard them as afflictions) and should not expect others to make do with less than what fairness guarantees them so that they can fulfill the obligations they impose on themselves. When some more-than-minimal form of unfairness is involved, then the state does not just have a trivial or moderately important reason for refusing an accommodation. It has a strong reason.[34]

It is also true that even the accommodations that are mandated by the priority view are meant to avert a certain kind of burdensome impact. But policies designed to avert such an impact do not necessarily involve an invasion of others’ fair shares or a permission for conscientiously motivated people to shirk their social responsibilities.[35] Sometimes people who claim accommodations do not want more resources than others have and they do not ask to be excused from obligations that others are subject to. Instead what they want is for a particular policy to be formatted in such a way that they can enjoy the rights and benefits that it provides, and shoulder their fair share of the burdens, without compromising their convictions of conscience. When religious minorities or vegetarians request that a public school

cafeteria accommodate their religiously or ethically imposed dietary restrictions, for instance, they are not asking for any right or benefit that others are not already enjoying. They just want to be able to enjoy the same public benefits as others take for granted without having to violate an obligation of conscience.

Although I will not try to spell out the argument here, I believe that accommodation claims have this structure in a number of prominent areas in which they have been debated. For instance, minorities who ask to be excused from dress-codes adopted by the military or police do not necessarily object to doing their bit to give their force a uniform appearance. They would be satisfied if the uniform that all are required to wear was one that did not conflict with their religious obligations. Likewise, one can imagine ways of introducing accommodations into unemployment insurance schemes that did not impose unfair costs on those who seek no accommodation. People who have "cheap tastes" regarding their availability for work, and who are available any day of the week, might, for instance, be charged a slightly lower premium (or be paid a slightly higher benefit in the event they become unemployed) than the many people who prefer to designate a day that they should not be expected to work. This arrangement would be considerably more accommodating of conscientious beliefs than would be a scheme that denied all unemployment benefits to people who refuse to work on a particular day for reasons of conscience.[36]

In other kinds of accommodation cases, people holding certain views want some relief from a burdensome law, but the cost of providing that relief does not translate into unfair burdens for their fellow citizens. Instead the costs, such as they are, are borne by those who hold the views themselves (who face risks to their health if they are excused from drug or mandatory helmet laws and may also be expected to pay higher insurance premiums), or in some cases by their own children (if one accepts that fairness permits parents some latitude to educate their children

in ways that fit with their own beliefs but that may leave the children ill-prepared for certain future challenges), or by animals (who are subjected to painful forms of slaughter). My point is not that accommodations in all these cases are warranted. Rather, it is to say that these cases do not involve a request by anybody for more than their fair share of society's resources or to be excused from taking on their fair share of society's responsibilities. If accommodations should be refused in some or all of these cases, it is not because they unfairly impose costs on others.

To conclude, then, I do not think that fairness considerations consign the priority view to irrelevancy. Some accommodation claims may indeed give rise to a justifiable complaint of unfairness, and it is plausible to think that the state has a strong reason not to grant these claims. The protection owed to the liberty of conscientious action does not extend so far as to license unfairness. But this fairness constraint does not rule out all accommodations beyond those recognized by the formal view. As I have argued, there are a range of accommodation claims that would be supported by the priority view but not the formal view and that do not give rise to any plausible complaint of unfairness.

5. Neutrality Revisited

I have expressed my main findings with respect to neutrality in mostly negative terms. Understood in a particular way, I have argued, neutrality plays a less pivotal role than is sometimes suggested in settling disputes over the claims of conscience. The appeal to neutrality does not dispose of the question whether a given interference with the liberty of conscience is justifiable or not. Framing the argument in this way has been a useful means of isolating the question that I have been most interested in, namely whether the priority view should be part of the framework that guides our deliberations about accommodations of conscience.

Setting this strategic reason for contrasting the priority view with neutrality to one side, however, it is worth noting that the central conclusion of the paper can also be expressed in the form of a positive claim about neutrality. As I argued in sec. 2(b) above, there is more than one view that a proponent of neutrality might hold on how to identify the intentions behind a given policy. One kind of approach focuses on the actual and historical mental-states of the various actors involved in making and authorizing the policy. A different kind of approach sets aside these psychological considerations and instead asks whether it is possible to reconstruct a reasonably plausible rationale for pursuing the policy that does not involve an aim of favoring or disfavoring a particular view. Within this second kind of approach there is a further question about how high or low to set the bar of reasonable plausibility. Is it enough to clear this bar that there be some recognizable, neutral goal or value that is advanced by the policy? Or must a rationale also satisfy important considerations of justice before it can be considered reasonably plausible?

There are good theoretical reasons for opting for the rational-reconstructive over the psychological approach, and for opting for a higher bar over a lower one within the rational-reconstructive approach.[37] One of the theoretical payoffs of employing the concept of neutrality is that it permits one to evaluate certain kinds of complaints of injustice in a purely procedural way. When people complain that the forms of life that they value are not doing as well as they would wish, the concept of neutrality provides a framework for replying. If the basic institutions of society can be regarded as neutral, then the response is that the disappointing outcome may be regrettable but it is not unjust. In virtue of their neutrality, basic institutions are not biased against the forms of life experiencing the lack of success. The lack of success is not due to a systematic bias by public institutions but to other factors, such as the choices and preferences of the members of society. Neutral institutions, on this view, establish what Rawls terms “pure procedural justice”.

Neutrality can play this theoretical role, however, only if it is understood in the right way. If intentions were to be identified psychologically, then neutrality would not, in general, be sufficient to establish pure procedural justice. Decision-makers can have all sorts of idiosyncratic, uninformed, and misguided aims in mind that would count as neutral on the psychological approach. The fact that laws and policies were made with such intentions would rightly not be regarded as sufficient for persuading people whose way of life fares poorly under those laws and policies that they have no complaint of justice. The same is true under the rational-reconstructive approach when too low a bar is set for reasonable plausibility. The lower the standard of plausibility for identifying a policy as neutral the less plausible it is to regard neutral arrangements as having the procedural power to determine just outcomes. Only when laws and policies are justified by a reasonably plausible, neutral rationale is it reasonable to expect people whose way of life is faring poorly to accept that public institutions have done all that they can and are not arbitrarily biased against them.

So another and better way to put my conclusion is as a claim about what neutral laws and policies with respect to conscientious practices would look like. I have defended the priority view as a requirement of justice. There are important reasons for deferring to the claims of conscience when there is no strong reason not to do so. Policies that ignore these reasons should not be regarded as sufficiently plausible to register as supported by a neutral intention. Only when the priority view is satisfied can a law or policy be regarded as neutral.

In the end, then, I agree with part of Brian Barry's position on accommodations, though I reject another part of it. Barry emphasizes the procedural power of neutrality to establish justice, and I agree that this is a suitable theoretical role to assign neutrality. I also agree that neutrality can be identified with what Barry simply terms "fairness" rather than with equal impact.[38] My disagreement with Barry

concerns the content of fairness. If neutrality is to have the power to confer procedural justice, it is important to get this content right. The argument of this paper has been that an adequate account of justice must incorporate the insights of the priority view. Far from serving as an alternative to accommodations of conscience, then, neutrality sometimes requires the state to extend such accommodations.

Endnotes

[1] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[2] For an excellent overview of contemporary controversies concerning religious accommodations, with some reference to accommodations of non-religious forms of conscience, see Kent Greenawalt, *Religion and the Constitution, Vol. 1: Free Exercise and Fairness* (Princeton, 2006). Two other valuable discussions are: Nancy Rosenblum (ed.) *Obligations of Citizenship and Demands of Faith: Religious Accommodations in Pluralist Democracies* (Princeton, 2000); and Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard, 2007). As I explain in section 4(a) of the main text, unlike much of the literature on the topic, I distinguish between accommodations and exemptions.

[3] 374 U.S. 398.

[4] *Employment Division, Department of Human Resources v. Smith*, 494 U.S. 872 (1990).

[5] See especially *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

[6] "The Court's parade of horribles…not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests."

[7] Brian Barry, *Culture and Equality* (Harvard: 2001) Ch. 2.

[8] Barry, p. 171.

[9] See note 2 and section 4(a) in the text on the relationship between exemptions and accommodations.

[10] Barry, p. 34.

[11] Barry, pp. 34-5.

[12] Constitutional doctrine is the usual frame for discussions of the accommodation problem, although a notable exception is Jeremy Waldron, "One Law For All? The Logic of Cultural Accommodation", 59 *Washington and Lee Review* 3 (2002). For the constitutional framing, see, e.g., the volumes by Greenawalt, Eisgruber and Sager, and Rosenblum, and the just-released book by Martha Nussbaum, *Liberty of Conscience* (Basic Books, 2008). Even Barry suggests at one point that his real objection is to the role of the courts in granting exemptions (see his comments on *Smith* at pp. 171-2). Chapter 2 of his book argues, however, that there is no liberal objection to neutral laws that burden religion, and this, presumably, is a point that would hold true (if it is true) in parliamentary debates and informal political conversations and not just in the judicial context.

[13] Brian Barry, ch. 2. Note though that Barry's understanding of neutrality may depart from the intention-based account mentioned in the text above. Barry seems to equate neutrality with equal treatment and to understand the latter, in turn, as consisting of the uniform application of a single law. Since no mention is made of the intention behind the law, this would seem to imply that a policy that explicitly and intentionally targets (or favors) a particular religious view would count as neutral on Barry's account so

long as it is uniformly applied to all persons. Because this conception of neutrality strikes me as wildly implausible, and indeed is inconsistent with some of Barry's own examples (e.g. he says that the English law of blasphemy is "manifestly indefensible on the most elementary conception of equal treatment") I shall continue working with the intentions-based conception of neutrality.

[14] Eisgruber and Sager, chs. 2-3, develop an expansive reading of the non-discrimination condition, which, if correct, would overlap significantly in its implications with the priority view.

[15] Eisgruber and Sager, pp. 92-3, 105-6; Waldron, p. 8; Greenawalt, p. 70. Amy Gutmann does not mention this difference when she suggests that it was discriminatory for Oregon to have adopted an exemption for communion wine but not for religious uses of peyote. See *Identity in Democracy* (Princeton, 2003), pp. 176-7.

[16] Eisgruber and Sager rely heavily at times in their book on the assumption that it would be discriminatory for the state to extend accommodations for medical conditions but not conscientious commitments. See, e.g., the discussion of the Newark police-force's grooming requirement (pp. 91, 96-7), Illinois' restrictions on headwear on the basketball court (91, 96-7), and *Thomas v. Review Board of the Indiana Employment Security Division* 450 U.S. 707 (1981) (98-9).

[17] The fact that the state has extended an accommodation for medical conditions does count against the argument that extending *any* kind of accommodation would compromise unacceptably the state's pursuit of its legitimate interests. Under the priority view, such a fact would be relevant to assessing whether the state has a strong reason for refusing an accommodation or only a trivial or moderately important reason.

[18] Eisgruber and Sager consider a related objection (at pp. 100-04) and reply that it is an error to think that their theory "requires courts or legislatures to make precise comparisons of the interests that its citizens have" (101). Instead, what is required is for officials to avoid "disparities in treatment" that "suggest a failure of equal regard" (102). As the authors explain earlier in the book, a failure of equal regard occurs when disparities in treatment "devalue some citizens' interests or commitments *on the basis of their spiritual foundations*" (p. 89; my italics). My argument, however, is not that Eisgruber and Sager's theory requires precise comparisons. Rather, the argument is that relevant differences between cases make it difficult to be confident that disparities in treatment do reflect the devaluation of some commitments on the basis of their spiritual foundations; other plausible interpretations are possible.

[19] Eisgruber and Sager make this argument at pp. 92 and 106. See also: Michael McConnell, "Free Exercise Revisionism and the *Smith* Decision", 57 *University of Chicago Law Review* 1109 (1990), p. 1148; Amy Gutmann, "Religion and State in the United States: A Defense of Two-Way Protection" , in Nancy Rosenblum (ed.) *Obligations of Citizenship and Demands of Faith: Religious Accommodations in Pluralist Democracies* (Princeton, 2000) 127-64, at 151-2; Anthony Appiah, *The Ethics of Identity* (Princeton, 2005) also discusses a counter-factual test (pp. 91, 96-8), although his discussion is, on balance, fairly skeptical.

[20] Appiah, pp. 97-8, suggests similar concerns, illustrating them through a discussion of *Thomas v. Review Board* (see n. 16 above).

[21] An instructive U.S. Supreme Court case that engages with the problem of identifying intentions is *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993) (referred to in the text as the Santeria case). An earlier discussion that deals helpfully with the problem is Douglas Laycock, "Formal, Substantive, and Disaggregated Neutrality Toward Religion", *Depaul Law Review* (1990) 993-1018.

[22] See previous note.

[23] This point is widely made. See, e.g., Scalia's concurrence in *Hialeah*. See also: Jeremy Waldron, "Legislation and Moral Neutrality", Robert Goodin and Andrew Reeve (eds) *Liberal Neutrality* (London: Routledge, 1989); George Sher, *Beyond Neutrality* (Cambridge, 1997) 23-4; Appiah, p. 89.

[24] This suggestion is adapted from a proposal made by Sher, pp. 24-7.

[25] This is a central point in Eisgruber and Sager's analysis of *Sherbert*, at pp. 14-5, 40.

[26] The "at the level of normative principle" rider is important here. Drafters of constitutions and legislation should probably resist case-by-case determination of various commitments' claims to special status and should instead award privileged status to a general class of commitments. The normative criteria discussed in the text are relevant to delineating the boundaries of such a general class (which is likely to

be both over- and under-inclusive compared with case-by-case determination), as are a variety of other considerations, such as the interest in distinguishing sincere from insincere commitments.

[27] In various places, Rawls sketches an account of the liberty of conscience to illustrate some more general points about the basis and special priority of the basic liberties. Rawls emphasizes the non-negotiable character of a person's commitments of conscience at: *A Theory of Justice*, Revised Edition (Harvard, 1999), p. 182; *Political Liberalism*, Expanded Edition, pp. 311-2; *Justice as Fairness* (Harvard, 2001), p. 105. Non-negotiability is also stressed by Josh Cohen in a helpful reconstruction of Rawls's case for liberty of conscience: "For a Democratic Society", in Samuel Freeman (ed.) *The Cambridge Companion to Rawls*, pp. 104-6. William Galston also emphasizes the "compulsory power" of claims of conscience, in "Expressive Liberty and Constitutional Democracy: The Case of Freedom of Conscience", in *The Practice of Liberal Pluralism* (Cambridge, 2005) ch. 4.

[28] Rawls, *Political Liberalism*, p. 311, says that they "may suffer accordingly". Andrew Koppelman criticizes this account of the importance of conscience in "Is it Fair to Give Religion Special Treatment?", *University of Illinois Law Review* 571 (2006), at pp. 584-7. He treats a conscientious objection as a particularly intense dislike, but note that I am drawing attention here to a qualitative feature of conscientious feeling (that to violate conscience is to feel that one has done something wrong) and not to a claim about the intensity of such feeling. Koppelman also objects that conscience (like intense preferences) can "generate exorbitant demands" that are "unworthy and dangerous" (585). When conscience does make such demands, there are strong reasons for refusing them. But this does not touch the cases that I am interested in, which are cases in which there are only trivial or moderately important reasons for refusing to accommodate conscience.

[29] Rawls mentions the "strains of commitment" in connection with the priority of the basic liberties in *A Theory of Justice*, p. 475. See also the discussion in *Political Liberalism* of the "first moral power", pp. 315-20.

[30] For this point, see Waldron, "One Law for All?", p. 24.

[31] A version of the point made here is developed more fully in Nussbaum, *Liberty of Conscience*, pp. 168-73. Considering whether there is something "special" about religious and quasi-religious commitments, Nussbaum argues that they arise in the course of a person's search for ultimate meaning and value. The capability of searching for ultimate meaning, she claims, is worthy of political respect, even though, of course, we disagree about whether there is any ultimate meaning to be found or what it might be like (p. 169). A similar suggestion is made in Andrew Koppelman, pp. 588-9, and developed throughout part III. See also Gutmann, *Identity in Democracy*, pp. 168-78.

[32] A standard objection (frequently made in the legal literature) against religious exemptions is that they introduce an objectionable inequality in the treatment of comparable religious and non-religious claims. See e.g.: William P. Marshall, "In Defense of *Smith* and Free Exercise Revisionism", *University of Chicago Law Review*, 58 (1991), pp. 319-23; Christopher Eisgruber and Lawrence Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct" *University of Chicago Law Review*, 61:4 (1994) pp. 1254-70. Koppelmann; Nussbaum. Like many writers on this topic, I try to avoid this objection by treating religious and *comparable* non-religious claims even-handedly, grouping them together into the more general category of claims of conscience. For this approach, see, e.g., Galston, pp. 66-9; Rogers Smith, "`Equal' Treatment? A Liberal Separationist View," in *Equal Treatment of Religion in a Pluralistic Society*, Stephen V. Monsma and J. Christopher Soper (eds.) (Grand Rapids, MI: Eerdman's 1998), p. 193 (cited in Galston, p. 68); and Amy Gutmann, *Identity in Democracy*, pp. 168-78.

[33] Barry, pp. 34-5. Eisgruber and Sager, "The Vulnerability of Conscience", also make a version of this challenge at pp. 1256-7. And Seana Shiffrin argues that many accommodations conflict with the "luck-egalitarian" principle of "choice-sensitivity", which requires individuals to bear the costs of the choices that they make in the context of a luck-insensitive distributive scheme. She takes this to be a problem with the "choice-sensitivity" principle, however, not an objection to accommodations. See Seana Valentine Shiffrin, "Egalitarianism, Choice-Sensitivity, and Accommodation", in R. Jay Wallace, Samuel Scheffler, and Michael Smith, (eds.), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, Oxford University Press, 2004.

[34] This insistence on a fairness constraint can help proponents of the priority view to respond to an important objection not considered in the text. The objection is that the priority view would require the state to make exemptions for conscientiously motivated people from a host of run-in-the-mill government policies which, on some views at least, would count as only moderately important. These might include: zoning regulations, environmental protections, labor standards, etc. Religious groups have sometimes claimed exemptions from these policies on the grounds that their activities and plans (e.g. to build an

office-tower in a neighborhood zoned residential) are religiously motivated. On my view, by contrast, the state would have a strong fairness-based reason for refusing to accommodate in these kinds of cases. The cases all involve demands to be relieved from a requirement to shoulder a fair share of the burdens of some scheme of social cooperation. For the objection, see, e.g., Eisgruber and Sager, pp. 41-2, 83-5. The context of their discussion is a critique of the "compelling state interest" test enshrined in *Sherbert*. Admittedly, a difficult case for my analysis is a restriction on hunting or fishing adopted for the sake of conservation. I have the intuition that priority in allocating scarce rights to hunt or fish ought to be given to persons (e.g. members of Native groups) who have a strong religious or cultural reason for engaging in the activity. What is needed, I think, is some fuller account of fairness in the allocation of the right to do something that a scheme of conservation can permit some of but not too much. The example is from Waldron, p. 29. Waldron's article contains many valuable insights about fairness and accommodations, though I think he runs together a concern about the fairness of exemptions as such with a concern about the fairness of exempting religiously motivated people from doing their part in a particular scheme of social cooperation. He treats the zoning and motorcycle helmet cases as giving rise to similar questions of fairness, whereas I think that both give rise to the first question but only the former gives rise to the second.

[35] This point gets lost in the way that Schiffrin ("Egalitarianism, Choice-Sensitivity, and Accommodation") sets up the problem. On her account of luck egalitarianism, luck egalitarians object to any departure from choice-sensitivity (the principle that people should bear the costs of their own choices) that is not motivated by a concern to bring about a luck-insensitive distributive scheme. On my view, by contrast, departures from choice-sensitivity do not need to be motivated by such a concern to be consistent with fairness. This may simply mean that, like Schiffrin, I reject one of the tenets of luck egalitarianism.

But it is worth noting that the view I favor seems consistent with an argument made by Ronald Dworkin (who is often considered a luck egalitarian) in his paper "Equality of Resources" (reprinted as ch. 2 of *Sovereign Virtue*). Dworkin argues that the envy test is a necessary but not a sufficient condition of equality. Equality also requires that the goods being distributed be bundled together in a non-arbitrary manner, a condition he thinks would be satisfied by a perfectly functioning market. Thus, if before an equal division was attempted on Dworkin's imaginary island, officials traded all of the island's resources away for a stock of plovers eggs (to use Dworkin's example) and then distributed an equal amount of the eggs to each immigrant, some immigrants (those who dislike plover's eggs) would have a legitimate complaint. The complaint is not that the envy- test has been violated (it is not) nor that the luck-insensitivity principle has been violated. Rather, it is to what Dworkin terms the "arbitrariness" of the way in which the goods for distribution have been bundled – the fact that officials could have bundled the goods in some different way, which would have been more responsive to the preferences of those making the complaint. This, then, is a case in which, on Dworkin's view, someone has a legitimate preference-based objection to a distributive scheme that does not appeal to the luck-insensitivity principle.

Dworkin argues that the way to achieve a distribution that both satisfies the envy test and is non-arbitrary is by giving everyone equal purchasing power and then auctioning off each discrete item. At the same time, he never rules out the possibility that some goods might best be distributed by the state (even if only for pragmatic reasons). Suppose, for instance, that the state provides public education and decides to offer subsidized food in the school cafeterias. The question of how to interpret and satisfy the non-arbitrariness condition then arises. Should the cafeteria convert its entire budget into a single menu item, or try to cater to different preferences, or at least to different dietary restrictions? If it does opt for a single menu item, then arguably those with dietary restrictions (or even different preferences) have an arbitrariness objection that is legitimate (insofar as the state's aim is equality) even though it is preference-based and does not appeal to the luck-insensitivity principle.

[36] The claim is not that accommodations, under such an arrangement, would impose no costs on others; a no-accommodations unemployment insurance scheme may well be cheaper and easier to administer than the more complicated scheme I imagine in the text. The claim is that accommodations, under such an arrangement, would impose no *unfair* costs on others. A crucial element of the "expensive-tastes" objection is therefore missing.

[37] The argument of the remainder of this paragraph follows Rawls, *Political Liberalism*, pp. 195-200. The idea that neutrality establishes "pure procedural justice" is also implicit in Barry's discussion of neutrality and fairness, in *Culture and Equality*, ch. 2, e.g. at p. 32. See also Alan Patten, "Liberal Neutrality and Language Policy", *Philosophy & Public Affairs* (2003).

[38] Barry, p. 28.