The Sabbath Observer, the Idiosyncratist, and the Religious Organization: How the EEOC Imagines Religion at Work

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In March 2022, as the Omicron variant was waning and COVID-19 infection rates were dropping across the country, the United States Equal Employment Opportunity Commission (EEOC) updated its guidance to employers on how to handle employee requests for religious exemptions from vaccine mandates.[1] This was the second time in six months that the EEOC had revised its guidance, responding to employers' ongoing uncertainty about the extent of their obligation to accommodate the religious needs of their employees. Did an employer have to accept an employee's religious claim at face value, or could they scrutinize it for inconsistencies or ambiguities? Was it ever permissible to question the sincerity of their employees' beliefs, and, if so, when and on what basis? How should they distinguish between a belief grounded in religion and one grounded in politics or personal preference, neither of which are entitled to accommodation under U.S. law? In its policy document, the EEOC tried to help employers find the right balance between presuming the sincerity of an employee's "stated religious belief" and identifying factors that might "undermine an employee's credibility." Needless to say, its efforts failed to satisfy partisans on either side of America's political divide.

The debates about COVID-19 vaccine exemptions called attention to the significant role the EEOC plays in regulating American religious life. As employers wrestled with how to assess their employees' requests for accommodations, numerous media outlets published articles detailing the broad and often contradictory standards by which the EEOC defines religion.[2] A number of these sources expressed surprise that a government agency tasked with redressing discrimination in the workplace should even have a

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formal definition of religion. Yet this would hardly be news to scholars of religion and American culture. As critical scholarship on religious freedom has well established, so long as states adjudicate rights on the basis of religion, they will find themselves tasked with having to distinguish legitimate religious claims from illegitimate ones. They will have to determine which—and whose—claims are worthy of protection, and which are not. Despite their professed commitments to principles of separation, secular states will inevitably have to make contested determinations about what counts as properly religious.[3]

In pursuing these claims, scholars of American religions have tended to focus on the work of federal judges and their interpretations of the First Amendment of the U.S. Constitution. They have looked to key legal decisions to analyze—and critique—how the state conceives of religion.[4] But the U.S. government is not so monolithic, and the role of the federal judiciary can be easily exaggerated. In fact, administrative agencies arguably play a much greater role in the day-to-day management and regulation of American religious life. A wide range of government bureaucracies are regularly tasked with the project of defining religion and demarcating its boundaries.[5] Such work may seem at odds with the American commitment to church-state separation and religious disestablishment, which tends to presume the need for state agents to avoid making any such determinations about religion's proper scope. But, as a practical matter, they do so all the time. As long as "religion" appears in a wide range of statutory contexts, separate from whatever the First Amendment might or might not say about it, midlevel bureaucrats and other state agents will have to sort out just what it means.

Apart from the Supreme Court, it has become a cliché of sorts in religious studies scholarship to say that the Internal Revenue Service (IRS) plays the most significant role in defining religion, legally. "The Internal Revenue Service is, both de facto and de jure, America's primary definer and classifier of religion," Jonathan Z. Smith tells us in his essay "God Save the Honorable Court."[6] Scholars of Scientology, in particular, often make similar claims.[7] The point has never seemed quite right, however, first, because the operative category in the Internal Revenue Code is "church," not "religion." In its administrative guidelines, the IRS privileges organized institutions with "distinct legal existence," "definite and distinct ecclesiastical government," and "formal code of doctrine and discipline."[8] Its corporate understanding of religion stands at odds with the more individualistic and antinomian ways that Americans typically conceive of U.S. religious life.[9] Even more to the point, the IRS's influence extends only to interpreting federal tax law and is constrained by the terms and conditions of the Internal Revenue

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Code. It has no direct authority over the ways religion is defined in a host of other statutory and regulatory contexts.

In fact, American law is far too variegated and fragmented for any single agency to serve as "primary definer and classifier." Instead, different administrative agencies have authority to enforce different aspects of federal, state, and local law, each of which may reference and define religion in different ways, at times borrowing or adapting from each other's frameworks—and from those of the religious actors they are meant to regulate—in ways that might or might not cohere.[10] It is worth attending to these differences in order to understand what they can teach us about the complex entanglements of religion and law in the United States.

In this article, I analyze the work of the EEOC, the federal agency charged with enforcing laws related to employment discrimination. In so doing, I center the workplace as a critical site of religious practice and legal regulation. As a wealth of recent scholarship has established, work is far more than a place where Americans earn their livelihoods.[11] "Work produces not just economic goods and services but also social and political subjects," Kathi Weeks writes in *The Problem with Work*.[12] It shapes who we are, what we want, and how we understand our relations with others and with the state. Work is where Americans spend much of their time, where they find purpose and community, where they build personal and collective identities, and where they practice skills of democratic citizenship. The workplace is also a site of profound inequality. This became abundantly clear during the time of COVID-19, as determinations about which workers were regarded as "essential" led to grossly disparate outcomes in health and economic wellbeing. As Kathryn Lofton succinctly puts it, "Work determines life."[13]

Scholars of religion and law have devoted greater attention to other social spaces, like schools, prisons, and the military.[14] It is worth noting, however, how prominently matters of work figured into the landmark U.S. Supreme Court decisions that defined the parameters of First Amendment Free Exercise jurisprudence. The case of *Sherbert v. Verner*, for example, which announced that any substantial burden on a claimant's free exercise of religion must be justified by a "compelling state interest," centered on South Carolina's refusal to grant unemployment benefits to a Seventh-day Adventist who had been fired for refusing to work on Saturdays.[15] And *Employment Division v. Smith*, the "peyote case" that dismantled *Sherbert*'s compelling interest test, similarly originated as a dispute about unemployment benefits after two members of the Native American Church were discharged from their employment as drug-rehabilitation counselors.[16] As these cases alone suggest, the

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workplace warrants far greater scrutiny than it has received from scholars of American religious and legal life.

In my analysis, I look "beyond the First Amendment" to trace the different ways the EEOC has conceptualized religion for purposes of enforcing Title VII of the Civil Rights Act of 1964.[17] I draw on the Commission's published guidelines on religious discrimination, its compliance manuals for investigators in the field, and its internal records and correspondence to trace the shifting and sometimes contradictory ways that its agents have made sense of religious identities and commitments.[18] I identify three tropes, or types, of religious figures that coexist in unresolved tension in the EEOC's archive: the Sabbath Observer, the Idiosyncratist, and the Organization. Each of these figures names a different way of imagining religion with very different implications for its regulation. By attending to their distinct genealogies and legacies, I consider how they were products of and contributors to larger trends in American religious, political, and economic life.

While I hope these tropes might have broader valence for scholars of religion and law and scholars of religion and American culture, beyond the particular context of the workplace, I conclude by considering what they tell us specifically about changing notions of religious freedom at work. I examine how these different renderings of religion configure its relationship to work in very different ways. While the Idiosyncratist and Organization both imply the possibility of realizing one's religious commitments in and through the workplace, the Sabbath Observer insists on the right to forms of value and collective life outside and apart from work. What might it mean to recover this commitment at a time when work seems to be demanding more and more from us? What alternatives might this figure suggest for how we configure our religious and professional lives? Although focused relatively narrowly on the ways the EEOC has defined religion, this article ultimately aims to inspire broader reflection on the disparate ways we conceive of the relationship between religion, work, and American life.

The Sabbath Observer

The EEOC was created to enforce Title VII of the Civil Rights Act of 1964, which prohibited discrimination in hiring and employment practices on the basis of race, color, sex, religion, and national origin. The bill's drafters spent surprisingly little time considering whether to include religion within Title VII's list of protected categories. In the decades preceding Congress's passage of

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the 1964 legislation, civil rights groups, consistently stymied in their efforts at the federal level, successfully lobbied for twenty-five states to pass fair employment practices laws, most of which included protections against discrimination on the basis of "race, color, or creed."[19] When Congress finally passed legislation of its own, it adopted the existing state-level protections for religion with relatively little deliberation or debate. In fact, to the extent that Congressional committees considered religious discrimination at all, it was largely to pronounce it a problem of the past. As Father John Francis Cronin explained in testimony before a House subcommittee in 1964, "There are remnants of religious discrimination in the United States, but compared to the instant problem before us, of the civil rights of the Negro community, these are very minor and peripheral."[20]

In apparent confirmation of these assertions, the EEOC received relatively few allegations of religion-based discrimination in its early years, at least in comparison with complaints alleging discrimination on the basis of race, color, or sex.[21] Internal records show EEOC investigators far more preoccupied with working out the scope and limits of protection for those latter categories than for religion. When religion-related problems did arise, they were almost exclusively in the context of employees seeking time off to observe Sabbath and other religious holidays. The vast majority of these complaints came from Orthodox Jews, Seventh-day Adventists, and others, whose observance of the Sabbath from Friday evening to Saturday evening put them at odds with the typical workweek schedule. As the EEOC explained in introducing its first published "Guidelines on Discrimination Because of Religion" in 1966:

> Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or to refuse to hire a person whose religious observances require that he take time off during the employer's regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year.[22]

The Sabbath Observer has a long history in the United States and beyond. The Sabbath has figured prominently not only in disputes between religionists and secularists over the place of religion in American public life, but also among individuals and communities who observed the Sabbath in different ways. While nineteenth-century Sabbatarian groups advocated for legal enforcement of Sabbath observance, Jews and other Saturday-observing groups

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protested against laws that required them to close their businesses on Sundays.[23] As states began to experiment with workplace antidiscrimination measures in the mid-twentieth century, regulators debated how far they had to go in accommodating Sabbath observance. In New York, for example, the State Commission Against Discrimination tried to strike a middle ground between respecting the needs of Sabbath observers and those of business owners. "In general," the Commission explained in a 1955 memorandum, "it has been the Commission's approach that where an employer can do so without serious inconvenience to the conduct of its business, it should accommodate itself to the reasonable needs of employees or prospective employees in connection with religious holiday observance." And yet, should a job genuinely require a six-day workweek, Monday through Saturday, then employers should feel free to "inform a prospective employee of these conditions and leave it to the applicant to determine whether or not he wishes to accept such offer of employment."[24] State commissioners were deeply concerned about Jewish job applicants not being hired on account of being Jewish but were more ambivalent about whether to protect specific Jewish practices that might prevent them from participating fully in economic and social life.

When the EEOC first turned to this question in 1966, it mostly followed New York's lead. Though the Commission determined that Title VII imposed on employers an obligation "to accommodate the reasonable needs of employees," it allowed them "to establish a normal work week . . . generally applicable to all employees" without making special exceptions for Sabbath observance. The fact that such a policy might have disparate effects for religious minorities did not amount to "discrimination," the 1966 guidelines announced, provided that all workers were subject to the same requirements.[25]

The following year, in response to a slew of complaints from religious advocacy groups, like the National Jewish Commission on Law and Public Affairs and the Department of Public Affairs and Religious Liberty of the Seventh-day Adventist Church, the EEOC issued revised guidelines that were far more favorable to religious workers.[26] They required employers to accommodate the scheduling needs of their Sabbath-observing employees unless doing so would impose an "undue hardship" on their business operations. In a shift, the 1967 guidelines placed the burden of proof on employers, requiring them to demonstrate, on a case-by-case basis, that it would be unreasonable to meet their employees' needs. It would not be enough to show that their normal work schedule applied generally to all; instead, they would be expected to accommodate Sabbath observance whenever possible, even if that meant treating their religious workers differently.[27]

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Many employers were angered by the EEOC's new guidelines and contested the grounds on which the Commission had erected them. Several companies wrote letters to the Commission's chairman, Stephen N. Shulman, to detail their objections. "The proposed new guidelines appear to set aside basic concepts," explained George G. Harrer, manager of personnel services for Chicago Pneumatic Tool Company.[28] Businesses would be required to hire employees who were unable to meet the basic terms of their employment. Managers would be bombarded with all sorts of unreasonable requests. Religious accommodation would run afoul of collectively bargained union schedules. Above all, the Commission's guidelines would privilege the needs of religious employees over those of nonreligious ones. As the vice president of one Michigan-based manufacturing company explained it, "The question we wish to raise regarding the new EEOC proposed guideline on religious discrimination is whether it really has anything to do with 'equal opportunity' or whether it is a matter of preferential treatment."[29]

Regardless of their merits, there was some question as to whether the EEOC had the authority to enforce its guidelines in the first place. Under the 1964 Civil Rights Act, the Commission was empowered to investigate charges and work toward conciliation between opposing parties, but it lacked the power to initiate charges itself or to issue "cease-and-desist" orders that could be upheld in federal court. Its 1966 and 1967 guidelines on religious discrimination were merely advisory, lacking any statutory basis in the language of the Civil Rights Act itself. In fact, in the few early cases relating to religion, federal courts often rejected the EEOC's recommendations, interpreting the employer's obligation not to discriminate on the basis of religion far more narrowly.[30]

In 1972, Congress passed a set of amendments to the 1964 Civil Rights Act, which were meant to give more teeth to the EEOC's enforcement powers. At the behest of Senator Jennings Randolph, a long-serving Democrat from West Virginia and a committed Seventh Day Baptist, they also codified into law the EEOC's determination that employers were obligated to accommodate their religious employees' needs. They did so through an awkwardly worded new section, §701(j), which purported to define religion for purposes of enforcing Title VII. The new clause, added to the "Definitions" section of the bill, read as follows:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's

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> religious observance or practice without undue hardship on the conduct of the employer's business.[31]

The most obvious thing to note about this definition is that it hardly functions as a definition at all. That is, it offers little guidance as to how one might distinguish a "religious" observance or practice from a "nonreligious" one. In circular fashion, §701(j) simply defined religion as encompassing "all aspects of religious observance and practice, as well as belief."[32] Its clear intent was to codify by statute the employer's obligation to accommodate the employee's religious needs, not to offer clear guidance on differentiating religion from nonreligion. While its advocates argued that its language was consistent with how federal courts had interpreted the First Amendment, it could be read as far more expansive, making clear that "observances and practices" were protected, too, and not just the right to "believe."[33]

Despite being framed as a "definition" of religion, the 1972 amendments, along with the EEOC's 1966 and 1967 guidelines, did little to clarify what was meant by religion for purposes of Title VII enforcement. Focused almost exclusively on the rights of the "Sabbath Observer," most of those involved in these early efforts presumed they already knew exactly what they were talking about. In its engagement with the category of the Sabbath Observer, the EEOC imagined religion primarily as a matter of denominational identity. Being religious meant belonging to a bounded, organized community that imposed strict requirements on its members, requirements that put adherents at odds with the normative expectations of U.S. social and economic life. Sabbath Observers were "nontraditional" religionists, who could point to a specific history of hardship and discrimination to justify the legal accommodations they sought. The religion of the Sabbath Observer was treated as special, distinct from secular forms of practice and commitment, and needing special protection to level the playing field for all American workers. As Senator Randolph intoned from the Senate floor, "I am sure that my colleagues are well aware that there are several religious bodies—we could call them religious sects, denominational in nature—not large in membership, but with certain strong convictions, that believe there should be a steadfast observance of the Sabbath and require that the observance of the day of worship, the day of the Sabbath, be other than on Sunday."[34]

By contesting the strictures of the typical workweek, the Sabbath Observer posed a clear "problem" for management. But the Sabbath Observer also posed a problem for organized labor. This was because efforts to accommodate Sabbath observance by adjusting schedules or swapping work assignments often served to

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undermine collectively bargained seniority systems. Such systems privileged longevity of service over religious need when assigning work schedules. Historian Nelson Lichtenstein describes the "seniority idea" as no mere pragmatic arrangement but rather as a "key facet in the moral economy of American work life," whose "ethical basis lies in the respect and veneration all societies owe those of experience, age, and continuous tenure."[35] The seniority system was a hard-won achievement of the twentieth-century labor movement, which played a key role in securing the freedom and dignity of working Americans by protecting them from the capricious whims of unreliable managers. Sabbath Observers threatened this system by suggesting that their needs should take precedence to the deference due to long-time employees. They regarded the seniority system as a barrier to their full participation in the American workforce, not as a critical safeguard for workers' rights. In so arguing, Sabbath Observers asserted primary loyalty and obligation to God and religious community, not to union and their fellow worker.[36] Their religious commitments offered a rival form of collective identity and solidarity, distinct from, and often in conflict with, both the labor union and the company.

The tension between Sabbath observance and union membership came to a head in the landmark 1977 case of *Trans World Airlines v. Hardison*, which invited the Supreme Court to interpret the meaning of Title VII's new §701(j) for the first time.[37] Larry G. Hardison was a TWA employee and a member of the Worldwide Church of God, who was discharged for refusing to work on Saturdays. TWA had considered multiple possibilities for accommodating Hardison's Sabbath observance, but each plan would have required the corporation to incur additional expense or violate the terms of its collectively bargained union contract. Neither of these steps was necessary, the Court ruled, in a highly controversial 7–2 decision. "An agreed-upon seniority system [is not required to] give way when necessary to accommodate religious observances," Justice Byron White wrote for the majority. "It would be anomalous to conclude that, by 'reasonable accommodations,' Congress meant that an employer must deny the shift and job preferences of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others."[38] Likewise, White continued, for an employer "to bear more than a *de minimus* cost" to accommodate the needs of their religious employees would constitute an "undue hardship" that was not required by the statute.[39] It was regrettable that Hardison could not be accommodated, White concluded, but TWA had fulfilled its obligations under the newly amended Title VII.

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It would be hard to exaggerate the firestorm that *Hardison* sparked. Though it was only about statutory interpretation, rather than the First Amendment, *Hardison* was nearly as momentous as the Court's 1990 decision in *Employment Division v. Smith* (the "peyote case"), if less widely remembered today. In its own way, it anticipated many of the same issues that would define the later debates about *Smith*. The Court's critics alleged that it had eviscerated Title VII's protections from religious discrimination, leaving it to the goodwill of individual employers to accommodate their religious employees, but relieving them of any legal obligation to do so. All employers would have to do to escape the statute's burdens would prove that a proposed accommodation would entail a more than "*de minimis* cost," a stunningly low threshold. The Court's supporters, however, emphasized the value of equality among workers over that of religious liberty. To require corporations to privilege the needs of religious employees, even at the expense of a collectively bargained union contract, was to go far beyond what could reasonably be expected, they alleged. It would be to elevate religion and its demands over that of equally valid nonreligious concerns. It would be to carve out a special exception for religion that would make the day-to-day managing of a business practically impossible. Surely Title VII could not be read to require that.

Despite their vehement disagreements, what neither side contested was whether Hardison's claims counted as "religious." While TWA questioned how far it had to go in accommodating Hardison's needs, it never challenged whether his observances fit within the scope of Title VII's protections. Presumably this was because Hardison fit the mold of an archetypal Sabbath Observer: an identity grounded in denominational belonging; a member of a small, bounded community, whose articulated commitments put him at odds with the normative expectations of management and labor; a specific record of suffering discrimination and hardship on account of his "nonnormative" beliefs; and a willingness to incur economic consequences for his loyalty to God's commands. By the time Hardison's case made its way to the Supreme Court, the Sabbath Observer had been established as a clearly recognizable trope in U.S. law, with claims distinctly legible to those tasked with interpreting Title VII's mandates.

The Idiosyncratist

In contrast with the Sabbath Observer, consider the worker who I describe as the *Idiosyncratist*, one whose mode of religiosity

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centers on the dictates of private conscience, radically individualistic and unmoored from any sense of denominational belonging. The Idiosyncratist holds religious beliefs that need not be shared by others. They might even hold beliefs that are expressly rejected by those who hold positions of authority within the tradition to which the Idiosyncratist professes to belong. As the EEOC's revised "Guidelines on Discrimination Because of Religion" from 1980 affirm, "The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."[40] In other words, if a Catholic worker seeks a religious exemption from an employer's COVID-19 vaccine mandate, it does not matter what the Pope has to say about the legitimacy of the employee's belief or its compatibility with Catholic teachings. The EEOC recognizes no religious authority beyond that of the individual.

The figure of the Religious Idiosyncratist bears a distinct genealogy from that of the Sabbath Observer. The EEOC developed this standard in response to two "problem" cases in 1970 and 1971. In the first, a nurse was discharged from working at a private hospital because she wore a headscarf in line with her "Old Catholic" beliefs instead of the prescribed nurse's cap.[41] In the second, a woman alleged that she was fired after she joined the "Black Muslim religion" and began wearing ankle-length dresses as required by her new faith.[42] In both cases, which not coincidentally centered on women's dress, the employers contested whether the traditions and practices in question counted as "religious" within the scope of Title VII protection.

To resolve that question, the EEOC turned for guidance to *United States v. Seeger* (1965) and *Welsh v. United States* (1970), two recently decided U.S. Supreme Court cases about conscientious objection to Vietnam War–era military service.[43] According to the Universal Military Training and Service Act of 1958, conscientious objector status was reserved for those who based their objections to war on their "religious training and belief," a phrase that the statute defined, in part, as "an individual's belief in a relation to a Supreme Being."[44] In *Seeger* and *Welsh*, the Court confronted individuals who did not avow belief in a traditional monotheistic god, or who did not even describe the source of their beliefs as religious at all, yet still claimed to qualify as conscientious objectors. In response, the Court chose to interpret the statute's language broadly, adopting a "parallel test" that defined as religious any "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the

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exemption."[45] According to *Seeger* and *Welsh*, what defined a belief as religious was not its substantive content but its function and place in the life of the believer. It did not matter whether beliefs were articulated in traditional religious language, but whether they were deeply and sincerely held.[46]

In its 1970 and 1971 rulings, the EEOC elected to apply the *Seeger* and *Welsh* standards to the context of workplace discrimination. Borrowing language from the Court's "parallel test," the Commission came to define religion expansively as including all "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." It was not the content of one's beliefs that mattered, the EEOC announced, nor did it make a difference whether those beliefs were shared by others. In the case of the Old Catholic nurse, for example, the Commission acknowledged that its investigation had "revealed no evidence to support the Charging Party's assertion that she is the member of an organized sect whose beliefs are common to a number of people." Some might even find her beliefs "incomprehensible" or "incorrect." But they counted as "religious," nonetheless, because the nurse held them "with the strength of traditional religious convictions." According to this familiar view, personal sincerity alone is what constitutes religion, no matter how idiosyncratic, not solidarity or communion with others.[47]

The EEOC's turn to a personal, radically subjective understanding of religion aligned with broader transformations already underway in U.S. religious life, at least within American Protestantism. Sociologists like Robert Wuthnow traced a shift during the 1960s and 1970s from a spirituality of "dwelling" to one of "seeking," which deemphasized institutional authority, rules, and hierarchies.[48] Robert Bellah and his collaborators on *Habits of the Heart* similarly identified individualism as the dominant religious ethos of the time. While the "traditional pattern" of religious life "assumes a certain priority of the religious community over the individual," they argued, for Americans that pattern was "to some degree reversed." They cite a 1978 Gallup poll that found that "80 percent of Americans agreed that 'an individual should arrive at his or her own religious beliefs independent of any churches or synagogues.'"[49] This perspective was illustrated perfectly through their example of Sheila Larson, the nurse who claimed to follow her own personal religion, Sheilaism, named after herself. "This suggests the logical possibility of over 220 million American religions," the authors write, "one for each of us."[50] While there is no evidence that the EEOC's commissioners were following these trends closely, their embrace of the Idiosyncratist standard enshrined the possibility of

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each American constituting a religion unto themselves into the regulatory language of law.

Already by 1972, the EEOC had begun to introduce the language of Idiosyncratism into its *Interpretive Manual*, a reference volume for investigators in the field who were charged with carrying out its directives and ensuring employer compliance. "When the conviction is drawn from the tenets of a recognized church of which CP [charging party] is a member," the 1972 *Manual* explained, "the question [of whether it is 'religious'] is easily answered in the affirmative. When it is not, however, a judgment must be made concerning the depth and sincerity of CP's conviction."[51] The *Manual* distinguishes between members of organized religious communities, who do not need to prove the depth of their commitments, and religious Idiosyncratists, whose unfamiliar practices render their convictions more suspect. Yet none of this language was included in the formal "definition" of religion that Congress incorporated into Title VII via the 1972 Amendments that same year. Nowhere in the legislative records is there any reference to *Seeger* or its "parallel test." In fact, it is not even clear if the new definition put forward in Title VII's §701(j), with its emphasis on practices and observances, was consistent with the EEOC's turn to the language of inward, sincerely held belief.

The tension between these different ways of understanding religion became especially evident in the aftermath of the Supreme Court's decision in *Hardison*. The EEOC, determined to reassert its expectation that businesses should make reasonable efforts to accommodate their religious employees, convened a series of public hearings, gathering testimony from state-level regulators, business and union leaders, religious leaders representing different denominations and advocacy groups, and Sabbath-observing employees. The workers and religious advocates offered detailed accounts of the hardships they faced and the various pragmatic arrangements their employers had devised for accommodating their needs. Focused primarily on the rights of Sabbath Observers, the Commission dedicated very little attention to the question of defining religion or delimiting its scope.[52]

Employers, however, were far more attuned to the problems attending an overly broad conception of religion. A few executives raised "slippery slope" concerns during the hearings, asking how they would be expected to distinguish legitimate religious claims from illegitimate ones, especially as their workplaces grew more diverse. "Who is to determine what constitutes a religion?" asked one human resources manager. "Who is to determine who can start a new religious group?"[53] While the religionists who offered testimony

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tended to do so as members of recognizable, distinct religious denominations, the employers saw more clearly that religious accommodations could not be so neatly restricted. They worried that enterprising employees would take advantage of the system, feigning religious commitment as justification for demanding all sorts of changes to their workplace conditions. "A request for Saturdays off by a rotating shift employee in a large company cannot be viewed as an isolated request by a Sabbatarian," insisted the director of human resources for the National Association of Manufacturers.

> Rather, it must be viewed in terms of the impact of all requests by Saturday Sabbath observers, Sunday observers, et cetera. As a practical matter, morale problems could be anticipated and persons of less demanding religious convictions and/or practices, indeed any person desirous of Saturday, Sunday, or whatever day off each week, might well seek "accommodation." The employer, merely seeking to run a business efficiently, may now be subject to satisfying myriad conflicting "religious" demands by the employees. Is it for the employer to question the sincerity of the employee's religious beliefs? Does the EEOC intend to tell us how?[54]

These HR professionals recognized that an expansive notion of religion would thrust them into the untenable position of having to determine the sincerity and legitimacy of their employees' requests without providing any coherent guidelines for how to do so. They preferred to maintain a stance of neutrality by making no special allowance for religion, one way or the other.

These objections grew more strenuous after the EEOC drafted new guidelines on religious discrimination that included the *Seeger/Welsh* standard for defining religion. In response, corporate executives flooded the EEOC with letters, detailing their concerns. "We take strong issue with the Commission's stated purpose to 'define religious practices to include moral or ethical beliefs as to what is right and wrong,'" complained a senior administrator on behalf of North Carolina State University. "Our practical experience suggests that EEOC's definition . . . will lead to the claims by many individuals that idiosyncratic or individualistic ideas constitute religion, and that such a definition will significantly and artificially multiply the number of claims of religious discrimination."[55] While one letter writer perceptively described the EEOC's new definition as *under*-inclusive ("Practices cannot always be defined in terms of belief. Many religious practices of long standing have no moral or

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ethical belief on which they specifically rest"[56]), most criticized it for being far too capacious, too pluralistic in its imagination. "With such a definition," explained the equal employment policies manager of a midwestern manufacturing company, anticipating almost exactly the warnings of Bellah and his *Habits of the Heart* collaborators, "there can be as many different religious beliefs as there are people."[57] U.S. religions, this letter-writer implied, were far too fragmented to be accommodated.

The most hysterical letters proffered all sorts of hypothetical scenarios that might arise. Some anticipated their employees justifying their use of pot and other illegal drugs as protected religious observances. Others offered more outrageous possibilities: "Standing on the head every half hour clears the head and creates good thoughts; kissing all the people of the opposite sex twice a day spreads love and goodwill. Come on now! Be sensible. Even the practices of the Ayatollah Khomeni and his radical followers fit your definition: they are religious and *they strongly* believe they are morally right."[58] Or, as a more succinct commenter put it: "The ritual of making love to a mule fits your definition as a religious practice."[59]

These writers sought clear standards, objective criteria by which they could distinguish those practices warranting protection from those that did not, and they recognized that the Idiosyncratic notion of religion failed to offer that. Even more, as the reference to Ayatollah Khomeni makes clear, they wanted ways of distinguishing good religion from bad, religious practices that fit their moral worldview from those that did not. While they might be able to make space for Sabbath observance, they could not handle the possibility of each employee being an idiosyncratic religion unto themselves.[60] As we have seen, Sabbath Observance was perceived as relatively limited in scope, pertaining only to members of relatively small, recognizable religious denominations who had experienced histories of discrimination and hardship. Idiosyncratism universalized religious belief, extending legal protections to any employee who might hold strong ethical or moral beliefs.[61] This would make it impossible to manage the day-to-day operations of business, many human resource professionals complained.

It turned out that these employers did not need to be so concerned. Over the next couple of decades, federal judges and the EEOC conspired together to establish a number of limiting factors that narrowed the scope of Title VII's protection, despite the broad, capacious language included in the EEOC's guidelines. Religious beliefs could not address concerns that were merely "temporal" or "political," the Commission and courts agreed, in rejecting the

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discrimination complaints of employees who described their membership in the KKK as religious.[62] Religious beliefs were different from "mere personal preferences," a worker discovered, when she tried to seek accommodations for her body art.[63] And religious observances were not merely "social activities" or "family obligations," it turned out, when an employee learned she could take time off from work to attend Christmas Mass but not to stay for the family meal and gift exchange that followed.[64]

These limiting categories came directly from the Universal Military Training and Service Act and the Supreme Court's decision in *Seeger*, which distinguished religious objections to war from "a merely personal moral code" or from those grounded in "essentially political, sociological or economic considerations."[65] Yet these criteria were hardly straightforward or consistent in their application. While the effort to separate the religious from the political has been one of the defining projects of the modern period, it has never been so neatly accomplished in practice. And most scholars of religion would be hard-pressed to come up with a coherent way of distinguishing idiosyncratic beliefs from personal moral codes. Instead, these categories proved useful precisely because they were ambiguous. The EEOC could codify a capacious understanding of religion while limiting it as necessary, the elasticity of its categories allowing for a great deal of discretion in sorting out those practices worthy of protection and accommodation from those that were not. We might even describe the Idiosyncratist mode of religiosity as infinitely expansive—until it wasn't. Despite the breadth of protection it promised, successful claimants still had to fit their commitments into recognizable frames, to make them legible to state bureaucrats and regulators. As other critical scholars of religious freedom have noted in other contexts, the EEOC guaranteed religious workers the right to be idiosyncratic, but only in certain normatively prescribed ways.[66]

The Religious Organization

If the Idiosyncratist mode of religion is radically individualistic, imagining religious identity as unmoored from any sense of shared history or communal belonging, then the third trope I identify is more collectivist and hierarchical in orientation, ascribing religion first and foremost to a corporate or institutional body. Under antidiscrimination law, the Idiosyncratist is promised legal accommodation, special regard for their practices and observances, in order to enable their full and equal participation in the American workforce. The Religious Organization, on the other hand, is subject

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of exemption, excused from having to follow aspects of those very same antidiscrimination laws. The law takes the Organization's religion into account not to level the playing field but to tilt it, to permit the Organization to operate and constitute itself in self-consciously religious ways, according to its distinct religious mission.

Exemptions for religious organizations were written into Title VII from the get-go.[67] The relevant section of the 1964 statute states:

> Title VII shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[68]

Under the principle that the state should not interfere in the inner workings of religious institutions, Congress elected to grant the Religious Organization a great deal of latitude when it came to hiring and firing workers. Religious Organizations could make employment decisions on the basis of an employee's religion in ways that otherwise would be prohibited. They might even choose to limit their staff exclusively to members of a particular tradition or denomination.

But what counts as a Religious Organization? How broadly should such an exemption be applied? As Congress considered the proposed 1972 amendments to the Civil Rights Act, these questions came to the fore. In particular, senators debated whether the exemptions for educational institutions should apply to the hiring of all faculty and staff or only to those charged with carrying out specifically religious duties, like teaching theology courses. A college "devoted to giving a Christian education" should be permitted to take steps "to assure that the youth who attend it should be instructed on any subject, whether religious or nonreligious, by teachers who are members of a Christian church," argued Democratic Senator Sam Ervin of North Carolina. They should not be told they have "to appoint this other applicant who is a Mohammedan, agnostic, or atheist to fill this vacant position to teach chemistry or economics or sociology."[69] But religious corporations and associations "often provide secular services to the general public without regard to religious affiliation," responded Democratic Senator Harrison Williams of New Jersey, and "most of the many thousands of persons employed by these institutions perform totally secular functions." If that is the case, Williams argued, then those

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employees "should be given the same equal employment opportunities as those persons employed in comparable positions by secular employers." There could be no justification for permitting a religious institution "to discriminate against a janitor, for example."[70]

While Senator Ervin won that particular debate, persuading Congress to maintain expansive exemptions for religiously affiliated educational institutions, the gulf between the two positions was not as wide as it seemed. There was little disagreement among members of Congress that religious institutions should enjoy considerable discretion when it came to making religion-based employment decisions; they just did not always agree on the precise contours of what counted as religious. They all recognized that it would be necessary to draw lines even if they were not always sure where or how those lines should be drawn.

Over the next several decades, the EEOC spent surprisingly little time addressing the question of exemptions for religious organizations as it periodically updated its published guidelines. The Religious Organization has reemerged as object of intense scrutiny, however, in the wake of the Supreme Court's decisions in *Burwell v. Hobby Lobby Stores* and the ministerial exception cases. In *Hobby Lobby* (2014), the Court announced that a privately held, for-profit corporation might enjoy religious free exercise rights.[71] In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* (2012) and *Our Lady of Guadalupe School v. Morrisey-Berru* (2020), the Court enshrined the "ministerial exception," which shields religious organizations from following antidiscrimination laws when it comes to their employment relations with "ministers," meaning they can discriminate not only on the basis of religion, but also on the basis of sex, age, and other protected categories.[72] The Court went on to define "minister" broadly, expanding it beyond clergy to encompass a wide range of personnel, including some teachers who were not even eligible to become clergy in the denomination of the organization claiming the exemption. Taken together, these cases broadened the scope of what might count as a Religious Organization or what exemptions a Religious Organization might enjoy far beyond what was imagined by Title VII's drafters. They herald what some legal scholars have described as a "corporate turn" in the law of religious freedom, under which organizations have frequently found *greater* success than individuals in seeking protection for their religious rights of conscience.[73]

In January 2021, the EEOC took steps to acknowledge these shifts. In the waning days of the Trump administration, the agency's three Republican-appointed commissioners pushed through the first revisions to its *Compliance Manual on Religious Discrimination* since

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2008.[74] The revised *Manual* features a greatly expanded section on exceptions to Title VII, with subsections on "Religious Organizations" and the "Ministerial Exception," which encourage broad interpretations of both categories. Notably, it allows for the possibility that for-profit entities might qualify for Title VII exemption as religious corporations. It also makes clear that the Organization's determination of what counts as religious or who counts as a minister should be given considerable weight. Whereas the Idiosyncratist notion of religion emphasized that an individual may hold beliefs in direct tension with those of the community to which they profess to belong, the exemption for Organizations privileges the authority of institutional leaders. "The exemption allows religious organizations to prefer to employ individuals who share their religion," the *Manual* states, "defined not by the self-identified religious affiliation of the employee, but broadly by *the employer's* religious observances, practices, and beliefs."[75] Similarly, in cases involving claims of ministerial exception, the *Manual* reminds investigators that "the religious institution's 'definition and explanation' of an employee's role 'in the life of the religion in question is important.'"[76] No such weight is given to the employee's own understanding of their role within the organization.

The EEOC's 2021 *Compliance Manual* describes the religious organization exemption and the ministerial exception as structural guarantees that prohibit government agencies and courts from interfering in the internal operations of a religious corporation. The category of religion carves out an area of autonomy, granting not only the institution's right to be free of state regulation but also to impose its own regulations and requirements on the lives of its employees.[77] Being allowed to employ individuals only "of a particular religion," the *Manual* explains, means that an organization can "terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer." And it can do this, the *Manual* maintains, citing a Sixth Circuit Court decision from 2000, even while "holding [itself] out as an equal employment opportunity employer."[78] A legal lexicon developed to root out discrimination in the workplace here becomes a license for workplace managers to discriminate. At the very least, it frames the decision to accommodate the diverse needs of workers as a voluntary choice made by (religious) business owners, not a legal mandate.

The figure of the Religious Organization shifts our attention from the needs of workers and employees to that of employers and the company. In contrast to both the Sabbath Observer and the Idiosyncratist modes of religiosity, the Religious Organization implies a corporate conception of religion, according to which it is

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the institution itself that bears religious rights, prior to those of any individuals who might constitute it. It also presumes, in the wake of *Hobby Lobby* and other subsequent decisions, the potential congruity of religion and profit making. The Religious Organization can approach the market as one site among others through which one constructs and lives out religious commitments. It regards religion not as a set of privately held beliefs but as a public mode of acting in the world. As critics of neoliberalism have noted, exemptions for religious organizations thus grant wide latitude to corporations to operate in the public sphere without being accountable to democratic norms or obligations.[79] If Congress, when it enacted the Civil Rights Act of 1964, asserted its right to regulate private employers, then a broad interpretation of what counts as a Religious Organization returns that power to the corporation, insulating its decisions from public scrutiny. By describing their mission as religious, employers can exercise broad discretion over whom they employ in ways that Title VII was meant to foreclose. If the Religious Idiosyncratist can be idiosyncratic only in normatively prescribed ways, then the Religious Organization seems significantly less fettered in exercising its freedoms.

Conclusion: Religion and/at Work

The Sabbath Observer, the Idiosyncratist, and the Religious Organization. These three tropes, or modes of religiosity, coexist in unresolved tension in and across the statutory language of Title VII, the EEOC's published guidelines on religious discrimination, and its compliance manuals for investigators in the field. Each imagines differently what it means to be religious in the contemporary United States, and each points to different possibilities for what it means to regulate it. Each marks a distinct set of beliefs, practices, and institutions, which warrant different types of legal protection and accommodation. But, although these tropes may have valence in other areas of U.S. law, too, I want to conclude by focusing specifically on the domain of work and briefly consider what the figures of the Sabbath Observer, the Idiosyncratist, and the Religious Organization reveal about the shifting relationship between religion and work today. How do they relate to changes in religion's role in the workplace since the 1960s?

In the case of the Religious Organization, we have already seen the ways that it approaches the market as a site through which one expresses and lives out religious commitments, rather than as a domain properly kept separate from religious concerns. By shifting our attention to the rights of managers and employers, the Religious

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Organization reimagines business decisions about whom to hire, whom to fire, and whom to serve as religious matters, properly protected from state interference in order to guarantee the organization's right to constitute itself on its own terms. And while U.S. law might once have relied on commercial activity as an easy shorthand for distinguishing religious corporations from secular ones, such clear distinctions no longer hold (if they ever did).[80] The Religious Organization's mission need not be constrained by the pursuit of profit. It regards religion not as a private matter with carefully circumscribed boundaries, but as fully integrated into the public sphere, including the realms of business and commerce. In these ways, the figure of the Religious Organization approaches religion and work as properly rendered compatible, not in conflict.

In its own way, the trope of the Religious Idiosyncratist has also come to presume religion's compatibility with work. In line with what Winnifred Sullivan has described as the "naturalization" of religion in law, the EEOC tends to interpret the category of the Idiosyncratist so capaciously that all employees might be thought of as having religious or spiritual needs that ought to be respected.[81] All employees might have sincerely held "moral or ethical beliefs as to what is right and wrong" that warrant protection. Universalized in this way, many contemporary advocates interpret the legal mandate to accommodate religion as an imperative to make space for employees to express their religions at work, or even *through* work, rather than apart from it.[82] Creating a faith-friendly workplace that invites workers to bring their "whole selves" into their places of employment is trumpeted less as a legal requirement than a smart business decision, likely to improve productivity and morale.[83] Religious accommodations are celebrated as economically beneficial, as good for the corporation's bottom line. The presumption is not one of conflict but of compatibility, that religion can and ought to be seamlessly integrated into the workplace without disrupting the operations of capital. Religion is imagined as a resource to be mobilized, not a problem to be carefully managed or contained.

Accommodating the needs of a diverse workforce by enabling employees to bring their "whole selves" to work would seem like an obvious good. Yet it also accelerates the neoliberal trend documented by antiwork theorists like Kathi Weeks and Sarah Jaffe of work making greater and greater claims on our lives.[84] In the rhetoric of advocacy groups like the Religious Freedom and Business Foundation, religious liberty in the workplace increasingly seems to mean having the right to find fulfillment through work, not asserting a right to one's life and time outside of it.[85] Such arguments leave little space for distinguishing our personal from our professional

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selves.[86] They are buttressed by an Idiosyncratist notion of religion that treats employees as atomized individuals with few sources of solidarity or communion outside of the workplace itself. As historian Bethany Moreton writes more broadly of the politics of neoliberalism, "Neoliberalism envisions the economy as a sphere independent of other social institutions and relationships. In this logic, there is no such thing as society or community, only individuals."[87] In similar fashion, the Religious Idiosyncratist today is encouraged to channel their religious commitments through work, reconciling any conflicts that might arise in order to advance the economic needs of the corporation, rather than joining with others to adopt an agonistic stance toward management or seeking community outside the context of work altogether.[88]

In the face of such trends, I want to conclude by suggesting that, for those concerned about economic inequality, expanding corporate power, and neoliberal working conditions, it may be worthwhile to revisit the EEOC's category of the Sabbath Observer. In contrast with Idiosyncratists or Organizations, Sabbath Observers realize their values and commitments outside of the workplace, rather than through it, by advancing an alternate temporality that disrupts the needs of capital, rather than accommodating it. In the EEOC's decisions from the 1970s, which centered on declining manufacturing industries and unionized labor, Sabbath Observance appeared as a disruption, a break in the smooth and efficient operations of business. In the aftermath of the Supreme Court's decision in *Hardison*, Sabbath Observers did not argue for the right to bring their whole selves to the workplace, or to neatly reconcile demands of religion and work, but insisted instead on a sharp demarcation between the two, less a rejection of work outright than a diminishment of its singular significance. They appealed to particular histories of discrimination and hardship to justify their right to time outside of the rigid schedules dictated by their employers. Despite the ways they are pitted against each other in the EEOC archive, we might even imagine Sabbath observance as complementary to union activity, both proffering the possibility of collective action and solidarity in opposition to the atomizing effects of the corporate workplace—both insisting on the right to collective forms of life and value outside of work and the market.

The Sabbath Observer may be limited in obvious ways as a category for adjudicating legal rights, yet it gestures to alternative resources available in the legal archive for imagining other ways of configuring religion's relation to work, ones that might mobilize religious discourses in opposition to dominant capitalist modes of thought, rather than in subservience to them. If the figure of the

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Sabbath Observer no longer has the valence in U.S. law that it once did, perhaps it is because we have lost the capacity to think otherwise about the place of work in our lives. It may not just be our ways of thinking about religion that require reexamination, but also our ways of thinking about work. Building a just and equitable society requires nothing less.

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Notes

[1]Equal Employment Opportunity Commission, "What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," updated March 14, 2022, https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#L; Lisa Nagele-Piazza, "EEOC Updates Guidance on Religious Accommodations for COVID-19 Vaccines," *SHRM Employment Law* (blog), March 7, 2022, https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-eeoc-updates-guidance-religious-accommodations.aspx.

[2]Phil McCausland, "Religious Exemptions to Vaccine Mandates Could Test 'Sincerely Held Beliefs,'" *NBC News*, September 5, 2021, https://www.nbcnews.com/news/us-news/religious-exemptions-vaccine-mandates-could-test-sincerely-held-beliefs-n1278514; Kira Ganga Kieffer, "Perspective: Doubters' Push for Religious Exemptions from Coronavirus Vaccination May Not Work," *Washington Post*, September 20, 2021, https://www.washingtonpost.com/outlook/2021/09/20/doubters-push-religious-exemptions-coronavirus-vaccination-may-not-work/; Jon Healey, "Citing Religious Beliefs to Avoid the COVID-19 Vaccine Could Cost You Your Job," *Yahoo!*, September 23, 2021, https://www.yahoo.com/now/citing-religious-beliefs-avoid-covid-110005732.html; Laurel Demkovich, "What Really Counts as a Religious Exemption to the COVID-19 Vaccine? Employers Are Trying to Figure It Out," *The Spokesman-Review*, September 23, 2021, https://www.spokesman.com/stories/2021/sep/23/what-really-counts-as-a-religious-exemption-to-the/; Andrea Hsu and Shannon Bond, "Getting a Religious Exemption to a Vaccine Mandate May Not Be Easy. Here's Why," *NPR*, September 28, 2021, https://www.npr.org/2021/09/28/1041017591/getting-a-religious-exemption-to-a-vaccine-mandate-may-not-be-easy-heres-whyf.

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[3]See, for example, Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005); Tisa Joy Wenger, *We Have a Religion: The 1920s Pueblo Indian Dance Controversy and American Religious Freedom* (Chapel Hill: University of North Carolina Press, 2009); Hussein Ali Agrama, "Sovereign Power and Secular Indeterminacy: Is Egypt a Secular or a Religious State?" In *After Secular Law*, ed. Winnifred Fallers Sullivan, Robert A. Yelle, and Mateo Taussig-Rubbo (Stanford, CA: Stanford University Press, 2011), 181–99; Jolyon Baraka Thomas, *Faking Liberties: Religious Freedom in American-Occupied Japan* (Chicago: University of Chicago Press, 2019).

[4]The tendency to focus narrowly on judicial opinions has been most pronounced among law professors, of course, but scholars of U.S. religions have often followed suit. Works, primarily historical in approach, that emphasize judicial decision-making include Eric Michael Mazur, *The Americanization of Religious Minorities: Confronting the Constitutional Order* (Baltimore: Johns Hopkins University Press, 1999); Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 2002); David Sehat, *The Myth of American Religious Freedom* (New York: Oxford University Press, 2011); Steven K. Green, *The Third Disestablishment: Church, State, and American Culture, 1940–1975* (New York: Oxford University Press, 2019). The emphasis on judicial opinions is particularly pronounced in the area of pedagogy. Based on a quick perusal of the syllabi posted to the websites of the American Academy of Religion (AAR) (https://www.wabashcenter.wabash.edu/resources/syllabi/) and the Center for Religion and American Culture (https://raac.iupui.edu/teaching/young-scholars-in-american-religion-syllabi/), it is striking how many of them equate the study of "religion and law" with a close consideration of Supreme Court opinions. The AAR site, for example, includes five syllabi with titles akin to "Religion and Law," and four of them consist almost exclusively of reading Supreme Court case law. Winnifred Fallers Sullivan notes the trend to over-emphasize religion clause jurisprudence in her incisive afterword to a volume I co-edited, where she describes judicial opinions as "very seductive as texts—short and self-contained and almost irresistible to the critical cultural eye." She suggests that "we [scholars of religion and law in the United States] have learned how to do close reading of judicial opinions," but warns that we may have learned this skill "a little too well." Winnifred Fallers Sullivan, "Afterword," in *Religion, Law, USA*, eds. Joshua Dubler and Isaac Weiner (New York: New York University Press, 2019), 284. At the editors' invitation, contributors to

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that volume focused their essays on specific case studies, which in most cases they took to mean particular court cases and judicial opinions. As Sullivan puts it, the volume offers a rich introduction "to the postseparationist and postsecularist understanding of the conjunction of religion and law, as seen from US religious studies" but maintains a relatively sharp focus on the law of the liberal state. Sullivan, "Afterword," 283. Much of Sullivan's own trailblazing work has relied on close, critical readings of judicial opinions, albeit buttressed by deep and far-reaching engagement with scholarship from a wide range of fields. See, for example, Winnifred Fallers Sullivan, *Paying the Words Extra: Religious Discourse in the Supreme Court of the United States* (Cambridge, MA: Harvard University Center for the Study of World Religions, 1994); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005); Winnifred Fallers Sullivan, *Prison Religion: Faith-Based Reform and the Constitution* (Princeton, NJ: Princeton University Press, 2009); Winnifred Fallers Sullivan, *Church State Corporation: Construing Religion in US Law* (Chicago: University of Chicago Press, 2020). But Sullivan has also been consistent in her calls to U.S. religion scholars to think more broadly and capaciously about what constitutes law and legal materials and, even more pointedly, to think beyond the framework of the liberal state and its law. See, for example, Mona Oraby and Winnifred Fallers Sullivan, "Law and Religion: Reimagining the Entanglement of Two Universals," *Annual Review of Law and Social Science* 16, no. 1 (2020): 257–76. In this article, I maintain an interest in the regulatory power of the liberal state but aim to expand our understanding of the sites where we locate that power.

[5]In *Sincerely Held: American Secularism and Its Believers* (Chicago: University of Chicago Press, 2022), Charles McCrary similarly attends both to the realm of judicial decision-making and to the bureaucratic power of administrative agencies.

[6]Jonathan Z. Smith, "God Save This Honorable Court: Religion and Civic Discourse," in *Relating Religion: Essays in the Study of Religion* (Chicago: University of Chicago Press, 2004), 376.

[7]James T. Richardson, "Scientology in Court: A Look at Some Major Cases," in *Scientology*, ed. James R. Lewis (New York: Oxford University Press, 2009), 287–88; Hugh B. Urban, *The Church of Scientology: A History of a New Religion* (Princeton, NJ: Princeton University Press, 2011), 156.

[8]United States Internal Revenue Service, "'Churches' Defined," https://www.irs.gov/charities-non-profits/churches-religious-organizations/churches-defined.

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[9]On the role of the "church" in U.S. law, see Sullivan, *Church State Corporation*; also, see my discussion of the "Religious Organization" later in this article.

[10]On the FBI as arbiter of U.S. religious life, see Sylvester A. Johnson and Steven Weitzman, eds., *The FBI and Religion* (Berkeley: University of California Press, 2017).

[11]James Dennis LoRusso, *Spirituality, Corporate Culture and American Business: The Neoliberal Ethic and the Spirit of Global Capital* (Bloomsbury Academic, 2017); Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk about It)* (Princeton, NJ: Princeton University Press, 2017); Ilana Gershon, *Down and Out in the New Economy: How People Find (or Don't Find) Work Today* (Chicago: The University of Chicago Press, 2017); Melissa Gregg, *Counterproductive: Time Management in the Knowledge Economy* (Durham, NC: Duke University Press, 2018); Sarah Jaffe, *Work Won't Love You Back: How Devotion to Our Jobs Keeps Us Exploited, Exhausted, and Alone* (New York: Bold Type Books, 2021); Kristy Nabhan-Warren, *Meatpacking America: How Migration, Work, and Faith Unite and Divide the Heartland* (Chapel Hill: The University of North Carolina Press, 2021); Carolyn Chen, *Work Pray Code: When Work Becomes Religion in Silicon Valley* (Princeton: Princeton University Press, 2022).

[12]Kathi Weeks, *The Problem with Work: Feminism, Marxism, Antiwork Politics, and Postwork Imaginaries* (Durham, NC: Duke University Press Books, 2011), 8.

[13]Kathryn Lofton, *Consuming Religion* (Chicago: University of Chicago Press, 2017), 208.

[14]On schools, see, for example, Steven K. Green, *The Bible, the School, and the Constitution: The Clash That Shaped Modern Church-State Doctrine* (New York: Oxford University Press, 2012). On prisons, see Sullivan, *Prison Religion*; Joshua Dubler, *Down in the Chapel: Religious Life in an American Prison* (New York: Farrar, Straus, and Giroux, 2013); Brad Stoddard, *Spiritual Entrepreneurs: Florida's Faith-Based Prisons and the American Carceral State* (Chapel Hill: University of North Carolina Press, 2021). On the military, see Ronit Y. Stahl, *Enlisting Faith: How the Military Chaplaincy Shaped Religion and State in Modern America* (Cambridge, MA: Harvard University Press, 2017).

[15]Sherbert v. Verner, 374 U.S. 398 (1964).

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

[17]Michael D. McNally, *Defend the Sacred: Native American Religious Freedom beyond the First Amendment* (Princeton, NJ: Princeton University Press, 2020).

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[18]Law professors have tended to describe the EEOC's definition of religion in uncritical ways that overstate its internal coherence. See, for example, Raymond F. Gregory, *Encountering Religion in the Workplace: The Legal Rights and Responsibilities of Workers and Employers* (Ithaca, NY: ILR, 2011). Debbie Kaminer is more attentive to the contradictions and tensions in the law of workplace accommodations, but she focuses more on the employer's obligation to accommodate than on the legal definition of religion. See, for example, Debbie N. Kaminer, "Title VII's Failure to Provide Meaningful and Consistent Protection of Religious Employees: Proposals for an Amendment," *Berkeley Journal of Employment and Labor Law* 21, no. 2 (September 2000): 575–631; Debbie Kaminer, "Religious Accommodation in the Workplace: Why Federal Courts Fail to Provide Meaningful Protection of Religious Employees," *Texas Review of Law and Politics* 20 (Fall 2015): 107–56.

[19]There is a great deal of scholarship on state-level Fair Employment Practices legislation, but most of it focuses on race-based discrimination with very little attention to matters of religion. For example, see Paul Burstein, *Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States since the New Deal* (Chicago: University of Chicago Press, 1985); Paul D. Moreno, *From Direct Action to Affirmative Action: Fair Employment Law and Policy in America, 1933–1972* (Baton Rouge: Louisiana State University Press, 1997); Stuart Svonkin, *Jews against Prejudice: American Jews and the Fight for Civil Liberties* (New York: Columbia University Press, 1997), especially chapter 4; Andrew Edmund Kersten, *Race, Jobs, and the War: The FEPC in the Midwest, 1941–46* (Urbana: University of Illinois Press, 2000); Martha Biondi, *To Stand and Fight: The Struggle for Civil Rights in Postwar New York City* (Cambridge, MA: Harvard University Press, 2003); Anthony S. Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941–1972* (Princeton, NJ: Princeton University Press, 2009).

[20]110 Cong. Rec. 1528-29 (1964).

[21]In 1967 testimony before a Senate subcommittee, the Chair of the EEOC reported that the commission had received over sixteen thousand charges since the Commission began its work. More than 60 percent were related to race, one-third to sex, 3 percent to national origin, and only about 1 percent to religion. See RG 403, Office of the Chairman Records of Chairman Stephen Shulman 1966–1968, Box 5, National Archives and Records Administration, College Park, MD.

[22]"Guidelines on Discrimination Because of Religion," 31 Fed. Reg. 8370 (1966).

[23]Naomi W. Cohen, *Jews in Christian America: The Pursuit of Religious Equality* (New York: Oxford University Press, 1992);

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Jonathan D. Sarna and David G. Dalin, eds., *Religion and State in the American Jewish Experience* (Notre Dame, IN: University of Notre Dame Press, 1997); Lofton, *Consuming Religion*, 208–11.

[24]New York State Commission against Discrimination, "Memorandum of Law: Observance of Religious Holidays," August 18, 1955, Series 19280, Box 10, Item 1, "Sabbath Observers, vol. 1," New York State Division of Human Rights Executive Subject and Correspondence Files, New York State Archives, Albany, NY.

[25]"Guidelines on Discrimination Because of Religion," 31 Fed. Reg. 8370 (1966).

[26]New York's State Division of Human Rights took parallel steps at the same time to expand protections for Sabbath Observers at the behest of the same groups, who pursued a coordinated legal advocacy strategy at the national and state levels. At the state level, for example, see correspondence from the Commission on Law and Public Affairs and other Jewish advocacy groups to the New York State Division of Human Rights in Series 19280, Box 10, Item 2, "Sabbath Observers," New York State Division of Human Rights Executive Subject and Correspondence Files, New York State Archives, Albany, NY.

[27]"Guidelines on Discrimination Because of Religion," 29 C.F.R. §1605 (1967).

[28]George G. Harrer to Stephen M. Shulman, June 7, 1967, RG 403, Office of the Chairman Records of Chairman Stephen Shulman 1966–1968, Box 7, "Religious Discrimination," National Archives and Records Administration, College Park, MD.

[29]Gretchen Saam to Equal Employment Opportunity Commission, June 7, 1967, RG 403, Office of the Chairman Records of Chairman Stephen Shulman 1966–1968, Box 7, "Religious Discrimination," National Archives and Records Administration, College Park, MD.

[30]See, especially, *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971), which invalidated the EEOC's 1967 Guidelines and suggested they might be unconstitutional.

[31]42 U.S.C. § 2000e(j).

[32]As evidenced by its later compliance manuals, the EEOC was keenly aware of this problem. See, for example, the EEOC's 1986 *Compliance Manual for Investigators in the Field*, which explains that, because section §701(j) "states only that an observance or practice must be 'religious,'" the Commission must look elsewhere (than the section defining religion!) for a definition of religion (§628.4[b][1]).

[33]On "belief" as a key category for First Amendment jurisprudence, see Sarah Imhoff, "Belief," in *Religion, Law, USA*, eds. Joshua Dubler and Isaac Weiner (New York: New York University Press, 2019), 26–39.

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[34]*Legislative History of the Equal Employment Opportunity Act of 1972* (Washington, DC: U.S. Government Printing Office, 1972), 712.

[35]Nelson Lichtenstein, *State of the Union: A Century of American Labor*, rev. and exp. ed. (Princeton, NJ: Princeton University Press, 2013), 61.

[36]It was also the case that many, though certainly not all, Sabbath Observers refused to pay union dues, opting instead to direct an equivalent sum toward religious charities of their choice.

[37]Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[38]*Hardison*, 432 U.S. at 79, 81.

[39]*Hardison*, 432 U.S. at 84.

[40]*EEOC Guidelines on Discrimination Because of Religion*, 29 C.F.R. § 1605.1 (1980).

[41]*EEOC Dec. No. 71-779*, CCH EEOC Decisions (1970).

[42]*EEOC Dec. No. 71-2620*, CCH EEOC Decisions (1971). There is a long history, of course, of state authorities policing the boundaries of Black religious life and challenging the legitimacy of Black religious practices. See, for example, Sylvester Johnson, *African American Religions, 1500–2000: Colonialism, Democracy, and Freedom* (New York: Cambridge University Press, 2015); Judith Weisenfeld, *New World A-Coming: Black Religion and Racial Identity during the Great Migration* (New York: New York University Press, 2016).

[43]United States v. Seeger, 380 U.S. 163 (1965); Welsh v. United States, 398 U.S. 333 (1970).

[44]*Seeger*, 380 U.S. at 165.

[45]*Seeger*, 380 U.S. at 176.

[46]For a longer genealogy of "sincerely held religious belief" as a standard under U.S. law, see McCrary, *Sincerely Held*.

[47]*EEOC Dec. No. 71-779*, CCH EEOC Decisions (1970).

[48]Robert Wuthnow, *After Heaven: Spirituality in America since the 1950s* (Berkeley: University of California Press, 1998).

[49]Robert Bellah et al., *Habits of the Heart: Individualism and Commitment in American Life* (Berkeley: University of California Press, 1985), 227–28. Also see McCrary, *Sincerely Held*, 188.

[50]Bellah et al., *Habits of the Heart*, 221.

[51]Equal Employment Opportunity Commission, *Interpretive Manual: A Reference Manual to Title VII Law for Compliance Personnel of the Equal Employment Opportunity Commission* (May 1972), "Section 472: When Is a Conviction 'Religious?'" 361.

[52]*Hearings before the United States Equal Employment Opportunity Commission on Religious Accommodation: Hearings Held in New York, NY, Los Angeles, CA, & Milwaukee, WI, April–May, 1978* (Washington, DC: U.S. Government Printing Office, 1979).

[53]*Hearings before the United States Equal Employment Opportunity Commission*, 340.

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[54]*Hearings before the United States Equal Employment Opportunity Commission*, 327. Note that the written transcript of this oral testimony included scare quotes around the word *religious* in much the same way that critical scholars of religion often style it today. Was the sarcasm obvious to those who were listening?

[55]Clauston Jenkins, Executive Assistant to the Chancellor, North Carolina State University, to Ms. Marie D. Wilson, Executive Secretariat, Equal Employment Opportunity Commission, November 1, 1979. Guidelines on Discrimination because of Religion: Comments, Volume I. EEOC Archives, Washington, DC.

[56]Guidelines on Discrimination because of Religion: Comments, Volume II. EEOC Archives, Washington, DC.

[57]Richard V. Salvino, Manager—Equal Employment Policies, The Timken Company, to Ms. Marie D. Wilson, Executive Secretariat, Equal Employment Opportunity Commission, December 12, 1979. Guidelines on Discrimination because of Religion: Comments, Volume II. EEOC Archives, Washington, DC.

[58]Guidelines on Discrimination because of Religion: Comments, Volume I. EEOC Archives, Washington, DC.

[59]Guidelines on Discrimination because of Religion: Comments, Volume II. EEOC Archives, Washington, DC. The handwriting on this last statement is somewhat illegible. The letter writer is either concerned about ritual love making to mules or males. It looks like they initially typed "male" and then crossed out the "a" and handwrote a "u" to make "mule." But it could also be the other way around.

[60]In their discussion of "Sheila-ism," Robert Bellah and colleagues warn of the civic dangers associated with each American imagining themselves to be an idiosyncratic religion unto themselves. See Robert Bellah et al., *Habits of the Heart*.

[61]The shift from Sabbath Observance to Idiosyncratism in the EEOC's guidelines parallels a similar shift in the history of conscientious objection that led to the Supreme Court's *Seeger* and *Welsh* decisions. In the first part of the twentieth century, conscientious objector status was reserved for members of historic "peace churches." The Universal Military Training and Service Act of 1958 broadened the category to encompass anyone whose objections to war were grounded in their beliefs "in relation to a Supreme Being."

[62]*EEOC Dec. No. 79-06*, CCH EEOC Decisions (1983); Slater v. King Soopers, 809 F. Supp. 809, 810 (D. Colo. 1992).

[63]Equal Employment Opportunity Commission, *Compliance Manual on Religious Discrimination* (January 15, 2021).

[64]Duran v. Select Med. Corp., No. 08-cv-2328-JPM-tmp, 2010 WL 11493117, at *5-6 (W.D. Tenn. Mar. 19, 2010).

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[65]*Seeger*, 380 U.S. at 173.

[66]See, for example, Sullivan, *Impossibility of Religious Freedom*; Rosemary R. Hicks, "Between Lived and the Law: Power, Empire, and Expansion in Studies of North American Religions," *Religion* 42, no. 3 (July 2012): 409–24; Finbarr Curtis, *The Production of American Religious Freedom* (New York: New York University Press, 2016); Tisa Wenger, *Religious Freedom: The Contested History of an American Ideal* (Chapel Hill: University of North Carolina Press, 2017); McCrary, *Sincerely Held*.

[67]As with the protections against religious discrimination, the exemptions for religious organizations have a longer history at the state level. For example, as early as 1944, members of the New York State War Council Committee on Discrimination in Employment decided that their work would not apply to "fraternal, charitable, educational, or religious association[s] not organized for profit." See Minutes, New York State War Council Committee on Discrimination in Employment, February 23, 1944, Series A4278, Box 1, New York State War Council Committee on Discrimination in Employment Minutes and Investigations, New York State Archives, Albany, NY.

[68]Title VII, § 702(a), 42 U.S.C. § 2000e-1(a).

[69]Legislative History of the Equal Employment Opportunity Act of 1972 (Washington, DC: U.S. Government Printing Office, 1972), 849.

[70]Legislative History of the Equal Employment Opportunity Act of 1972 (Washington, DC: U.S. Government Printing Office, 1972), 1250.

[71]Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[72]Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171 (2012); Our Lady of Guadalupe School v. Morrisey-Berru, 591 U.S. ___ (2020).

[73]Micah Schwartzman, Chad Flanders, and Zoë Robinson, eds., *The Rise of Corporate Religious Liberty* (New York: Oxford University Press, 2016); Kathryn Lofton, "Corporation as Sect," in *Consuming Religion* (Chicago: University of Chicago Press, 2017), 197–219; also see Sullivan, *Church State Corporation*, on how the figures of the church and the corporation have haunted U.S. law as rival sovereigns to the state, often serving as co-regulators of individual conscience. For a religious history of the corporation, see Amanda Porterfield, *Corporate Spirit: Religion and the Rise of the Modern Corporation* (New York: Oxford University Press, 2018).

[74]Equal Employment Opportunity Commission, *Compliance Manual on Religious Discrimination* (January 15, 2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

[75]EEOC, *Compliance Manual*, C.1 [emphasis mine].

[76]EEOC, *Compliance Manual*, C.2.

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[77]On the ways conscience claims in the healthcare arena have privileged institutions over individuals, see Ronit Y. Stahl, "Conscience," in *Religion, Law, USA*, eds. Isaac Weiner and Joshua Dubler (New York: New York University Press, 2019), 40–58. On the ways Free Exercise jurisprudence can serve as a disciplinary mechanism for religious claimants, see Finbarr Curtis, "Exercise," in *Religion, Law, USA*, eds. Isaac Weiner and Joshua Dubler (New York: New York University Press, 2019), 59–72.

[78]EEOC, *Compliance Manual*, C.1.

[79]Curtis, *Production of American Religious Freedom*; Lofton, "Corporation as Sect"; Wendy Brown, *In the Ruins of Neoliberalism: The Rise of Antidemocratic Politics in the West* (New York: Columbia University Press, 2019).

[80]As a descriptive matter, it has never been so easy to distinguish religious and commercial activity, of course. This has always served more as a legal fiction, a normative valuation of what sorts of religious activity were worth protecting. For historical studies of religion's entanglement with the commercial, see, for example, Nicole C. Kirk, *Wanamaker's Temple: The Business of Religion in an Iconic Department Store* (New York: New York University Press, 2018); Daniel Vaca, *Evangelicals Incorporated: Books and the Business of Religion in America* (Cambridge, MA: Harvard University Press, 2019). On the challenge of distinguishing religious and secular corporations, also see Isaac Weiner, "Secular Corporations, Religious Subjects," Canopy Forum (May 21, 2021), https://canopyforum.org/2021/05/21/secular-corporations-religious-subjects/.

[81]Winnifred Fallers Sullivan, "Religion Naturalized: The New Establishment," in *After Pluralism: Reimagining Religious Engagement*, eds. Courtney Bender and Pamela E. Klassen (New York: Columbia University Press, 2010), 82–97; Winnifred Fallers Sullivan, *A Ministry of Presence: Chaplaincy, Spiritual Care, and the Law* (Chicago: University of Chicago Press, 2014).

[82]See, for example, Douglas A. Hicks, *Religion and the Workplace: Pluralism, Spirituality, Leadership* (New York: Cambridge University Press, 2003); David W. Miller, *God at Work: The History and Promise of the Faith at Work Movement* (New York: Oxford University Press, 2007); Lake Lambert, *Spirituality, Inc.: Religion in the American Workplace* (New York: New York University Press, 2009); Brian J. Grim and Kent Johnson, "Corporate Religious Diversity, Equity, and Inclusion as Covenantal Pluralism," in *The Routledge Handbook of Religious Literacy, Pluralism, and Global Engagement*, eds. Chris Seiple and Dennis R. Hoover (London: Routledge, 2021), 228–40.

[83]James Dennis LoRusso describes the workplace spirituality movement, and more specifically the discourse of bringing your

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"whole self" to work, as a strategy of neoliberal governance in "Towards Radical Subjects: Workplace Spirituality as Neoliberal Governance in American Business," in *Spirituality, Organization, and Neoliberalism: Understanding Lived Experiences*, eds. Emma Bell et al. (Northampton, MA: Edward Elgar, 2020), 1–26.

[84]Weeks, *Problem with Work*; Jaffe, *Work Won't Love You Back*.

[85]See the website of the Religious Freedom and Business Foundation at https://religiousfreedomandbusiness.org/.

[86]On the dissolution of the boundary between personal and work life, see Gershon, *Down and Out in the New Economy*.

[87]Bethany Moreton, *To Serve God and Wal-Mart: The Making of Christian Free Enterprise* (Cambridge, MA: Harvard University Press, 2009), 126. Historian Nelson Lichtenstein argues that Title VII's emphasis on individual civil rights inadvertently undermined the power of organized labor and its emphasis on democratic norms and group solidarity. See Lichtenstein, *State of the Union*.

[88]On the ways that tech workers find religious meaning through work, see Chen, *Work Pray Code*.

ABSTRACT *Charged with enforcing Title VII of the 1964 Civil Rights Act, the U.S. Equal Employment Opportunity Commission plays an overlooked but profoundly important role in shaping American religious life. While scholars of religion, law, and American culture have devoted a great deal of energy to analyzing the ways that federal courts define religion for the purposes of protecting it, they have paid less attention to the role of administrative agencies, like the EEOC. In this article, I argue that the private workplace offers a critical site for understanding how the state regulates and manages American religious life. I look to the EEOC's regulatory guidelines and compliance manuals as important sources for understanding the shifting relationship between religion, law, and work in the United States. I identify three modes of religiosity—or three types of religious actors—existing in tension in the EEOC archive, each bearing a distinct genealogy: the Sabbath Observer, the Idiosyncratist, and the Organization. While gesturing to very different notions of what religion is, the figures of the Idiosyncratist and the Organization both assume that demands of religion and work can be neatly reconciled. They presume that religion can be seamlessly integrated into the workplace without disrupting the functioning of capitalism. However, for those concerned about economic inequality, corporate power, and neoliberal working conditions, I suggest that it may be useful to revisit the EEOC's Sabbath Observer, who insists on the right to collective forms of life and value outside of work and the market.*

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