NOTES

THE FAILURE OF EQUAL REGARD TO EXPLAIN THE *SHERBERT* QUARTET

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INTRODUCTION

The First Amendment of the United States Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] Where laws *have* prohibited the free exercise of religion, whether by direct regulation of religious conduct or as an unintended consequence, religious adherents burdened by those laws have sought exemptions, arguing that such exemptions are constitutionally compelled.

These arguments persuaded the United States Supreme Court in *Sherbert v. Verner*,[2] where the Court asserted for the first time that the government must demonstrate a compelling state interest before its infringement on religious liberty would be upheld.[3] In *Sherbert*, the Court applied the compelling state interest test and held that South Carolina could not constitutionally deny unemployment compensation benefits to a Seventh-Day Adventist whose observance of Saturday as the Sabbath prevented her from accepting otherwise available employment.[4] After *Sherbert*, the Court heard three other unemployment insurance cases—these four are known as the *Sherbert* Quartet—in which the claimants' religious scruples precluded them from continuing with their employment. In each case, the Court kept its promise of putting the government to the compelling state interest

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1 U.S. Const. amend. I.

2 374 U.S. 398 (1963).

3 See id. at 403. The strict scrutiny test articulated in *Sherbert* follows that used by the Court in evaluating alleged infractions of the most fundamental constitutional rights, such as equal protection or freedom of speech.

4 See id. at 410.

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test and found that the state's proffered interests in denying unemployment benefits were constitutionally infirm.[5]

Outside the unique factual settings of the *Sherbert* Quartet, however, the promise of strict scrutiny review for religious exemption cases has remained largely unfulfilled.[6] Despite this inconsistency in the case law, many scholars and students alike interpret the Court's holdings as a preference for religion over secular forms of conscience. In each case comprising the *Sherbert* Quartet, the Court acknowledged that the state's interest in protecting state unemployment compensation funds from dilution was not sufficiently compelling to justify the infringement on the claimant's religious exercise.[7] The Court

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[5] See Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 834 (1989) (holding that independence of claimant's views from any established religious sect is constitutionally irrelevant in determining eligibility for unemployment compensation); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) (holding that claimant was entitled to benefits even though her conscientious refusal to work on her Sabbath was driven not by recent change in conditions of employment but by recent change in religious views); Thomas v. Review Bd., 450 U.S. 707, 709 (1981) (holding that Indiana's denial of unemployment compensation benefits to claimant whose religious scruples forbade his participation in production of armaments was unconstitutional).

[6] In fact, religiously motivated individuals have successfully sought relief from burdensome laws in only one other case outside of the *Sherbert* Quartet: Wisconsin v. Yoder, 406 U.S. 205 (1972). In *Yoder*, the Court held that Wisconsin's interest in requiring children to remain in school until the age of 16 was not sufficiently compelling to exonerate the state from interfering with the religiously motivated desire of the Amish to shield their children from American schools after the age of 14. See id. at 234-36. In all other religious exemption cases, the Court has found the compelling state interest test of *Sherbert* satisfied by finding that either the claimant's free exercise right was not burdened or the government's interest compelling. See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 451-53 (1988) (finding that government's interest in building timber road through federal land sacred to certain Native Americans did not burden their religious beliefs); Bowen v. Roy, 476 U.S. 693, 700-01 (1986) (holding that government could constitutionally require Native American child to use social security number despite her parents' religious belief that child's spirit would consequently be robbed); Goldman v. Weinberger, 475 U.S. 503, 509-10 (1986) (holding that military could prohibit Orthodox Jewish officer from wearing Jewish yarmulke). These results are at odds with the manner in which the compelling state interest test has played out in other constitutional areas, where the test has been characterized accurately as "'strict' in theory and fatal in fact." Gerald Gunther, The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972). In the religious exemption arena, the test has proven to be "strict in theory but feeble in fact." Christopher L. Eisgruber & Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. Chi. L. Rev. 1245, 1247 (1994); see also Geoffrey R. Stone, Constitutionally Compelled Exemptions and the Free Exercise Clause, 27 Wm. & Mary L. Rev. 985, 994 (1986) (stating that survey of Court's decisions, rather than its rhetoric, reveals that "the actual scrutiny is often far from strict").

[7] See *Frazee*, 489 U.S. at 835 (finding that Illinois's argument that chaos would result if all Americans failed to work on Sundays was not sufficiently compelling state interest to justify burdening claimant's religious exercise); *Hobbie*, 480 U.S. at 141 (refusing to apply less rigorous standard of review to Florida's interest in denying claimant benefits where Florida conceded its interest could not withstand strict scrutiny); *Thomas*, 450 U.S. at 718-

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therefore appeared to be saying that religiously motivated conduct will be guarded against state intrusions animated by all but the most compelling of governmental interests.

Motivated perhaps by its disbelief that religion is somehow special or by the compelling state interest test's inability to provide a coherent approach to the religious exemption problem, the Court announced a new approach to the Free Exercise Clause in 1990. In *Employment Division v. Smith*,[8] a sharply divided Court addressed the religious exemption jurisprudence and held that the Free Exercise Clause does not compel courts to grant exemptions from generally applicable statutes to individuals whose religious beliefs conflict with those laws.[9] For the first time, the Court held that the compelling state interest test should be invoked in religious exemption cases only when the governmental action at issue is neither neutral nor generally applicable, that is, when the law facially persecutes a particular religion.[10]

To the extent the *Smith* Court renounces an interpretation of the Free Exercise Clause that privileges religion, many support the

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19 (holding that Indiana's interests in avoiding both burdening of unemployment compensation fund and detailed probing by employers of job applicants' religious beliefs were not compelling); *Sherbert*, 374 U.S. at 407 (holding that South Carolina's interests both in protecting its unemployment compensation scheme from unscrupulous claimants feigning religious objections and in not hindering ability of employers to schedule necessary Saturday work were not compelling).

8 494 U.S. 872 (1990).

9 See id. at 878-89 (finding precedential support for proposition that religious convictions do not free individuals of legal responsibility).

10 See id. (stating that where burden created by neutral law on religion is incidental, Free Exercise Clause would permit religious intrusion). In *Smith*, a department of the Oregon state government fired two members of the Native American Church for ingesting peyote, a controlled substance, the use of which is banned by state law. See id. at 874. The employees argued that because peyote was used in their Church's sacraments, the Free Exercise Clause entitled them to an exemption from the law. See id. Writing for a majority of the Supreme Court, Justice Scalia dismissed the claim, stating that the religious significance of the peyote use was irrelevant because the statute at issue was not specifically directed against the Church. See id. at 879. Congress has responded to *Smith* by enacting the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to bb-4 (1994), which purports to restore the compelling state interest test for religious exemption challenges. While several commentators have questioned the constitutionality of RFRA, see, e.g., Christopher L. Eisgruber & Lawrence G. Sager, Why the Religious Freedom Restoration Act is Unconstitutional, 69 N.Y.U. L. Rev. 437 (1994); Scott C. Idleman, The Religious Freedom Restoration Act: Pushing the Limits of Legislative Power, 73 Tex. L. Rev. 247 (1994), many circuit courts of appeals that have directly addressed the issue have upheld its constitutionality, see, e.g., Mockaitis v. Harcleroad, 104 F.3d 1522, 1529 (9th Cir. 1997); Sasnett v. Sullivan, 91 F.3d 1018, 1022 (7th Cir. 1996); Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996). But see Hamilton v. Schriro, 74 F.3d 1545, 1557 (8th Cir. 1996) (McMillian, J., dissenting) (concluding that RFRA is unconstitutional). The Supreme Court granted a writ of certiorari in *Flores*, 117 S. Ct. 293 (1996), and heard oral argument on February 19, 1997.

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Court's new direction. Commentators have echoed the Court's theme, suggesting, in varying forms, that the better interpretation of the Free Exercise Clause is one based on the protection, not the privileging, of religion.[11] Few, however, have articulated a judicially enforceable constitutional theory based on this more refined understanding. Professors Christopher Eisgruber and Lawrence Sager offer one possible solution. In their article, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*,[12] they articulate a judicially enforceable constitutional theory based on the protection of religion, known as the principle of equal regard.

Professors Eisgruber and Sager contend that in the context of religious exemption cases, the principle of equal regard should displace the compelling state interest test as the judicial method by which courts determine the constitutionality of laws burdening religious beliefs. They criticize the use of the compelling state interest test, arguing that it grants religion greater constitutional solicitude than given to other deep, personal interests, such as familial commitments or personal health.[13] Finding this interpretation impermissibly sectarian insofar as it unconstitutionally privileges religion,[14] they concur with the Court that "[t]o make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is 'compelling'—permitting him, by virtue of his beliefs, 'to become a law unto himself' . . .—contradicts both constitutional tradition and common sense."[15]

Instead, Professors Eisgruber and Sager continue, the correct interpretation of the First Amendment is that it does not privilege but rather protects religion. Accordingly, they argue, the compelling state

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[11] See, e.g., Stephen L. Carter, The Resurrection of Religious Freedom?, 107 Harv. L. Rev. 118, 128-30 (1993) (comparing religion cases to racial discrimination cases to argue that, like people of color, minority religious adherents need constitutional protection against majority who are likely to ignore, or even undermine, minority interests); Abner S. Greene, Is Religion Special? A Rejoinder to Scott Idleman, 1994 U. Ill. L. Rev. 535, 536 (suggesting that founders wanted to protect religion from political tyranny, but disagreeing with scholars who do not recognize that religion is also special); Michael W. McConnell, Free Exercise Revisionism and the *Smith* Decision, 57 U. Chi. L. Rev. 1109, 1152 (1990) ("The clause . . . singles out a particular category of human activities for particular protection, a protection that is most often needed by practitioners of non-mainstream faiths who lack the ability to protect themselves in the political sphere . . . .").

[12] Eisgruber & Sager, supra note 6.

[13] See id. at 1258 n.31, 1260. They state: "[B]y insisting that the state grant religious exemptions except when doing so would compromise interests of 'the highest order,' we require the state to weigh religious interests very highly." Id. at 1289.

[14] See id. at 1248 (arguing that privilege view of religious exemptions is normatively unjustified and unattractive in its practical implications).

[15] Eisgruber & Sager, supra note 10, at 450-51 (quoting Employment Div. v. Smith, 494 U.S. 872, 885 (1990) (citation omitted)).

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interest test should be replaced by the principle of equal regard: whereas the compelling state interest test requires the state to value religion highly, equal regard simply requires that religion be valued equally among other compelling, secular interests.

Professors Eisgruber and Sager do reserve the compelling state interest test for one special context, a context in which the test can be used to implement the principle of equal regard. In an administrative system where ad hoc interpretations of facially neutral statutes, such as the unemployment compensation statutes at issue in the *Sherbert* Quartet, routinely deny welfare benefits to individuals who fit the general profile of entitled beneficiaries, a presumption of discrimination arises.[16] Professors Eisgruber and Sager argue that the compelling state interest test, although ill suited for religious exemption cases in general, works best in the quasi-adjudicative context of the *Sherbert* Quartet as a way to ferret out invidious discrimination. Their theory is that ad hoc refusals to grant unemployment compensation benefits to religiously motivated applicants results from a failure to regard equally the interests of these religious adherents against those of applicants who quit their jobs for powerful, secular reasons, such as family or health. In this ad hoc context, Professors Eisgruber and Sager maintain that it seems "appropriate to protect against such failures by applying the compelling state interest test."[17] By asking the administrative body to articulate a compelling state interest to justify its refusal of welfare benefits to an applicant who fits the general profile of one entitled to benefits, the court puts the onus on the administrative body to prove it has not violated the principle of equal regard.

The state fails to honor the principle of equal regard only if it does prefer a secular claimant who cannot work because of compelling nonsectarian reasons, such as familial obligations or health, over a religious claimant who cannot work due to the demands the precepts of his religion place upon him. Professors Eisgruber and Sager contend that this is what happened in each case comprising the *Sherbert* Quartet. Specifically, they point to the Indiana Review Board, in *Thomas v. Review Board*,[18] as failing to regard equally Mr. Thomas's religiosity with the deep, secular commitments of other putative bene-

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16 See Eisgruber & Sager, supra note 6, at 1287 (stating that where claimants are generally available for work and decline particular jobs for powerful, narrow reasons, "it seems perfectly appropriate to worry that ad hoc administrative refusals to treat such . . . applicants as entitled to unemployment benefits represents a failure of equal regard").

17 Id.

18 450 U.S. 707 (1981).

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ficiaries, thereby offending the principle of equal regard.[19] The Supreme Court, by demanding each state's articulation of a compelling state interest for its refusal to grant benefits, was essentially demanding that each state not regard compelling secular reasons for termination of employment more highly than it would religiously motivated ones. This understanding of the *Sherbert* Quartet reveals the Court's concern with "the protection of minority religious believers rather than the privileging of religiously motivated conduct."[20]

To test whether states do in fact undervalue religion and thus violate the principle of equal regard, this Note conducted a survey of unemployment compensation case law. The results of the survey demonstrate that states do not violate the principle of equal regard in their dispositions of unemployment insurance cases. Rather, the survey results suggest that, in general, states construe eligibility for benefits narrowly, so narrowly that they cannot be said to prefer one set of convictions over another. In other words, refusals to grant religiously motivated claimants unemployment compensation benefits do not raise an inference of discrimination. Application of the compelling state interest test is therefore unwarranted; the principle of equal regard appears unable to justify the *Sherbert* Quartet.

Part I explains Professors Eisgruber and Sager's arguments against conferring upon religion a special status in our constitutional hierarchy and describes their theory of equal regard. Part II presents the results of the survey of unemployment insurance denials. Part III examines those results and explains why the principle of equal regard cannot adequately help us understand the jurisprudence of the *Sherbert* Quartet.

I
THE RELIGIOUS EXEMPTION PROBLEM

The Free Exercise Clause of the First Amendment provides religiously motivated individuals a constitutional sword with which to strike down laws restricting their religious activity. Laws rarely persecute religion directly, however; therefore, those who challenge religiously burdensome, but otherwise valid, neutral laws generally do not question the law's constitutionality outside of its incidental effect on their religious practice. These challengers seek exemptions from the law, basing their argument exclusively on the unique value of their

[19] See Eisgruber & Sager, supra note 6, at 1298 (explaining that partiality of Indiana's policy in *Thomas* is "constitutionally condemnable" because of way it defines personal interests).

[20] Id. at 1278.

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particular religious convictions. Such arguments raise the question of whether the singularity of religion is a sufficient constitutional basis on which to ground an exemption or whether such a practice is unconstitutionally sectarian.[21]

Section A presents the various textual, historical, and normative arguments which Professors Eisgruber and Sager discuss and reject for giving religion special treatment. Section B sets forth their arguments explaining that religious exemptions nevertheless are constitutionally compelled, not because religion is unique but because it is vulnerable to persecution. Section B then presents the approach Professors Eisgruber and Sager have taken toward religious exemptions, based on this nonpersecution principle, and questions whether this theory can adequately explain the *Sherbert* Quartet.

A. Is Religion Special?

The *Smith* decision forces us to ask whether religiously motivated individuals are entitled to a constitutionally compelled exemption from generally applicable laws pursuant to the Free Exercise Clause. Professors Eisgruber and Sager point out that in a "liberal democracy, the claim that one particular set of practices or one particular set of commitments ought to be privileged . . . bears a substantial burden of justification."[22] As the discussion below reveals, they find that this burden has not been met; in their eyes, the textual, historical, and normative arguments for delineating a special place for religion under the Constitution do not convincingly support an argument for why religious conduct in and of itself merits expanded consideration.

Professors Eisgruber and Sager present the argument that a purely textual analysis of the Constitution would "'presuppose that religion is in some way a special human activity, requiring special rules applicable only to it.'"[23] Proponents of this argument contend that the presence of two clauses in the Constitution devoted exclusively to religion indicates that burdens upon religion are in some important way different than are serious burdens upon secular activity and thus require special treatment.[24] This argument suggests that religion is

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21 See William P. Marshall, The Case Against the Constitutionally Compelled Free Exercise Exemption, 40 Case W. Res. L. Rev. 357, 358 (1989-1990) ("[T]he issue [in a free exercise challenge] is whether certain individuals should be exempted from otherwise valid, neutral laws of general applicability solely because of their religious conviction.").

22 Eisgruber & Sager, supra note 6, at 1260.

23 Id. at 1271 (quoting Douglas Laycock, The Remnants of Free Exercise, 1990 Sup. Ct. Rev. 1, 16 (1991)).

24 See id. (citing Professor Douglas Laycock's argument); see also Mark Tushnet, The Constitution of Religion, 18 Conn. L. Rev. 701, 718 (1986) (arguing that text of First Amendment affirms "a distinction between religion and other forms of expression").

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given textual distinction because it is somehow special, or preferred, in our constitutional structure. Professors Eisgruber and Sager, however, find these arguments unconvincing; although religion may be more remarkable than certain secular interests, such as "matters of fashion or recreation,"[25] they maintain this argument alone does not avail the Religion Clauses solely to a privileging view.[26]

They also contend that this textual argument ignores the Equal Protection Clause of the Fourteenth Amendment, which, they argue, may place religious and secular belief in parity, thereby in all likelihood eviscerating any claim that religion retains the same singular constitutional solicitude it may once have enjoyed prior to Reconstruction.[27] The Fourteenth Amendment analysis becomes more relevant, they continue, when we consider cases that involve state law, such as those in the *Sherbert* Quartet, "since the Free Exercise Clause does not mention the states, and the Fourteenth Amendment does not mention religion."[28]

Others have made textual arguments similar to that of Professors Eisgruber and Sager, analogizing to the Press Clause. Professor William Marshall points out that "it is hardly novel to assert that mention in the text of the first amendment does not require constitutionally favored treatment other than protection against direct persecution."[29] He explains that the textual arguments privileging religion ignore the treatment the Press Clause, which is also located in the First Amendment, has received. He cites *Branzburg v. Hayes*[30] as support,[31] a decision in which the Court refers to prior case law holding that "otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed."[32] The Press Clause, therefore, does not bestow constitutionally privileged treatment upon the media with respect to laws of general applicability. In *First National Bank v. Bellotti*,[33] Chief Justice Burger, in his concurring opinion, rejected the view that the Press Clause somehow confers "special and extraordi-

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25 Eisgruber & Sager, supra note 6, at 1271.

26 See id.

27 See id.

28 Id. at 1272. In support of this contention, Professors Eisgruber and Sager refer to Professor William Marshall who similarly argues that laws persecuting religious conduct might be invalidated under the Equal Protection Clause and concludes on this basis that the Free Exercise Clause cannot therefore be construed conclusively as allowing constitutionally compelled exemptions. See id. at 1272 n.43 (citing Marshall, supra note 21, at 374).

29 Marshall, supra note 21, at 375.

30 408 U.S. 665 (1972).

31 See Marshall, supra note 21, at 375 n.88.

32 *Branzburg*, 408 U.S. at 683-84.

33 435 U.S. 765 (1978).

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nary privileges or status on the 'institutional press' . . . which are not extended to those who wish to express ideas other than by publishing a newspaper."[34] As Professor Laurence Tribe comments, "despite its separate protection by the first amendment, the prevailing view is that the press enjoys no special status under the Constitution,"[35] although it does enjoy protection at least from invidious discrimination.[36] Applying this line of reasoning to the Free Exercise Clause suggests that mere mention of religion in the text of the First Amendment does not compel a constitutional privilege, but it may suggest constitutional protection from direct persecution.

Professors Eisgruber and Sager also dismiss historical arguments attempting to distinguish burdens upon religion from those upon comparably significant secular obligations, largely because the history itself is ambiguous as to the framers' intent motivating inclusion of the Religion Clauses.[37] They present Professor Michael McConnell's research into the foundations of the Free Exercise Clause, which they find to be the most extensive, to demonstrate the truth of their statement.[38] According to Professor McConnell, Thomas Jefferson and James Madison were the most important figures in the enactment of the Religion Clauses, yet they had opposite views toward religious freedom.[39] Jefferson was unconcerned for those who desired to practice an active faith because his view of liberty of conscience did not necessarily entail the freedom to practice religion in whatever form one chose, but rather freedom from sectarian religion itself.[40] Madison, on the other hand, believed that claims for religious liberty were weightier than Jefferson was willing to recognize. McConnell points out that Madison did not share Jefferson's "'disdain . . . for the

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34 Id. at 797-98 (Burger, C.J., concurring); see also Leathers v. Medlock, 499 U.S. 439, 464 (1991) (Marshall, J., dissenting) (emphasizing that although Press Clause does not guarantee press preference over other speakers, it does protect members of press from discrimination).

35 Laurence H. Tribe, American Constitutional Law § 12-20, at 963 (2d ed. 1988).

36 See id.

37 See Eisgruber & Sager, supra note 6, at 1270-73; see also Jesse H. Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 676 (1980) (emphasizing that "there is no clear record as to the Framers' intent, and such history as there is reflects several varying purposes").

38 See Eisgruber & Sager, supra note 6, at 1272-73 (citing Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990)). Crediting McConnell's research as "[p]robably the most richly documented attempt to derive the principle [that religion is privileged] from history," they then conclude that "his failure illustrates why history cannot dispose of the questions that concern us." Id. at 1272.

39 See id. (discussing McConnell, supra note 38, at 1455).

40 See id. (discussing McConnell, supra note 38, at 1453).

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more intense manifestations of religious spirit.'"[41] Instead, Madison's "'more affirmative stance toward religion'" and his recognition of the "'demands of religion'" intimate his advocacy of an approach toward religious liberty consonant with a constitutionally compelled exemption for religious conduct.[42] Professors Eisgruber and Sager conclude from this history that this "serious divergence between the views of these two pivotal thinkers renders history an unreliable guide to interpretation of the Religion Clauses."[43] Historical inquiry thus may not support a claim to a constitutionally compelled religious exemption from laws of general applicability.[44]

Professors Eisgruber and Sager also find the normative argument supporting an expanded constitutional consideration of religion unavailing. This argument grounds itself in an interpretation of the Religion Clauses stemming from the intrinsic value of religious pluralism.[45] The normative theory values religion for its ability to imbue the citizenry with the moral responsibility and veneration necessary for government to flourish.[46] Religion, it is argued, humanizes us and inculcates us with civic virtue. It fosters community, love, and

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[41] Id. (quoting McConnell, supra note 38, at 1452).

[42] Id. (quoting McConnell, supra note 38, at 1453). Professor McConnell states that although Madison's writings cannot prove his support of free exercise exemptions, they suggest an approach toward religious liberty that is consonant with them. See McConnell, supra note 38, at 1453.

[43] Eisgruber & Sager, supra note 6, at 1272-73. For discussions connecting the significance of the Equal Protection Clause with the First Amendment, see id. at 1273 (arguing that because Equal Protection Clause may be comparable in significance to Religion Clauses, intentions of Jefferson and Madison have no bearing on its meaning); see also Marshall, supra note 21, at 376 (stating that any historical evidence "must be tempered by the understanding that the first amendment was not intended to apply to the states").

[44] See Eisgruber & Sager, supra note 6, at 1273 ("Even if we set Madison up as the unique arbiter of the meaning of the Religion Clauses, ignore the Fourteenth Amendment, and blind ourselves to the normative difficulties of privileging religion, McConnell's history can not bring us to [the privileging view of religion]."); see also Stephen Pepper, Taking the Free Exercise Clause Seriously, 1986 BYU L. Rev. 299, 305-06 (arguing that Religion Clauses may have been compromise between these two competing philosophies); Ellis West, The Case Against a Right to Religion-Based Exemptions, 4 Notre Dame J.L. Ethics & Pub. Pol'y 591, 622-23 (1990) (suggesting that historical evidence directly supports proposition that founders did not contemplate constitutionally compelled exemptions under Free Exercise Clause). But see McConnell, supra note 11, at 1117-18 (arguing that despite ambiguous history, evidence of some early state constitutional provisions acknowledging free exercise exemptions "is the strongest evidence that the framers expected the First Amendment to enjoy a similarly broad interpretation").

[45] See, e.g., Michael W. McConnell, Accommodation of Religion, 1985 Sup. Ct. Rev. 1, 14-24 (1986) (arguing that pluralism supports deference to "special character and needs of religion"); Mark Tushnet, The Emerging Principle of Accommodation of Religion, 76 Geo. L.J. 1691, 1699-1701 (1988) (same).

[46] See, e.g., Marshall, supra note 21, at 381 (arguing that religion is source of moral values in populace); McConnell, supra note 45, at 17-18 (arguing that religion helps mold public virtue); Tushnet, supra note 24, at 735-38 (same).

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compassion.[47] Religious conscience is virtuous and thus accordingly compels exemptions for conduct that violates otherwise valid general laws.

Professors Eisgruber and Sager disagree, however, that this argument provides a constitutional justification for the privileging of religion. The Constitution, they believe, privileges certain conduct because that conduct is somehow virtuous or precedential.[48] So, for example, it grants broad privileges to speech. Professors Eisgruber and Sager remind us that "[t]he state is often barred from restricting speech because of its content, even when there is reason to suppose that important concerns would be advanced if the speech in question were suppressed."[49] Certain speech, therefore, "acquires the privilege of immunity from the reach of governmental authority, even under circumstances that would otherwise offer strong grounds for the exercise of that authority"[50] because it is uniquely special in our constitutional hierarchy.

Professors Eisgruber and Sager contend that the same cannot be said for religious conduct. The reasons that religion is regarded as special and virtuous are not unique to religion.[51] Indeed, religion does not hold a monopoly on the provision of morality and ethical well-being. Our pluralist society condemns the claim that religion so breeds virtue that it demands a constitutionally reserved and special place as impermissibly "partisan among conflicting views of what is valuable in life."[52] Professors Eisgruber and Sager stress that within our pluralist American polity, "policies predicated upon such a claim would violate society's duty to respect individuals without regard to

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47 See Eisgruber & Sager, supra note 6, at 1265.

48 See id. at 1250-52 (explaining why and when conduct will be constitutionally privileged); see also Eisgruber & Sager, supra note 10, at 448 ("Constitutional privileging requires as its justification an understanding that the activity in question brings with it some special virtue or priority in our political life.").

49 Eisgruber & Sager, supra note 10, at 448.

50 Eisgruber & Sager, supra note 6, at 1250-51.

51 Moreover, as Professors Eisgruber and Sager point out, religion is not always virtuous nor does it necessarily always stimulate civic responsibility. They state that "[r]eligious obligations can clash with the public interest in an infinite variety of ways and with infinite degrees of intensity." Eisgruber & Sager, supra note 10, at 447. To exemplify, they stress that "one need only look around the world, or probe our own history, to recognize that [religion] also sponsors discord, hate, intolerance, and violence." Eisgruber & Sager, supra note 6, at 1265.

52 Eisgruber & Sager, supra note 6, at 1266. Professors Eisgruber and Sager explain that "our constitutional tradition . . . contemplates a modern, pluralistic society, whose members find their identities, shape their values, and live the most valuable moments of their lives in a grand diversity of relationships, affiliations, activities, and passions that share a constitutional presumption of legitimacy." Id.

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their religious beliefs."[53] In other words, to recognize a constitutional claim that religion is special would reduce to a claim that the truth of a particular religion is undeniably correct, and that the truth of a secular code of morality and ethics does not exist.[54] Such a claim, they conclude, would be unconstitutionally sectarian.[55]

A second normative theory emphasizes that where a generally applicable law and religious dogma differ, the religious claimant finds herself in the grip of conscience; either she follows the precepts of her religion and disobeys the state, or she abandons her religious faith and risks the consequences.[56] The argument concludes that this unfortunate yet powerful circumstance supports the idea that the religious adherent has constitutional license to defy otherwise valid general laws.

While these claims for religion are undeniably significant, Professors Eisgruber and Sager find this argument ultimately unpersuasive because the concerns it addresses are not unique to religion.[57] They suggest that whenever one's convictions collide with those of the state, one is faced with conflicting obligations.[58] The suffering associated with the violation of a religious tenet, therefore, is not unique. An adherent of moral or political views would be equally and as deeply troubled by their transgression as an adherent of religious views

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[53] Eisgruber & Sager, supra note 10, at 449. Professors Eisgruber and Sager argue that our society "must develop constitutional principles that recognize that a citizen's ability to contribute to [society] does not depend upon membership in any particular religion, or, indeed, upon religiosity at all." Eisgruber & Sager, supra note 6, at 1266.

[54] Professor William Marshall makes a similar point. He states that "because special exemptions of any kind raise concerns of undue favoritism, they are normally suspect as violating fundamental constitutional principles of equal treatment." Marshall, supra note 21, at 358.

[55] This does not mean, however, that legislatures cannot formulate policies that benefit religious belief. Legislatures may still accommodate religious practice when they believe that those practices advance secular goals, such as providing community support groups or raising money for charity. Legislatures need only be careful that they tailor their regulations to fit those secular goals rather than to single out religion as uniquely special.

> [P]olicy makers might legitimately take into account the instrumental value of religious institutions as aids to moral development in a democratic society. But, at most, this argument simply indicates that we should think carefully before reading the Establishment Clause to fetter legislative discretion to advance religion where it is judged to have nonsectarian utility.

Eisgruber & Sager, supra note 6, at 1267. But see Carter, supra note 11, at 137 (arguing that religion should be accommodated because it is unique).

[56] See Eisgruber & Sager, supra note 6, at 1262-63 (discussing whether religion should be privileged simply because consequences for religious adherent of disobeying religious commandments can be eternal).

[57] See id. at 1268 (discussing idea of conscience as having variety of potential meanings).

[58] See id. at 1269.

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would be crippled by their violation.[59] Insofar as religious conscience is just one of the many powerful factors motivating human life, Professors Eisgruber and Sager insist that it cannot be distinguished in any principled, material way from other secular belief systems sufficient to justify its constitutional solicitude.[60]

They emphasize, however, that this rejection of the argument that religious exercise is special does not deny the significance of religious interests in an individual's life. They compare an army officer whose faith requires him to wear a yarmulke before an omnipresent God[61] as constitutionally distinguishable from an officer who desires to wear a Budweiser cap where army uniform regulations prohibit the wearing of either head covering.[62] Similarly, they do not dispute that those who "like to go sailing on Saturdays" are less burdened by a Saturday work schedule than those who "observe the Sabbath" on that day.[63] They urge that these comparisons, however, ignore the question whether burdens upon religious practice are substantially different "from the considerably more weighty burdens imposed by secular commitments to one's family, or by secular moral obligations, or by physical disabilities."[64]

In explanation, Professors Eisgruber and Sager compare two army officers, Goldman and Collar.[65] Goldman's religious "disability" obliges him to wear a yarmulke in contravention of army uniform regulations.[66] Collar's physical disability prevents him from wearing a necktie, also in contravention of army uniform regulations.[67] Profes-

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59 See David A.J. Richards, Toleration and the Constitution 95-98 (1986) (arguing for inalienable right to all forms of conscience).

60 See Eisgruber & Sager, supra note 6, at 1263 (arguing that there is no reason to suppose that religious conscience "is likely to matter more in the run of religious lives generally than will other very powerful forces in the lives of both the nonreligious and the religious"); see also William P. Marshall, In Defense of *Smith* and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308, 320 (1991) (arguing that "bonds of ethnicity, interpersonal relationships, and social and political relationships as well as religion may be, and are, integral to an individual's self-identity"). But see Carter, supra note 11, at 136-38 (arguing that religion is positive good).

61 See Goldman v. Weinberger, 475 U.S. 503, 503-13 (1986) (denying religious exemption to Air Force officer whose religiously motivated desire to wear yarmulke conflicted with armed force's uniform regulation).

62 See Eisgruber & Sager, supra note 6, at 1263 (agreeing with Professor Laycock's argument that it would be error to view such soldiers as "constitutionally indistinguishable" (quoting Laycock, supra note 23, at 11)).

63 Id. at 1264 (citing and agreeing with Michael W. McConnell, Religious Freedom at a Crossroads, 59 U. Chi. L. Rev. 115, 125 (1992), who makes qualitative distinction between these Saturday activities).

64 Id. at 1264-65.

65 See id. at 1264.

66 See id.

67 See id.

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sors Eisgruber and Sager ask whether we can constitutionally regard Goldman's interests as more compelling than Collar's and conclude that we cannot because to do so would privilege religion in an unacceptably sectarian way.[68]

B. The Case for Equal Regard and the Sherbert *Quartet*

As Professors Eisgruber and Sager have explained, to interpret the Free Exercise Clause as conferring upon religion a special status in the Constitution would be improper. The inscription of religion and the exclusion of other belief systems in the text of the First Amendment do not support the conclusion that religion is the preferred value.[69] Rather, they contend that the First Amendment's mention of religion reflects the fact that religious belief is often vulnerable to persecution and thus should be accorded special protection.[70] Their urging of a protection viewpoint springs, as we have seen, not from a conviction that religious belief is more worthy than other serious human commitments, but from their concern that certain religious believers are vulnerable to unfair and damaging forms of discrimination.[71] In other words, the First Amendment does not contemplate a special status for religion; rather, it acknowledges that the deep commitments of minority religious adherents may be treated with less regard than the profound, secular concerns of nonreligiously motivated individuals.

Based upon this nonpersecution principle of the First Amendment, Professors Eisgruber and Sager have articulated a judicially enforceable constitutional theory to explain not only their understanding of the Free Exercise Clause but also the Court's errant jurisprudence in this area. Animated by their view that the First Amendment pro-

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[68] See id. Professors Eisgruber and Sager explain that this does not mean that we cannot accommodate either religion or physical disability. Responding to Professor McConnell's argument that there is no need to accommodate religion unless it is "special and important," they argue that undeniably, there will be times when religious demands will be special and important to an individual, just as disabilities are special and important. Id. at 1267. Accommodation thus will be warranted in these circumstances. But Professors Eisgruber and Sager maintain that accommodation does not warrant the conclusion, as Professor McConnell would argue, that either religious beliefs or physical disabilities are "'intrinsically valuable.'" Id. (quoting McConnell, supra note 63, at 151).

[69] See, e.g., Marshall, supra note 60, at 325 (rejecting Professor McConnell's assertion that religion should be favored over nonreligion merely because religion is mentioned in First Amendment).

[70] See Eisgruber & Sager, supra note 6, at 1248 (advocating approach to religious exemptions based on protection, rather than privileging, of religion); see also Marshall, supra note 60, at 325 (noting that text of First Amendment "is consistent with protecting religion from discrimination [but] it does not compel discrimination in favor of religion").

[71] See Eisgruber & Sager, supra note 6, at 1250-54 (explaining protection view of religion and analogizing vulnerability of religious believers to that of African Americans).

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tects, but does not privilege, religion, Professors Eisgruber and Sager present the principle of equal regard.[72] They state that "[e]qual regard requires simply that government treat the deep, religiously inspired concerns of minority religious believers with the same regard as that enjoyed by the deep concerns of citizens generally."[73] The principle of equal regard thus demands first, that government treat equally the burdens imposed upon individuals practicing different religions[74] and second, that government give equal regard to religious and nonreligious interests so that it does not prefer religious to secular interests, or vice-versa.[75] When the government fails to do so, the judiciary must intercede.

The principle of equal regard is a powerful theory because it helps to explain why the Constitution can give textual prominence to religion without simultaneously conferring special status. Moreover, Professors Eisgruber and Sager argue, equal regard justifies the Supreme Court's highly selective application of the compelling state interest test in specialized contexts. As we have seen, religiously motivated individuals have succeeded in their claims for religious exemptions only in the *Sherbert* Quartet and *Wisconsin v. Yoder*.[76] If we view the Constitution as privileging religion as unique, we must ask why these cases are the only ones in which a religiously motivated individual has successfully sought an exemption. If, however, we view the Constitution as protecting religion because it is vulnerable, we understand that the religious adherent in each case prevailed not because she had been treated specially on the basis of her religious convictions, but because she had been treated disparately on the basis of those convictions. The principle of equal regard emphasizes that the Constitution does not mandate that religious believers be treated exceptionally.[77] Rather, the Constitution requires only that they be treated no differently.[78] Filtered through this protection lens, Profes-

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72 See id. at 1282-91.

73 Id. at 1283 (emphasis omitted).

74 See id. at 1284 ("When the state fails . . . to treat the deep concerns of minority believers with the same solicitude as those of mainstream citizens, the judiciary ought to intervene.").

75 See id. at 1291 ("Equal regard, of course, is a symmetrical principle, and applies to secular as well as sectarian concerns.").

76 406 U.S. 205 (1972).

77 See Eisgruber & Sager, supra note 6, at 1278 ("Neglected on all sides is an understanding of *Sherbert* that depends on the protection of minority religious believers rather than the privileging of religiously motivated conduct.").

78 Professors Eisgruber and Sager reflect that without a protection view of religious exemptions, the Court's decision in Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985), would seem out of step with *Sherbert*. *Thornton* held that a Connecticut statute unconditionally guaranteeing the right not to work on chosen Sabbath forced businesses to con-

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sors Eisgruber and Sager contend that "the *Sherbert* Quartet ceases to be an anomaly in the jurisprudence of religious freedom and the Constitution more generally, and stands as precedent for a more reasonable and nuanced view of the exemptions issue."[79]

Under this analysis, Professors Eisgruber and Sager read *Sherbert v. Verner*[80] as an easy case. Ms. Sherbert, a Seventh-Day Adventist, was terminated from her employment because she scrupulously refused to work on Saturday, her day of Sabbath.[81] Unable to obtain other employment that suited her religious convictions, Ms. Sherbert filed for but was denied unemployment benefits under South Carolina's Unemployment Compensation Act because the state deemed her unavailability to work Saturdays to be a forfeiture of her right to unemployment benefits.[82] The United States Supreme Court held that, having failed to meet its burden under the compelling state interest test, South Carolina unconstitutionally denied Ms. Sherbert unemployment benefits by basing its decision on her religiously motivated objection to Saturday employment.[83]

It would seem that the *Sherbert* holding supports the widely held view that religion is a preferred constitutional pursuit: why else did Ms. Sherbert prevail?

> On the privileging account, *Sherbert* is taken at its most literal and expansive word: most of us, most of the time, must take laws as we find them, but when we act in response to the dictates of our religion, the laws must yield to us unless they are crucial to very important state interests.[84]

Professors Eisgruber and Sager assert that this account is wrong, that in fact the principle of equal regard justifies the result in *Sherbert* without recourse to the compelling state interest test.

First, the principle of equal regard requires the government, when it acts in ways that may affect religious interests, to do so without discriminating against one religion in favor of another. South Carolina's denial of unemployment benefits to Ms. Sherbert because she

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form conduct to employees' religious interests and was therefore unconstitutional. See id. at 709-10; see also Eisgruber & Sager, supra note 6, at 1281-82 (analyzing *Thornton* from perspective of equal regard).

79 Eisgruber & Sager, supra note 6, at 1278.

80 374 U.S. 398 (1963).

81 See id. at 399.

82 See id. at 399-400 (citing South Carolina Unemployment Compensation Act, S.C. Code §§ 68-113 to -114 (currently codified at S.C. Code Ann., Title 41, §§ 41-35-110, -120 (Law. Co-op. 1976 & Supp. 1996)), which held claimants ineligible for unemployment benefits if they fail without good cause to accept suitable work when offered).

83 See id. at 410.

84 Eisgruber & Sager, supra note 6, at 1277.

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was a Sabbatarian clearly violated this basic principle of equal regard. If Ms. Sherbert had observed a Sunday Sabbath, the state would have had no trouble in accommodating her. The Court predicated its holding partly on this point, emphasizing that South Carolina law protected Sunday worshippers from persecution.[85] Although South Carolina had a law prohibiting businesses from operating on Sundays, the State Commissioner of Labor was authorized to open the textile plants where Ms. Sherbert worked during periods of "national emergency."[86] Nevertheless, state law provided that "'no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not . . . be discriminated against in any . . . manner.'"[87] The Court concluded from the presence of this law that "[s]ignificantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty."[88]

Such facial discrimination, Professors Eisgruber and Sager point out, represents an obvious failure of equal regard among religions.[89] The statutory exemption for Sunday worshippers reveals that South Carolina values the religious interests of Sunday worshippers more highly than it does the potential economic benefits that may accrue to the state had it not exempted those believers from Sunday work in the first instance. The failure to similarly exempt Saturday worshippers demonstrates that South Carolina values the interests of mainstream believers over those of the religious minority.[90]

Second, the principle of equal regard also requires that religious interests be treated no differently than secular interests. Professors Eisgruber and Sager illustrate this point in their discussion of *Thomas v. Review Board*.[91] Mr. Thomas, a Jehovah's Witness, terminated his employment when his employer transferred him from a foundry in a munitions company to a department that manufactured war arma-

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[85] See *Sherbert*, 374 U.S. at 406.

[86] Id.

[87] Id. (quoting S.C. Code, Title 64, § 64-4 (currently codified at S.C. Code Ann., Title 53, § 53-1-110 (Law. Co-op. 1976))).

[88] Id.

[89] See Eisgruber & Sager, supra note 6, at 1278-79 (arguing generally that South Carolina's preference of mainstream Christians to Sabbatarians manifests violation of equal regard principle).

[90] See id. at 1279 ("South Carolina's election of Sunday, placed side-by-side with its refusal to accommodate the needs of Sherbert and other Sabbatarians to decline Saturday employment, gives one overwhelming reasons to suppose that the state has disadvantaged a vulnerable group.").

[91] 450 U.S. 707 (1981).

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ments.[92] He claimed that his religious convictions prohibited him from accepting the new assignment.[93] Upon resignation, Thomas sought unemployment benefits, which Indiana refused to pay based on the disqualifying provisions of the Indiana Employment Security Act.[94]

Professors Eisgruber and Sager conclude that while *Thomas* is not a case of facial discrimination inasmuch as Indiana did not exempt Sunday worshippers from Sunday work, it too can best be understood as a case of invidious religious discrimination.[95] They argue that the ad hoc nature of the decisionmaking process involved in all unemployment benefits cases,[96] combined with the failure to require state administrators to articulate a compelling state interest for their decisions, provides strong reason to suppose that the state in *Thomas* inappropriately discredited Mr. Thomas's minority religious beliefs in comparison with other religious and nonreligious reasons.[97] With respect to cases like *Thomas*, the fear is that a state will not recognize minority religious reasons under the unemployment insurance laws as good cause for quitting one's job, but will recognize mainstream or nonreligious obligations.[98]

Professors Eisgruber and Sager explain, "[i]t is hard to imagine, for example, that Thomas would have been refused benefits had he resigned because of a serious allergy to the metal used in tank turrets; yet Thomas did have a serious allergy, a moral allergy, they urge, to the job he was being asked to perform."[99] This failure to appreciate Mr. Thomas's moral allergy thus violates the principle of equal regard, a violation that can be protected against by use of the compelling state interest test.[100]

This Note examines whether the principle of equal regard can in fact be protected by the compelling state interest test in the quasi-adjudicative context implicated in the *Sherbert* Quartet. To do so, this Note asks whether states do offend the principle of equal regard, as Professors Eisgruber and Sager suggest, in the context of the discre-

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92 See id. at 707.

93 See id. at 709-10.

94 See id. at 709-10, 709 n.1 (stating that Indiana based its refusal to grant claimant benefits on provision disqualifying any individual who "'voluntarily left his employment without good cause'" (quoting Ind. Code § 22-4-15-1 (Supp. 1978))).

95 See Eisgruber & Sager, supra note 6, at 1279-80 (arguing that *Sherbert* and *Thomas* are alike even though former involves case of facial disparity while latter does not).

96 See infra Part II.A (explaining administration of unemployment compensation statutory schemes).

97 See Eisgruber & Sager, supra note 6, at 1279-80.

98 See id. at 1299.

99 Id. at 1280.

100 See id. at 1287.

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tionary accommodation schemes of unemployment compensation benefits. The survey of numerous unemployment benefits cases presented below suggests that, contrary to Professors Eisgruber and Sager's assertion, states do not appreciate physical allergies over moral ones; that is, states do not impermissibly devalue religion against other compelling, secular reasons for terminating one's employment.

Part II presents the results of the survey, and Part III analyzes those results in light of the equal regard principle, concluding that the *Sherbert* Quartet cannot be explained by the principle of equal regard. The compelling state interest test would thus have no place in this context.

II
SURVEY OF UNEMPLOYMENT BENEFITS CASES

This Part presents a sample of unemployment compensation benefits cases from different states in an attempt to demonstrate which reasons administrative agencies and courts are willing to construe, consonant with state schemes, as good cause for terminating one's employment. No effort has been made to produce a statistically representative sample of unemployment compensation cases, nor does this Note claim to have found every case. Rather, this Note has sought to survey those cases in which claimants leave their jobs for some compelling secular interest that is comparably weighty to the religious reasons motivating the claimants in the *Sherbert* Quartet.[101] Some may argue there are no obligations that are comparably weighty to religious ones.[102] Professors Eisgruber and Sager, however, would dismiss these arguments as impermissibly sectarian: adherents of the view that religious burdens are weightier than others suggest that religion is somehow different, somehow special or supreme, a view that Professors Eisgruber and Sager challenge as constitutionally suspect.[103] Others may agree that there are indeed comparably weighty secular burdens, yet may take issue with those secular burdens with

[101] These cases were found on Westlaw in the Allstates Database under West key numbers corresponding to those secular interests this Note has determined are as compelling as religious convictions. Not every case from every state was surveyed. Nor was every state surveyed. Rather, a sample was drawn from those cases in the defined database.

[102] See, e.g., Greene, supra note 11 (arguing that religion is distinguishable from firmly held secular beliefs).

[103] That religion should not be constitutionally privileged is the thesis driving Professors Eisgruber and Sager's theory of equal regard. This Note does not disagree with that point; rather, this Note merely suggests that the theory of equal regard does not explain the *Sherbert* Quartet insofar as that states are reluctant to award benefits for most compelling reasons, religious or secular.

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which this Note has chosen to compare religious burdens.[104] Ultimately, the resolution of which position holds the better view is a determination influenced by individual judgment. This Note assumes that familial obligations, sexual harassment, and health problems are some of the many secular reasons that are comparably weighty to religious obligations, yet recognizes that others may disagree.

Section A will briefly explain the unemployment compensation administrative process. Section B will then present the cases involving compelling secular reasons, as discussed above, for terminating one's employment.

A. Unemployment Compensation Schemes

Every state unemployment compensation scheme obligates terminated employees to satisfy certain eligibility requirements as conditions precedent to the receipt of benefits. An eligible claimant is one who is available for and able to work, has not refused, without good cause, suitable work when such work was offered to her, and did not voluntarily terminate previous employment without good cause.[105] An individual's eligibility for benefits thus turns upon how the state construes good cause, a determination which is left to the discretion of the reviewing administrator.[106] Good cause is a term left undefined by state statutes, yet it plays a dual role in the determination of benefits: an individual is disqualified not only for voluntarily leaving her employment without showing good cause, but also for refusing suitable work, if and when offered, in the absence of good cause.

The characterization of religious and equally compelling secular burdens as good cause for leaving employment or refusing work thus becomes imperative if individuals affected by these burdens are to receive unemployment compensation benefits. Professors Eisgruber and Sager believe that states characterize compelling secular obliga-

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[104] See, e.g., Marshall, supra note 60, at 320 (arguing that "religious belief cannot be qualitatively distinguished from other belief systems").

[105] See Allen G. Siegel & Stewart S. Manela, The Ins and Outs of Unemployment Compensation 14 (1985).

[106] In every state, the circumstances that constitute good cause are not determined by law; rather, state bureaucrats are responsible for determining from the facts and circumstances surrounding a self-termination of employment whether such termination was or was not for good cause. The determination of good cause is therefore heavily factual and left wholly to the unfettered discretion of state bureaucrats. In general, the first step in this defining process is taken by a local unemployment insurance claims referee, to whom the putative beneficiary applies for benefits. The referee will determine whether the claimant is eligible for benefits based on interviews with the claimant and her ex-employer. If either party desires review of an unfavorable determination, it may appeal to the state's unemployment compensation review board and then may appeal that board's determination to the state appellate judicial system.

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tions as good cause while discriminating against religiously motivated ones. They justify the Supreme Court's decisions in the *Sherbert* Quartet on this basis; they argue that each claimant was denied benefits by his or her respective state not because each state failed to privilege religion, but because the states failed to regard equally the claimants' religiously motivated obligations and the compelling secular burdens of other claimants.

They use the example of Mr. Thomas and the Indiana Review Board to illuminate their point. The administrative ruling against Mr. Thomas manifests the state's decision that religiously motivated individuals leaving their work in the production of armaments do so without good cause and consequently disqualify themselves from the receipt of unemployment compensation benefits.[107] While this rule discriminates against those whose religious convictions condemn participation in the manufacture of war implements, as compared with those who are not bound to the same religious mores, Professors Eisgruber and Sager stress, "that circumstance, standing alone, does not constitute a failure of equal regard. The failure lies in the fact that Indiana recognizes other deep personal interests, like physical allergies, as good cause for declining or leaving employment."[108] As illustrated below, however, most states take such a narrow view of good cause that many compelling personal reasons for terminating employment, including physical allergies, do not suffice to render one eligible for unemployment compensation benefits. On this view, then, insofar as states do not tend to depreciate religion any more than compelling secular burdens, the theory of equal regard does not adequately explain the *Sherbert* Quartet.

B. Survey Results

The results of the survey reveal that many states define good cause narrowly, and they exempt from eligibility claimants who voluntarily left their employment for reasons this Note assumes are equally compelling as religious constraints, including familial obligations, sexual harassment at the workplace, and problems of mental and physical ill health. The reason for these narrow constructions may be due largely to the fact that many states assign as good cause only those reasons found to be "attributable to the employer," that is, those having been caused, in some way, by the claimant's employer. Defining good cause to circumscribe such a narrow set of qualifying circumstances necessitates the removal of domestic obligations or other per-

[107] See Eisgruber & Sager, supra note 6, at 1298.
[108] Id.

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sonal reasons as good cause. It is not surprising, then, that many states fail to recognize these personal reasons for terminating one's employment as "good cause."

1. Familial Obligations as Good Cause

The first type of familial obligation case deals with claimants who leave work to care for ill parents or spouses. In *Leeseberg v. Smith-Jamieson, Inc.*,[109] Ms. Leeseberg requested a leave of absence from her job as a nurse's aid at a nursing home because she had to care for her disabled husband, who had sustained serious injuries in a bulldozer accident.[110] Although her employer denied her request, she nonetheless took a leave. Soon thereafter, Ms. Leeseberg advised the nursing home that she wished to return to work.[111] At this time, her employer informed her that her position had been filled.[112] Eventually, Ms. Leeseberg applied for unemployment compensation benefits, but was denied them by the Michigan Employment Security Board of Review on the basis that she voluntarily left her employment without good cause attributable to the employer and was thus ineligible to receive benefits.[113] The Court of Appeals of Michigan affirmed, although it sympathized with Ms. Leeseberg's plight and acknowledged that its judgment forced Ms. Leeseberg to decide between "returning to work and retaining employment or staying home to care for her husband and risking possible discharge."[114] Despite its recognition that Ms. Leeseberg's decision to quit "was prompted by compelling personal reasons,"[115] the court ultimately held that such reasons did not amount to good cause under the state statute.[116]

In *Kieley v. Unemployment Compensation Board of Review*,[117] the Commonwealth Court of Pennsylvania rejected Ms. Kieley's con-

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109 386 N.W.2d 218 (Mich. Ct. App. 1986).

110 See id. at 219.

111 See id.

112 See id.

113 See id.

114 Id. at 220. In Sherbert v. Verner, 374 U.S. 398 (1963), and Thomas v. Review Board, 450 U.S. 707 (1981), the United States Supreme Court made a similar comparison in rejecting the rulings disqualifying both unemployment compensation claimants who quit because the precepts of their religion forbade the work at issue. The Court held: "The ruling [denying unemployment compensation benefits] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Sherbert*, 374 U.S. at 404; see also *Thomas*, 450 U.S. at 716-17 (quoting *Sherbert*, 374 U.S. at 404).

115 *Leeseberg*, 386 N.W.2d at 219.

116 See id.

117 471 A.2d 1345 (Pa. Commw. Ct. 1984).

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tention that she had quit her job for good cause.[118] Ms. Kieley had agreed, as a favor to her employer, to accept a temporary position as its rental and leasing manager. When the position became permanent, however, she resigned, stating that her fifty-mile one-way commute was too burdensome because she had ill parents for whom she was responsible for caring and her help was needed at home.[119] She testified that she cared for her mother, who was receiving kidney dialysis, and her father, who had had a number of eye operations and thus could no longer manage the operations of their hundred-acre family farm.[120] The court found that these personal circumstances did not constitute necessitous and compelling reasons for terminating her employment and therefore denied Ms. Kieley eligibility for the receipt of unemployment compensation benefits.[121] A dissenting judge, however, argued that insofar as Ms. Kieley's employer altered the conditions of Ms. Kieley's employment from a temporary position to a permanent one, Ms. Kieley need not prove that she voluntarily terminated her employment for a necessitous and compelling reason, but only that she later rejected work offered to her because she properly found it "unsuitable." The judge thus argued that the claimant remained eligible for benefits.[122]

In another caretaker case,[123] the Court of Appeals of Louisiana

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118 See id. at 1346-47.

119 See id. at 1346.

120 See id. at 1348 (Doyle, J., dissenting).

121 See id. at 1347.

122 See id. at 1348 (Doyle, J., dissenting).

123 There are many examples of courts rejecting a claimant's compelling need to care for ill parents or spouses. See, e.g., Margulies v. Pallott & Poppell, 599 So. 2d 195, 196 (Fla. Dist. Ct. App. 1992) (holding that termination of employment to care for ailing family member did not constitute good cause); In re Polax, 632 N.Y.S.2d 318, 318 (App. Div. 1995) (rejecting claimant's contention that he quit job as motor vehicle operator in New York for good cause to attend to his sick wife in Indonesia, stating that it was unclear if claimant's presence in Indonesia was necessary); In re Constantino, 626 N.Y.S.2d 326, 326 (App. Div. 1995) (holding that claimant voluntarily left his employment without good cause when his employer changed hours of his shift, even though such shift change made it impossible for claimant to take care of his disabled brother); In re Levine, 622 N.Y.S.2d 136, 136-37 (App. Div. 1995) (denying unemployment compensation benefits to claimant who left work to care for husband in New Jersey who moved to that state after being medically advised to avoid urban pollution); In re Perrotta, 616 N.Y.S.2d 561, 561 (App. Div. 1994) (holding that claimant's desertion of New York employment to move to Florida to care for ill husband was not good cause because of lack of medical proof that claimant's presence in Florida was required); Robinson v. Unemployment Compensation Bd. of Review, 532 A.2d 952, 953 (Pa. Commw. Ct. 1987) (holding that relocation to care for ill father was not good cause even though such motives were praiseworthy); Unemployment Compensation Bd. of Review v. Milauskas, 351 A.2d 291, 291 (Pa. Commw. Ct. 1976) (holding that termination due to filial obligations was not good cause). But see Steck v. Unemployment Compensation Bd. of Review, 467 A.2d 1378, 1380 (Pa. Commw. Ct. 1983) (allowing benefits to claimant to join her relocated spouse).

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in *Thomson v. State*[124] affirmed Mr. Thomson's disqualification for unemployment compensation benefits and rejected his contention that his religious duty under the Fourth Commandment of the Bible to care for his ill father and provide "moral support" to his mother constituted good cause to voluntarily leave his employment.[125] The court dismissed this argument, concluding that Mr. Thomson's obligations to his parents, although perhaps a personal good cause, did not constitute good cause consonant with the statute to justify the grant of unemployment compensation benefits.[126]

A second type of familial obligation case involves parental obligations to children. In *Sonterre v. Job Service North Dakota*,[127] Ms. Sonterre terminated her employment after her employer switched her from the night shift to the day shift and refused to consider her request for employment more suitable to her needs.[128] She explained that her shift change would require her to find a baby-sitter for her children and that her continued placement in the night shift would have alleviated the problem.[129] Although the district court found Ms. Sonterre had good cause attributable to the employer for quitting,[130] the Supreme Court of North Dakota reversed, holding that "[w]hile parental obligations may be good personal reasons for leaving employment, they are not causes that are attributable to the employer."[131]

The Court of Appeals of Indiana for the Second District has viewed domestic obligations similarly. In *Gray v. Dobbs House*,[132] Ms. Gray applied for unemployment compensation benefits when she encountered child care and transportation problems occasioned by

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In an interesting case, the Commonwealth Court of Pennsylvania remanded Bacon v. Unemployment Compensation Board of Review, 491 A.2d 944 (Pa. Commw. Ct. 1985), for a factual determination of the reasonableness of Ms. Bacon's decision to terminate her employment to save herself and her two small children from her husband's physical abuse. See id. at 947. The court acknowledged that Ms. Bacon's husband used to beat her when he became intoxicated. See id. at 945. The court was not convinced, however, that Ms. Bacon's termination of employment and relocation to another state was necessary under the circumstances. See id. at 946. The court stated that there may have been alternatives that would have allowed her to remain employed, even though it found that Ms. Bacon had no family in Pennsylvania with whom she could live. See id.

124 564 So. 2d 756 (La. Ct. App. 1990).

125 See id. at 757 (basing decision on strict statutory interpretation of good cause).

126 See id. at 759.

127 379 N.W.2d 281 (N.D. 1985).

128 See id. at 282.

129 See id. at 284.

130 See id. at 283.

131 Id. at 284. The court also questioned if Ms. Sonterre had reasonably sought adequate child care, although it noted that the record was silent on this question. See id.

132 357 N.E.2d 900 (Ind. Ct. App. 1976).

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her reassignment to a different shift.[133] The Review Board of the Employment Security Division denied her application for benefits, and the court affirmed on appeal.[134] Although acknowledging that Ms. Gray's shift restrictions did not render her detached from the labor market and thus ineligible for the receipt of benefits, the court nevertheless denied her benefits, citing *Geckler v. Review Board*[135] for the proposition that "'cases have not extended the construction of "good cause" to include purely personal and subjective reasons [such as domestic obligations] which are unique to the employee.'"[136] These reasons, the court continued, are not those that would "impel a reasonably prudent man to terminate under the same or similar circumstances."[137] The court concluded that the state should not be required to compensate employees who voluntarily quit their jobs for compelling domestic obligations.[138]

Courts are also reluctant to accept the preservation of the family unit as good cause for termination of employment. In *Norman v. Unemployment Insurance Appeals Board*,[139] the Supreme Court of California denied Ms. Norman's appeal for unemployment compensation benefits after she quit her job in California to follow her fiancé to Washington.[140] Ms. Norman explained that her fiancé's relocation

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133 See id. at 903.

134 See id. at 902.

135 193 N.E.2d 357 (Ind. 1963).

136 *Gray*, 357 N.E.2d at 903 (quoting *Geckler*, 193 N.E.2d at 359).

137 Id.

138 See id. at 907. For more cases rejecting the contention that a voluntary quit due to difficulties in securing adequate child care amounts to good cause, see, e.g., Beard v. State Dep't of Commerce, 369 So. 2d 382, 385 (Fla. Dist. Ct. App. 1979) (reversing Unemployment Compensation Board of Review's grant of benefits); Spears v. Review Bd. of the Ind. Employment Sec. Div., 297 N.E.2d 439, 440 (Ind. Ct. App. 1973) (affirming determination that lack of free child care did not constitute good cause for not accepting suitable work); Kampa v. Normandale Tennis Club, 393 N.W.2d 195, 197 (Minn. Ct. App. 1986) (holding that claimant's personal scheduling conflicts arising from accommodation of young son's medical problems did not constitute good cause); In re Scalfani, 620 N.Y.S.2d 627, 628 (App. Div. 1995) (holding that claimant who was having marital problems and difficulty in making reliable child care arrangements left her job for "noncompelling reasons"); Bannon v. Unemployment Compensation Bd. of Review, 364 A.2d 963, 964 (Pa. Commw. Ct. 1976) (affirming Board's finding that employee who resigned to care for young son was ineligible for benefits). But see In re McEvoy, 456 N.Y.S.2d 110 (App. Div. 1982) (affirming granting of benefits); Newland v. Job Serv. N.D., 460 N.W.2d 118, 118 (N.D. 1990) (holding that difficulties in securing child care may, in combination with other factors, constitute good cause for quitting); Hospital Serv. Ass'n v. Unemployment Compensation Bd. of Review, 476 A.2d 516, 516 (Pa. Commw. Ct. 1984) (affirming that claimants' refusal to accept day shift position, based on need to care for small children, did not render them ineligible for unemployment compensation).

139 663 P.2d 904 (Cal. 1983).

140 See id. at 909 (holding nonmarital relationships did not afford same evidentiary presumptions as do marriages in determining good cause).

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"kind of put me on the spot, either come up here and live with him up here in Washington or to break up."[141] The court reversed the trial court's determination that such circumstances constitute good cause and held that Ms. Norman's reasons for leaving her employment were not sufficiently compelling to support an award of benefits.[142] The dissent disagreed, emphasizing that "[w]e cannot deny the fact that a nonmarital relationship can acquire such significance and importance in the lives and hopes of the persons involved that one partner may reasonably and in good faith decide that preserving the relationship justifies terminating current employment."[143]

In *Green v. Unemployment Compensation Board of Review*,[144] Mr. Green's employer transferred him from his job in Philadelphia, Pennsylvania, first to a plant in Ellwood City, Pennsylvania, and then to a different plant in Joliet, Illinois, after the Ellwood City plant closed.[145] Ten months later, Mr. Green, citing his need to relocate to Philadelphia in order to preserve his wife's health, voluntarily terminated his employment and sought unemployment compensation benefits.[146] He testified that his wife's doctor had indicated that his wife was suffering "from acute anxiety, requir[ing] psychological counseling and, therefore, he advised relocation back to Philadelphia."[147] Mr. Green further testified that his wife threatened to leave him and their children in Illinois unless he quit his job.[148] The Commonwealth Court of Pennsylvania stated that while "preservation of the family unit is socially desirable,"[149] Mr. Green's termination for this reason was not for cause of a necessitous and compelling nature sufficient to support an award of unemployment compensation benefits.[150]

2. *Sexual Harassment as Good Cause*

There are many cases denying claimants benefits when claimants terminate their employment because of sexual harassment at the workplace. In *Brown v. Unemployment Appeals Commission*,[151] Ms. Brown had sufficiently proven that a coworker had verbally and physi-

141 Id. at 906.
142 See id. at 910 (leaving open possibility that good cause might be shown in nonmarital relationship with compelling circumstances).
143 Id. at 911 (Broussard, J., dissenting).
144 529 A.2d 597 (Pa. Commw. Ct. 1987).
145 See id. at 598.
146 See id.
147 Id.
148 See id.
149 Id. at 599.
150 See id. at 599-600.
151 633 So. 2d 36 (Fla. Dist. Ct. App. 1994).

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cally sexually harassed her.[152] The offender "stated that 'he liked [her] ass,' and 'he would like to eat [her].' . . . [He also] touched her behind . . . rubbed her back, exposed himself to her and made sexual gestures with his tongue."[153] Furthermore, on one afternoon, he stopped Ms. Brown by the doorway and "pulled up her top and started to pull down her pants and pulled his penis out."[154] After this last incident, Ms. Brown took a leave of absence, during which her employer arranged to relocate her to the main building.[155] Upon advice of her attorney and her psychologist, Ms. Brown refused this offer because her harasser's wife, the firm's administrator in charge of hiring and firing,[156] worked there.[157] The District Court of Appeals of Florida for the Fifth District denied Ms. Brown benefits because she failed to show that her voluntary departure was attributable to her employer.[158] The court further stated that the good cause standard "focuses on whether the circumstances would have impelled the average, able-minded, qualified worker to give up her employment. . . . The standard is not that of the highly emotional, super sensitive employee."[159] Applying this good cause standard, the court found Ms. Brown ineligible for unemployment compensation benefits.[160]

In *Weaver v. Minnesota Valley Laboratories, Inc.*,[161] Mr. Weaver resigned from work after being sexually harassed by his female supervisor.[162] Mr. Weaver testified that his supervisor's discussions with him regarding her drinking and sexual fantasies, her questions about sexual topics, and her remarks on his sexual relationship with his wife "affected his work and made him feel 'degraded and terrible . . . [and] under duress.'"[163] Others had testified that sex was discussed in the workplace.[164] Mr. Weaver had complained to the company's Chief Executive Officer, Mr. Day, that his supervisor was treating him un-

152 See id. at 39 (Dauksch, J., dissenting).
153 Id.
154 Id.
155 See id. at 37.
156 See id. at 40 n.1 (Dauksch, J., dissenting).
157 See id. at 37.
158 See id. at 38-39.
159 Id. at 38.
160 See id. at 39; see also Jensen v. Siemsen, 794 P.2d 271, 272, 275-76 (Idaho 1990) (finding that claimant failed to prove sexual harassment although several witnesses testified that claimant's employer appeared to be masturbating while tucking in his shirt before claimant, had inappropriately touched others, and often had made sexual innuendoes directed toward claimant and concluding on that basis that claimant failed to prove good cause for her self-termination).
161 470 N.W.2d 131 (Minn. Ct. App. 1991).
162 See id. at 132-33.
163 Id. at 132.
164 See id. at 133.

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professionally, but Mr. Day assessed the problem as a personality conflict and an inability by Mr. Weaver to accept a female supervisor.[165] On application for unemployment compensation benefits, a referee for the Commissioner of Jobs and Training found that Mr. Weaver quit his job with good cause attributable to the employer.[166] The Minnesota Court of Appeals reversed, however, stating that Mr. Weaver's circumstances were not sufficient under the statute to justify an award of benefits.[167]

3. *Mental and Physical Ill Health as Good Cause*

Courts also seem reluctant to hold that a claimant's self-termination motivated by ill health is sufficiently compelling to constitute good cause. In *Lee Hospital v. Unemployment Compensation Board of Review*,[168] the Board found that the claimant, Ms. Daley, had been harassed by her husband throughout the course of their year-long divorce proceeding and that such harassment resulted in "severe stress" for which she took medication and had been briefly hospitalized.[169] The Pennsylvania Commonwealth Court reversed the Board's determination that Ms. Daley quit for cause of a necessitous and compelling reason and stated that neither the domestic problems nor the resulting health difficulties were sufficient to support an award of benefits.[170]

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165 See id.

166 See id.

167 See id. at 134-35. The court rested its decision on its finding that Mr. Weaver failed to inform his employer about the harassment, suggesting that the employer had not had an opportunity to improve the situation. See id. at 134. The evidence indicates that Mr. Weaver did, however, inform the CEO of the harassing situation. See id. at 132-33.

168 637 A.2d 695 (Pa. Commw. Ct. 1994).

169 Id. at 696-97.

170 See id. at 698-99; see also Sothras v. Employment Div., 616 P.2d 524 (Or. Ct. App. 1980) (holding that whether personal reasons for leaving job could constitute "good cause" is value judgment entrusted to Employment Division's discretion). For other cases determining that stress is an insufficient reason to quit one's job, see, e.g., Davis v. Hoggle, 392 So. 2d 1190, 1192 (Ala. Civ. App. 1980) (reversing lower court's grant of benefits for lack of good cause to claimant who quit job where she became so frightened during her nightly commute that she lost sleep as result); In re Fumia, 635 N.Y.S.2d 341, 342 (App. Div. 1995) (denying benefits to claimant who could no longer tolerate stress associated with his job on basis that claimant failed to substantiate his claim with proof of doctor's advice to leave job, but admitting that claimant was denied opportunity to present his doctor as witness); In re Ehrenberg, 602 N.Y.S.2d 441, 442 (App. Div. 1993) (holding that harassment of claimant by supervisors was nothing more than claimant's inability to get along with them and thus was insufficient reason to leave work); In re Layton, 602 N.Y.S.2d 439, 439 (App. Div. 1993) (same); In re Wolfbiss, 570 N.Y.S.2d 382, 383 (App. Div. 1991) (same). But see Board of Educ. v. Paynter, 491 A.2d 1186, 1195 (Md. 1985) (upholding referee's finding that claimant who quit teaching because of harassment by students did so with good cause).

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In *American Water Works Service Co. v. Unemployment Compensation Board of Review*,[171] the Board found the claimant, Ms. Ritchie, had requested a leave of absence from her employment because an odor emitting from the air conditioner had made her nauseous to the point that she could not eat and thus feared for her health and the health of her unborn child.[172] The Board also found that Ms. Ritchie's physician had advised her to terminate her employment "because of the affect [sic] the odor had upon her health."[173] Based on this evidence, the Board reversed the referee's denial of benefits, finding that Ms. Ritchie left her employment for reasons of a necessitous and compelling nature.[174] On the employer's appeal, however, the Commonwealth Court of Pennsylvania vacated and remanded the case to the Board for a determination of whether Ms. Ritchie's illness was a cause attributable to her employer.[175]

In *Dozier v. Review Board*,[176] Ms. Dozier, who had a history of chronic absenteeism related to a medically diagnosed lower back problem, took a leave of absence from her job pursuant to her doctor's advice.[177] Her doctor had written to Ms. Dozier's supervisor, advising that Ms. Dozier would not return to work until October 5, 1981; on that day, Ms. Dozier was advised by her doctor to remain out of work for another week.[178] Ms. Dozier's mother contacted her daughter's employer, stating that Ms. Dozier would be gone for another week.[179] The next day, Ms. Dozier was terminated, and she thereafter applied for unemployment compensation benefits.[180] The Indiana Court of Appeals affirmed the Board's denial of benefits, stating that

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171 488 A.2d 1184 (Pa. Commw. Ct. 1985).

172 See id. at 1186.

173 Id. at 1187.

174 See id. at 1186.

175 See id. at 1187; see also Henderson v. Allen, 627 So. 2d 418, 420 (Ala. Civ. App. 1993) (denying benefits to claimant who resigned due to complications from her pregnancy, stating that claimant failed to avail herself of employer's maternity leave policy); Petty v. University of Del., 450 A.2d 392, 395 (Del. 1982) (finding that claimant who quit due to difficulties associated with her pregnancy was unable and unavailable for work, despite claimant's contention that she was only restricted from heavy cleaning tasks and not all custodial work); Lauderdale v. Division of Employment Sec., 605 S.W.2d 174, 178 (Mo. Ct. App. 1980) (finding that pregnant claimant on maternity leave was unavailable for work during her leave, although she exhibited strong desire to work and was actively looking for work, because of her doctor-mandated medical restriction to light duties that did not involve excessive walking, and stating that "[a] willingness to merely be employed conditionally does not meet the 'availability' test of the statute").

176 436 N.E.2d 373 (Ind. Ct. App. 1982).

177 See id. at 374.

178 See id.

179 See id.

180 See id.

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Ms. Dozier had failed to inform her employer that her continued absence was related to her medical condition.[181]

In *Walsh v. Unemployment Compensation Board of Review*,[182] the Board found that the claimant, who left her job due to the effects of paint fumes on her health, left without cause of a necessitous and compelling reason and accordingly denied her benefits.[183] Ms. Walsh, a diabetic, had obtained a certificate from her doctor, advising that the odor of paint fumes caused Ms. Walsh nausea, and that such an environment is medically undesirable for diabetic patients.[184] The Com-

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181 See id. at 375. Language in some of the cases cited in this subsection suggests that the claimant's alleged failure to notify his or her employer about his or her physical or ill-health condition serves as the basis for the court's rejection of the claimant's unemployment compensation claim. Other language, however, suggests that the courts are unwilling to recognize these causes even if the claimant's employer had been adequately informed. Although courts pay lip service to the notion that medical problems constitute good cause to quit one's job, in no case surveyed do courts expressly accept such reason as good cause.

182 329 A.2d 523 (Pa. Commw. Ct. 1974).

183 See id. at 525.

184 See id. For other cases rejecting the contention that one's ill health constitutes good cause to quit one's employment, see, e.g., Wade v. Review Bd. of the Ind. Dep't of Employment & Training Servs., 599 N.E.2d 630, 632-33 (Ind. Ct. App. 1992) (finding that claimant's voluntary termination of first job to accept better-paying second job was not good cause and that second employer's refusal to rehire claimant after claimant was unable to begin latter job as scheduled due to temporary illness did not fall within relevant statutory exemption); White v. Employment Appeal Bd., 487 N.W.2d 342, 346 (Iowa 1992) (remanding to determine whether claimant's cardiac-arrest-induced unemployment was attributable to employer and holding that if not, claimant was ineligible for benefits even though claimant's physician advised that claimant could perform any work not requiring operation of motor vehicle); Hessler v. Labor & Indus. Relations Comm'n, 851 S.W.2d 516, 518-19 (Mo. 1993) (en banc) (denying benefits to claimant who was advised by physician to stay off her feet due to complications arising from her pregnancy on basis that claimant failed to apprise her employer of her medical condition); Bailey v. Unemployment Compensation Bd. of Review, 653 A.2d 711, 714 (Pa. Commw. Ct. 1995) (denying benefits to HIV-infected claimant who quit because of fear he would place his minor students at risk, on basis that claimant failed to apprise his employer of his medical condition); Chapman v. Unemployment Compensation Bd. of Review, 414 A.2d 174, 175 (Pa. Commw. Ct. 1980) (finding claimant unavailable for work after he quit when diagnosed with severe chronic pulmonary disease, although claimant's physician certified that claimant was available to work "in a sedentary, clean air endeavor of some kind"); Baker v. Unemployment Compensation Bd. of Review, 336 A.2d 671, 674 (Pa. Commw. Ct. 1975) (finding claimant unavailable to work where claimant's physician recommended that claimant, who suffered from hypertension and allergy associated with chemical used at work, pursue nonstrenuous work for 15 hours per week). But see Canady v. Allen, 646 So. 2d 147, 148-49 (Ala. Civ. App. 1994) (finding claimant available for work despite doctor's orders that claimant not lift over 15 pounds); Missouri Div. of Employment Sec. v. Hankins, 700 S.W.2d 161, 163 (Mo. Ct. App. 1985) (finding claimant's failure to seek employment for three days because of sickness did not make her ineligible for extended benefits under statutory requirement of systematic and sustained efforts to find work); Gols v. Ross, 399 N.Y.S.2d 337, 338 (App. Div. 1977) (holding that woman's pregnancy does not automatically disqualify her from availability of unemployment insurance benefits).

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monwealth Court of Pennsylvania affirmed, stating that Ms. Walsh failed to notify her employer of her ill health.[185]

III
THE CASE FOR EQUAL REGARD FAILS IN THE CONTEXT OF AD HOC ADMINISTRATIVE REFUSALS

The above survey suggests that state courts generally take a narrow view of "good cause." States routinely deny unemployment compensation benefits to individuals who leave work to fulfil their familial obligations, to escape sexual harassment, and to avoid pernicious effects to their health. Understandably, to ensure the fiscal survival of a state unemployment compensation scheme, not every claimant for unemployment compensation benefits deserves an award. Rather, each state must develop a mechanism to determine what disabling circumstance is compelling enough to justify the award. Every state has determined that to be eligible, a claimant must show not only that she has left her employment for good cause, but also that she is able to work and is available for work once she has left her former employment. Yet, there will be times when putative beneficiaries limit the type of work for which they are available. These types of limitations, however, do not support the conclusion that the individual cannot work at all.

So, for example, every claimant in the *Sherbert* Quartet had placed a specific limitation on the type of work for which he or she was available; namely, each claimant found unacceptable any work that conflicted with his or her religious beliefs.[186] Absent these religiously motivated constraints, the claimants were generally able to work and were available for work. Nevertheless, the state courts in each case denied the claimant religious accommodation. The Supreme Court reversed the states' denials and found that the reason each claimant restricted his or her availability for employment was sufficiently powerful and compelling to justify an award of unemployment compensation benefits consonant with the state scheme.[187]

Under Professors Eisgruber and Sager's theory of equal regard, the Court's reversals were correct, not because religion is accorded a special status in the eyes of the Constitution, but because religion must constitutionally be protected from discrimination.[188] In the context of the *Sherbert* Quartet, Professors Eisgruber and Sager's fear is

185 See *Walsh*, 329 A.2d at 525.
186 See supra note 5; supra text accompanying note 4.
187 See supra text accompanying note 7.
188 See Eisgruber & Sager, supra note 6, at 1278-84.

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that religion is vulnerable in the face of ad hoc, discretionary schemes that judge the legitimacy of personal reasons for terminating one's employment.[189] Such "discretionary terrain," they argue, provides "fertile ground for the undervaluation of minority religious interests."[190] But this undervaluation, or discrimination, they continue, cannot easily be identified within an administrative scheme that relies heavily upon ad hoc judgments about reasons or obligations compelling someone to quit her job.[191] Because of this difficulty, Professors Eisgruber and Sager contend that an appropriate way to ferret out discrimination is to require the state to articulate a compelling state interest to justify its construction of "good cause."[192]

Professors Eisgruber and Sager's theory of this undervaluation of, or discrimination against, minority interests in schemes similar to those at issue in the *Sherbert* Quartet does not rest on an express state preference for mainstream religious believers over adherents of minority religions.[193] Rather, it rests on a state's failure to embrace religiously motivated reasons to quit one's job and compelling secular reasons as equally onerous.[194] Professors Eisgruber and Sager explain that a state's failure of equal regard lies in the fact that the state is "partial in the way that it defines personal interests: the state has failed to recognize a set of interests distinct to a minority religious position" while recognizing "other deep personal interests, like physical allergies, as 'good cause' for declining or leaving employment."[195] As cases like those of Ms. Dozier[196] and Ms. Walsh[197] indicate, however, states do not recognize other deep personal interests, like physical allergies, as good cause. In fact, the results of the brief survey of unemployment compensation cases strongly suggest that many states are restrictive in their embrace of other compelling secular obligations as good cause as well.

If we were to compare the claimants in the *Sherbert* Quartet with those discussed in Part II, as the principle of equal regard would have us do, we could reasonably conclude that states deny benefits without constitutionally discriminating against religious beliefs. The overwhelming evidence indicates that states give little regard to compelling secular obligations; under an equal regard analysis, discrimination

189 See id. at 1299.
190 Id.
191 See id.
192 See id. at 1299-1300.
193 See id. at 1291-97.
194 See id.
195 Id. at 1298.
196 See supra text accompanying notes 176-81.
197 See supra text accompanying notes 182-85.

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against religious obligations does not appear constitutionally suspect. An interpretation motivated by equal regard thus suggests that religion need not be constitutionally protected because it *is* being regarded evenhandedly against compelling secular interests. To require state administrators to justify their construction of good cause with a compelling state interest would serve only to privilege religion, a result that Professors Eisgruber and Sager assert is irreconcilable with the Constitution. Professors Eisgruber and Sager's contention that the compelling state interest test remains viable as a means to ferret out the discrimination against which the principle of equal regard protects in ad hoc, discretionary schemes, does not, therefore, seem appropriate. The test would not serve the purpose they had hoped it would.[198]

CONCLUSION

Whether religious exemptions are constitutionally compelled is a question of great controversy. Many argue that religion is a unique virtue meriting distinctive solicitude. These arguments find support in the requirement, articulated by the Supreme Court initially in *Sherbert v. Verner*,[199] that the state proffer a compelling governmental interest before its intrusion on religious interests can be justified. To the extent the compelling state interest test provokes a privileging view of religion, Professors Eisgruber and Sager condemn the test, and they reject the idea that the uniqueness of religion entitles it to constitutional attention. They offer another foundation for the granting of religious exemptions, however, one grounded in the theory that unless religion is protected, it will be treated with less regard than other deep personal convictions motivating an individual's life. Under this theory, constitutional concern is inspired not by the singularity of religion but by the vulnerability of minority religious believers to invidious forms of discrimination. Discrimination can be reflected not only in the disparity of judicial treatment between mainstream and minority religious adherents but between religiously motivated and secular individuals as well.

Professors Eisgruber and Sager analyze the *Sherbert* Quartet as cases of discrimination, basing their analysis on this latter fear that states will recognize the importance of secular obligations in an indi-

198 That this Note concludes that the principle of equal regard and the compelling state interest test do not adequately explain the *Sherbert* Quartet does not suggest that neither Professors Eisgruber and Sager's theory nor the compelling state interest test has no viability in other areas of our constitutional jurisprudence. The questions of in what arenas, and how, are beyond the scope of this Note, however.

199 374 U.S. 398 (1963).

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vidual's life while devaluing one's religious obligations. The results of the survey of state unemployment compensation cases strongly suggest, however, that many states are restrictive in their embrace not only of religious interests but also of compelling secular interests. If we conclude that the cases comprising the *Sherbert* Quartet can neither be understood to privilege religion, because to do so would be impermissibly sectarian, nor to protect religion, because an equal regard analysis intimates that religion is not vulnerable to discrimination, it appears that the principle of equal regard cannot adequately explain the *Sherbert* Quartet.

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