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# NONRELIGION, NEUTRALITY, AND THE SEVENTH CIRCUIT'S MISTAKE

# NONRELIGION, NEUTRALITY, AND THE SEVENTH CIRCUIT'S MISTAKE

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## INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[2] Who could have known that so few words would spawn so many? The religious clauses are sources of continuous litigation and academic study, and their correct interpretations are arguably still unsettled. This paper analyzes one admittedly small aspect of First Amendment litigation: the incorrect classification of atheism as a religion. Atheism, even by its own definition, is not a religion; and as a nonreligion, it is not entitled to protection under the Free Exercise Clause.

Denying atheists Free Exercise protection may seem to limit their rights. The truth, however, is that classifying atheism as a religion and entitling it to Free Exercise protection is both unnecessary and potentially detrimental to atheists' rights. Inaccessibility of Free Exercise protection for atheists is inconsequential, because atheism is fully protected by the Establishment Clause. In addition, stretching the Free Exercise Clause to protect atheists necessarily extends the protection to all non-religious groups, weakening the Clause's effectiveness. If Free Exercise protection is extended to groups that do not warrant it, the unintended consequences of this action may encourage

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[2] U.S. CONST. amend. I.

the Supreme Court to reexamine its current non-preferentialist approach to the First Amendment. Despite its limited scope, the "atheism as religion" argument has the potential to wreak havoc on First Amendment jurisprudence. A reevaluation of the interpretation of the Establishment Clause, including a possible return to a non-preferentialist approach, could mean that non-religious groups, including atheists, will lose their protections entirely.

The danger in the "atheism as religion" argument is that it seems harmless. Extending free exercise protection to atheists might not even seem like a departure from current practice. At a minimum, it doesn't seem to be a groundbreaking decision. In fact, *Kaufman v. McCaughtry*,[3] in which the Seventh Circuit extended Free Exercise Clause protection to an atheist prisoner, has hardly seemed to cause an uproar in the scholarly community.[4] The subdued response to *Kaufman* could be due to a belief that extending free exercise protection to atheists is not only the right thing to do, but it is also necessary in light of the Establishment Clause's requirement of neutrality between religion and nonreligion. *Kaufman*, however, was not only incorrectly decided—it is likely to lead courts down an unintended path. The Seventh Circuit has set precedent that will potentially cause further confusion in an already-thorny area of law. More concerning than *Kaufman*'s departure from free exercise precedent is the Seventh Circuit's failure to even acknowledge the change.

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[3] 419 F.3d 678 (7th Cir. 2005).

[4] According to Westlaw, as of May 4, 2007, *Kaufman* has been cited by six secondary sources, most of which use it in an analysis of the *Lemon* test and fail to even note the "atheism as religion" argument. *See generally* Marcia S. Alembik, Note, *The Future of The Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1207 (2006) (discussing *Lemon*); Kristi L. Bowman, *Seeing Government Purpose Through The Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 HARV. J.L. & PUB. POL'Y 417, 490 (2006) (same); Richard F. Suhrheinrich, *Has McCreary County's "Taint" Become A Stain?*, 23 T.M. COOLEY L. REV. 1, 23 (2006) (same).

Part I of this article examines atheism and discusses why it is not a religion and therefore not entitled to free exercise protection. Part II demonstrates that atheism does not require classification as a religion under the Free Exercise Clause because the Establishment Clause provides adequate and appropriate protection for this group. Part III examines *Kaufman v. McCaughtry* and explains what led the Seventh Circuit to reach its incorrect decision. Part IV explains why distinguishing between religion and non-religion is important, and why the *Kaufman* holding could be detrimental to First Amendment jurisprudence.

## I. ATHEISM IS A NOT A RELIGION, AND THEREFORE IS NOT ENTITLED TO PROTECTION UNDER THE FREE EXERCISE CLAUSE

The Free Exercise Clause prohibits governmental interference with religious practices.[5] In order to warrant protection, a belief must be religious.[6] Because atheism is not a religion, it is not entitled to protection under the Free Exercise Clause. Although the Supreme Court has not clearly defined "religion" for First Amendment purposes, an examination of Free Exercise case law helps to set forth the attributes a belief system must possess in order to be considered religious. Atheism does not possess any of these characteristics; therefore, it should not be classified as a religion under the First Amendment.

### A. What is atheism?

The definition of "atheism" differs depending upon the source. One atheist group defines atheism somewhat scientifically, as "a doctrine that states that nothing exists but natural phenomena (matter), that thought is a property or function of matter, and that

[5] *See generally Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).
[6] *See id.* ("[T]o have the protection of the Religion Clauses, the claims must be rooted in religious belief.").

death irreversibly and totally terminates individual organic units."[7] Other sources focus on the roots of the word "atheism" itself:

> Atheism is not a belief as such. It is the lack of belief. . . . When we examine the components of the word "atheism," we can see this distinction more clearly. The word is made up of "a;" and "-theism." Theism, we will all agree, is a belief in a God or gods. The prefix "a-" can mean "not" (or "no") or "without." If it means "not," then we have as an atheist someone who is not a theist (i.e., someone who does not have a belief in a God or gods). If it means "without," then an atheist is someone without theism, or without a belief in God.[8]

Disagreement among atheists in regards to the definition of atheism appears to only exist as to the distinctions between what is commonly referred to as "strong" vs. "weak" atheism. Although the intricacies of this debate are outside the scope of this paper, the basic distinction is that "weak" or "implicit" atheism is simply a lack of a belief in god, while "strong" atheism is an explicit denial of the existence of any gods.[9]

What is most important about these definitions of atheism is what they *do not* include: any assertions about morality, ethics, or the proper way in which an atheist should live his life.[10] The closest most atheist sources come to defining an atheistic morality is rebutting arguments that atheists are incapable of morality due to a lack of belief in a supreme being.[11] Atheists simply state that moral values can exist without

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[7] American Atheists Website, http://www.atheists.org/Atheism.

[8] Michael Martin, An Anthology of Atheism and Rationalism 3 (Gordon Stein ed., Prometheus 1980).

[9] *See* About: Agnosticism / Atheism, http://atheism.about.com/od/definitionofatheism/a/whatisatheism.htm. The difference between "weak" and "strong" atheism is admittedly subtle—a lack of a belief in god as opposed to a clear belief that god does not exist. The difference between "weak" and "strong" atheism does not impact my First Amendment analysis. Neither form of atheism is a religion under the Free Exercise Clause.

[10] This is not to say that an atheist could not have a moral code which he considers to be rooted in his atheism. I refer only to atheists to fit the common definition of atheism, which does not include group rituals or a moral code. This paper addresses only those atheists who fit into the common definition of atheism, which is a non-religion. It is, of course, possible for a person to consider himself atheistic, but to actually not fit into the common definition of atheism. This article's assertions apply only to those who an objective observer would call atheists.

[11] *See* About: Agnosticism / Atheism, http://atheism.about.com/od/aboutethics/p/GodlessMorality.htm.

religious beliefs, which is not the same as establishing a set of moral or ethical guidelines.

B. What constitutes a "religion" for First Amendment Purposes?

While the Supreme Court has not clearly defined "religion" for First Amendment purposes, a review of court opinions provides some useful guidance. The Court has held that a belief does not have to be theistic to be religious.[12] In *U.S. v. Seeger*, the Court held that a belief can be considered a religion if it is "sincere and meaningful" and if it "occupies the same place in the life of a possessor parallel to that filled by the orthodox belief in God or one who clearly qualifies."[13]

As to this parallelism guideline, Judge Adams's concurrence in *Malnak v. Yogi* outlines how to decide if a belief captures the "role" of religion in a person's life.[14] Judge Adams sets forth three characteristics of previously-accepted religions which should be considered when determining if a belief is a religion for First Amendment purposes: (1) Does the subject matter of the belief address fundamental questions such as those of life and death or right and wrong?; (2) Do the answers to the fundamental questions provide the believer with guidance as to what course of action to pursue?; and (3) Are there

[12] *See Torcaso v. Watkins*, 367 U.S. 48 (1961).
[13] *U.S. v. Seeger*, 380 U.S. 163, 176 (1965).
[14] *Malnak v. Yogi*, 592 F.2d 197 (3d Cir. 1979) (Adams, J., concurring). The majority of circuits have adopted or cited Adams's test with approval; *see, e.g., Altman v. Bedford Cent. School Dist.*, 245 F.3d 49 (2d Cir. 2001); *Wiggins v. Sargent*, 753 F.2d 663 (8th Cir. 2000); *Carpenter v. Wilkinson*, 946 F. Supp. 552 (6th Cir. 1996); *Alvarado v. City of San Jose*, 94 F.2d 1223 (9th Cir. 1996); *U.S. v. Meyers*, 847 F.2d 1408 (10th Cir. 1991); *Dettmer v. Landon*, 799 F.2d 929 (4th Cir. 1986); *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981); *U.S. v. Dykema*, 666 F.2d 1096 (7th Cir. 1981); *Udey v. Kastner*, 644 F. Supp. 1441 (E.D. Tex. 1986).

outwardly signs that parallel those of established religions, such as prayer or ceremonies?[15]

C. Atheism is not a religion

1. Atheism fails the Adams test

Applying the Adams test to atheism demonstrates that atheism does not meet any of the outlined factors. Although atheism does address death inasmuch as atheists believe that death is the end of a person's existence, it does not address other fundamental issues such as right and wrong. Again, it also gives its "believers" no guidance as to how to live their lives. Finally, atheists do not traditionally participate in prayers or ceremonies. Somewhat comparable to atheism is the New Age organization, which the Third Circuit held to not constitute a religion, after applying the Adams test:

> The New Age proponents cited by plaintiffs clearly indicate that there is no New Age organization, church-like or otherwise; no membership; no moral or behavioral obligations; no comprehensive creed; no particular text, rituals, or guidelines; no particular object or objects of worship; no requirement or suggestion that anyone give up the religious beliefs he or she already holds.[16]

2. Atheists do not consider themselves religious

In addition to its failure under Adams's test, atheism fails what is basically a "common sense" test as well—atheists do not consider themselves religious. The Supreme Court has held that a person's sincere characterization of his belief as a religion carries a great deal of weight in determining the characterization of that belief as a

[15] *Malnak*, 592 F.2d at 208-09.
[16] *Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 (9th Cir. 1996).

religion.[17] Atheist groups consistently state that atheism is not a religion. [18]

3. Atheism is a way of life, not a religion

In *Wisconsin v. Yoder*, the Supreme Court held that a way of life based upon subjective evaluation of secular values or considerations, no matter how personal, is not a religion.[19] The *Yoder* definition of nonreligion is a fitting description of atheism. Atheists use science, rather than religion, to define their position in their environment, or their role in the world overall. Atheists subjectively evaluate secular considerations such as how the scientific community explains the beginning of life, evolution, and death, and these conclusions color the way that atheists view the world and their role within it. Atheism is a way of life and not a religion, thereby disqualifying it for Free Exercise protection under *Yoder*.

Regardless of the definition of atheism, or whether it is evaluated under the Adams test or under *Yoder*, the conclusion is clear: atheism is not a religion. Although this determination is important, however, classifying atheism as a nonreligion actually does not deprive atheists of protection under the First Amendment, as the following section explains.

## II. ATHEISM DOES NOT REQUIRE FREE EXERCISE PROTECTION BECAUSE IT IS ADEQUATELY PROTECTED BY THE ESTABLISHMENT CLAUSE.

Although most atheists agree that atheism is not a religion, some have found it necessary or advantageous to seek protection as religious persons entitled to protection under the Free Exercise Clause. Although the sincerity of their claims is not disputed, an analysis of the Supreme Court's interpretation of the First Amendment demonstrates that

[17] *Welsh v. U.S.*, 398 U.S. 333, 341 (1970).
[18] *See* Atheists.org, http://www.atheists.org/faqs/atheism.html#not.religion.
[19] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

the protections atheists seek under the Free Exercise Clause are likely already afforded to them in the Establishment Clause. Therefore, atheists are adequately protected by the Establishment Clause, and do not require the right to bring claims under the Free Exercise Clause. An evaluation of the Establishment Clause will explain this reasoning.

A. The Establishment Clause Requires Neutrality Between Religion and Non-Religion

The Establishment Clause was originally interpreted to mean only that Government cannot prefer one religion over another (also known as a *non-preferentialist* approach).[20] However, the Supreme Court changed its approach, and has stated that the Establishment Clause requires neutrality not only among religions, but also between religion and nonreligion.[21] Once the Court found the Establishment Clause to require this second level of neutrality, atheism became protected against governmental interference.

Taking a common sense approach, consider again the definition of atheism—it is a lack of a belief in god, or a belief in nothing, in regards to religion. So, if an atheist believes in *nothing*, then under what circumstances will this belief be violated? The only way to violate or infringe upon a belief in *nothing* is to try to turn it into a belief in *something*; or, in other words, you violate the existence of nothing by attempting to establish something in its place. And when the government is encouraging or supporting or coercing a person to believe in *something*, then it is aligning itself with that belief, thereby violating the Establishment Clause. Therefore, even if atheism were a religion, a

[20] *See generally* Robert Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 Harv. J.L. & Pub. Pol'y 129 (1986).

[21] *See Everson v. Board of Education*, 330 U.S. 1, 15, (1947) ("Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."). *See also Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) ("Neither can [the Federal Government] constitutionally pass laws or impose requirements which aid all religions against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.").

violation of an atheist's Free Exercise rights would likely never occur without a corresponding Establishment Clause violation.

## III. THE SEVENTH CIRCUIT'S MISTAKE

Surprisingly, there has been relatively little case law directly addressing whether atheism is a religion. One recent case, however, specifically found atheism to be a religion entitled to protection under the Free Exercise Clause. In *Kaufman v. McCaughtry*, James Kaufman, a prisoner at Wisconsin's Waupun Correctional Institution, alleged that his First Amendment rights were violated when the warden refused to allow him to organize a group of atheists.[22] Kaufman brought both Establishment Clause and Free Exercise Clause claims. The district court dismissed the suit on the grounds that atheism is not a religion, meaning that the warden was within his discretion to treat Kaufman's request as one for a secular organization. The Seventh Circuit reversed, holding that atheism is a religion under the First Amendment, and that Kaufman's group was a religious one.

The *Kaufman* court's holding was incorrect, and four errors contributed to this mistake: 1) the court used an incorrect definition of atheism; 2) it used an overbroad definition of religion; 3) it failed to note that whether atheism is a religion is a free exercise issue, not an Establishment Clause one; and 4) it used the Supreme Court's neutrality requirement in its "atheism as a religion" decision; however, neutrality is required only by the Establishment Clause, making it inapplicable to the "atheism as a religion" argument (a free exercise issue). Each error will be addressed individually.

[22] 419 F.3d 678 (7th Cir. 2005).

A. The *Kaufman* court used an incorrect definition of atheism.

In *Kaufman*, the court referenced a questionable definition of atheism, stating: "Atheism is, among other things, a school of thought that takes a position on religion, the existence and importance of a supreme being, and a code of ethics."[23] This definition is simply incorrect. Atheists as a whole do not take one position on religion. While "strong" atheists may argue that all religions are based on fictions (thereby arguably taking a position on religion), "weak" atheists make no speculations or judgments outside of their own belief system.[24] Overall, no universal atheist position on religion exists. Atheists also do not take a position on the *importance of* a supreme being.[25] Atheists take only one position on a supreme being—a supreme being does not exist. Finally, as discussed *supra*, atheism does not have its own code of ethics. Arguably, this incorrect definition of atheism contributed to the incorrect holding.

B. The *Kaufman* court used an overbroad definition of religion.

The issue of atheism as a religion actually arose for the Seventh Circuit two years prior to *Kaufman* in *Reed v. Great Lakes Companies, Inc*.[26] In *Reed*, a hotel employee claimed that he had been fired due to his religious preference. In dicta, the court reviewed employment discrimination cases and analogized them to First Amendment cases, finding that "religious freedom includes the freedom to reject religion – 'religion' includes antipathy to religion. And so an atheist . . . cannot be fired because his employer dislikes atheists. *If we think of religion as being a position on divinity*, then atheism is

[23] *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005).
[24] *See* About: Agnosticism / Atheism, http://atheism.about.com/od/definitionofatheism/a/whatisatheism.htm.
[25] In the Seventh Circuit definition, *existence of* and *importance of* must have been regarded as two different concepts, because to construe otherwise would be to find their language redundant.
[26] 330 F.3d 931 (7th Cir. 2005).

indeed a form of religion."[27] This overbroad definition of religion was restated in *Kaufman*, and contributed to the incorrect holding of the case. While the Supreme Court has struggled to define *religion* for First Amendment purposes,[28] it has never held that a belief need simply be *a position on divinity* in order to constitute a religion. In fact, some belief systems found to *not* constitute religions do take positions on divinity.[29]

C. The *Kaufman* court unnecessarily categorized atheism as a religion for its Establishment Clause analysis

James Kaufman made both Establishment Clause and Free Exercise Clause claims in his suit against the prison. Prior to specifically addressing either of his claims, the court first determined whether atheism is a religion—specifically whether Kaufman's atheist group was a religious group. The categorization of atheism as a religion, however, was unnecessary for the analysis of his Establishment claim. If atheism is a religion, then Kaufman's Establishment claim is that the government is discriminating among religions. If atheism is *not* a religion, the Kaufman's Establishment claim is that the government is discriminating between religion and nonreligion. The Supreme Court has held that a discrimination of either kind violates the Establishment Clause.[30] Therefore, the classification of atheism as a religion was unnecessary for the Establishment Clause analysis, meaning that Kaufman's assertion that his atheist group was a religious one was pertinent only to his free exercise claim.

Because the categorization of atheism as a religion was not necessary to Kaufman's Establishment Clause claim, the issues should have been adjudicated

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[27] *Id*. at 934 (emphasis added).
[28] *See supra* notes 5-8 and accompanying text.
[29] *See Alvarado v. City of San Jose*, 94 F.3d 1223, 1230 (9th Cir. 1996) (New Age held not to be a religion despite its belief that Quetzalcoatl, a Mayan historical figure, is "an incarnation of Christ").
[30] *See supra* note 20 and accompanying text.

independently. The court should have done the following: first, addressed Kaufman's Establishment Clause claims based upon Establishment Clause precedent (because the analysis is the same whether or not atheism is a religion); second, determined whether Kaufman's atheist group was a religious group warranting protection under the Free Exercise Clause; and third, if it found that his group was entitled to free exercise protection, the court should have then decided if Kaufman's free exercise rights had been violated. By prematurely categorizing atheism as a religion, the court was led to error number four, in which Establishment Clause precedent was inappropriately applied to its "atheism as religion" analysis, which was part of the free exercise claim.

D. The *Kaufman* court failed to note that the neutrality requirement between religion and nonreligion lies only in the Establishment Clause.

As stated above, the *Kaufman* court did not clearly recognize that the "atheism as religion" argument was only relevant to Kaufman's Free Exercise claims.[31] This failure to separate his arguments led the court to misapply First Amendment precedent. The biggest mistake of the *Kaufman* court is its failure to note that it is the Establishment Clause, and not the Free Exercise Clause, which requires neutrality between religion and nonreligion. This error led the court to mistakenly use the neutrality requirement, and its corresponding Establishment Clause precedent, in its categorization of atheism is a religion, which is a free exercise issue.

1. Misunderstanding the neutrality requirement

[31] To be fair, the court said that it was addressing the Free Exercise claim first, which arguably makes its decision to start with the "atheism as religion" analysis appropriate. However, the court goes on to use Establishment Clause precedent in deciding whether atheism is a religion. Had the court addressed the Establishment claim first, it would have been less likely to apply Establishment Clause precedent to the Free Exercise claim, because it would have been applying the same precedent in both analyses. The *Kaufman* court said it would analyze the free exercise claim first, then look to both Free Exercise and Establishment Clause precedent, and then reach a decision on both the Free Exercise and Establishment Clause claims. This order of events led the court to apply Establishment Clause precedent to a free exercise issue.

The *Kaufman* court mistakenly concludes that ensuring neutrality between religion and nonreligion requires that atheism be classified as a religion, entitled to free exercise protection. However, while the Supreme Court has held that the First Amendment requires this neutrality,[32] this requirement lies only in the Establishment Clause, not in the Free Exercise Clause. The neutrality requirement is, therefore, inapplicable to Kaufman's free exercise claim. In other words, the neutrality required by the Supreme Court lies in only in the Establishment Clause, and it has no relationship to the determination of whether atheism is a religion.

The *Kaufman* court's misunderstanding of the *applicability* of the neutrality requirement is likely a result of a misunderstanding of the *reasoning* behind neutrality. The neutrality required by the Establishment Clause does not hinge upon the definition of the word *religion*; neutrality accomplishes the overall intent of the Establishment Clause. Yes, the Establishment Clause requires neutrality between religion and nonreligion, but not because the term *religion* also encompasses its antithesis. The requirement came about because the Court interpreted the Establishment Clause to mean not only that the government cannot establish one religion in place of another, but also that it cannot establish a religion where none was before. This interpretation does not require that "religion" also include "nonreligion."

The *Kaufman* court misunderstood this reasoning, and believed the neutrality requirement to be dependent on the word "religion." The court said: "The Establishment Clause itself says only that 'Congress shall make no law respecting an establishment of

[32] *Everson v. Board of Education*, 330 U.S. 1, 15, (1947); *see also Epperson v. State of Ark.*, 393 U.S. 97, (1968); *Torcaso v. Watkins*, 367 U.S. 488, 495, (1961); *Fowler v. State of Rhode Island*, 345 U.S. 67, (1953); *Zorach v. Clauson*, 343 U.S. 306, 313-14, (1952); *People of State of Ill. ex rel McCollum v. Board of Education*, 333 U.S. 203, (1948).

religion,' but the [Supreme] Court understands the reference to religion to include what it often calls 'nonreligion.'"[33] The *Kaufman* court misunderstood the source of the neutrality requirement; neutrality does not come about as a result of defining "religion" as both "religion and nonreligion." The requirement was adopted in order to ensure that the spirit of the Establishment Clause was followed.

This discussion is somewhat murky, so perhaps an analogy will help. Imagine that, instead of religion, the First Amendment addressed sports. In response to forced attendance at baseball games in England, an amendment to our Constitution was written saying that the government shall not establish baseball as the national sport, but neither will it interfere with a person's right to play baseball. The first half of the amendment would protect baseball players who did not wish to force their sport onto anyone else, as well as football players who did not wish to be forced to play baseball. This understanding of the first half of the amendment, however, does not hinge upon the definition of the word "baseball." Nor does the second half of the amendment say that the government will not interfere with a person's right to play *football*, for better or worse, the amendment only applies to baseball players.

This analogy is not perfect because football players actively play their sport, making it comparable to baseball. But imagine if football were just a fancy word for "lack of belief in baseball." Nonreligion is the opposite of religion. The neutrality requirement does not lead to the conclusion that "religion" now means "religion and nonreligion." When the Supreme Court ended the non-preferentialist approach and required neutrality not only among religions but also between religion and nonreligion, it was not because it suddenly understood the word "religion" in the First Amendment to

[33] *Kaufman*, 419 F.3d at 682.

mean something different. This decision came about because of a better understanding of the underlying principle of the Establishment Clause—the right to be free from government-enforced religion. And this freedom existed both for those who had already chosen a religion, and for those who chose not to practice a religion at all.

Also note that because the Establishment Clause and the Free Exercise Clause share the same word "religion" in the amendment, changing "religion" to include "nonreligion" in an effort to be in accordance with the neutrality requirement would also necessarily change the definition for the Free Exercise Clause as well. This in exactly what happens in *Kaufman*. Upon (implicitly) deciding that the neutrality requirement turned "religion" into "religion and nonreligion," categorizing atheism as a religion under the Free Exercise Clause was the next logical step. If "religion" actually means "religion *and* nonreligion," then the court had no choice but to conclude that this definition encompasses atheism. And that's exactly what it held.

*Kaufman* is an example of how a misunderstanding of one small part of the First Amendment can lead to what should be a preposterous conclusion. How can the word "religion" *possibly* be meant to include "nonreligion" as well? Under what statutory interpretation is a word determined to include its opposite? What is the point of a rule that respects religion if it also applies to non-religion?

2. The effect of misunderstanding the neutrality requirement

Upon concluding that the neutrality requirement hinged upon the word "religion," the court then goes on to apply Establishment Clause precedent to a free exercise issue; specifically, the determination of whether atheism is a religion. The court said that it

would address Kaufman's Free Exercise Claim first.[34] It started off well, appropriately looking to *Wisconsin v. Yoder*[35] and acknowledging that a religion must be more than a way of life. It then noted that religions do not require a supreme being, nor must they be mainstream in order to be protected, citing applicable cases such as *Torcaso v. Watkins*[36] and the Adams concurrence in *Malnak v. Yogi*.[37] It then mentions the parallelism argument from *Welsh v. United States*[38] and *United States v. Seeger*.[39]

Then, after what had begun as an appropriate analysis of the free exercise claim, the court then starts down a different path. It is at this point that the effect of the neutrality requirement misunderstanding becomes evident: the court begins using Establishment Clause cases in its analysis of what is a Free Exercise issue. It states: "The Supreme Court has recognized atheism as equivalent to a 'religion' for purposes of the First Amendment on numerous occasions, most recently in *McCreary County, Ky. v. American Civil Liberties Union of Ky.*[40]. . . ."[41] It continues, saying: "In *McCreary County*, [the Supreme Court] described the touchstone of *Establishment Clause* analysis as 'the principle that the First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."[42] The Court in *McCreary*, however, makes no assertion relating to atheism being a religion—it simply reiterates the neutrality requirement laid out in the Establishment Clause. *McCreary* reiterates the neutrality requirement because, like every other case that contains the neutrality

[34] *Kaufman*, 419 F.3d at 681.
[35] 406 U.S. 205, 215-16 (1972).
[36] 367 U.S. 488, 495 & n.11 (1961).
[37] 592 F.2d 197, 200-15 (3d Cir. 1979) (Adams, J., concurring).
[38] 398 U.S. 333, 340 (1970).
[39] 380 U.S. 163, 184-88 (1965).
[40] 545 U.S. 844 (2005).
[41] *Kaufman*, 419 F.3d at 682.
[42] *Kaufman*, 419 F.3d at 682 (internal citations omitted, emphasis added).

requirement, it is an Establishment Clause case. The *Kaufman* court fails to note that the *McCreary* language was not relevant to Kaufman's free exercise claim because the language was part of an Establishment Clause analysis.

After its *McCreary* reference, the *Kaufman* court then notes the following language from *Wallace v. Jaffree*[43]: "[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all."[44] Not surprisingly, however, *Wallace*, like *McCreary*, is an Establishment Clause case. Three sentences later, the court holds: "[W]e are satisfied that [atheism] qualifies as Kaufman's religion for purposes of the First Amedment claims he is attempting to raise." These Establishment Clause cases constitute the final deciding factors in the analysis, and arguably the most convincing ones. Yet this line of reasoning is inapplicable to the "atheism as religion" argument—whether atheism is a religion is a free exercise issue. Not only does the court apply Establishment Clause precedent to a free exercise question, but it does so without ever mentioning the distinction.

## IV. POTENTIAL PROBLEMS CAUSED BY CLASSIFYING ATHEISM AS A RELIGION

First Amendment issues are undoubtedly difficult, and the classification of atheism is no exception. The most difficult task, however, may be convincing courts that this distinction between nonreligion and religion matters. If atheists seek protection under the Free Exercise Clause, and they are actually already entitled to the same protections under the Establishment Clause, then why does it matter under which Clause the protections are afforded?

[43] 472 U.S. 38, 52-53 (1985).
[44] *Kaufman*, 419 F.3d at 682 (internal citations omitted).

A. Invalidation of earlier decisions

As discussed throughout this paper, the Supreme Court has held that the Establishment Clause requires government neutrality between religion and nonreligion. However, the Clause was originally viewed as only requiring neutrality among religions (the non-preferentialist approach). The Supreme Court held that neutrality among religions was not enough, and invalidated the non-preferentialist approach by holding that the government must not discriminate between religion and nonreligion.

If atheism is a religion, then these holdings are no longer valid or necessary. Why would there be a need to specifically ban discrimination between religion and nonreligion if nonreligion *is* a religion? The non-preferentialist approach was discontinued because it did not afford protection to atheists and other non-believers. But if atheism is a religion, then courts can go back to non-preferentialism, because discrimination among religions would now be their only concern. The Supreme Court felt the need to extend Establishment Clause protections to the "nonreligious," arguably demonstrating that they did not intend for "religion" to encompass atheism. Equating nonreligion with religion negates this line of reasoning and clearly does not follow the intent of the Supreme Court when it sought to invalidate the non-preferentialist approach.

B. Message to fringe "religious" groups

Again, in order to be protected under the Free Exercise Clause, a belief or practice must be religious. Numerous Supreme Court cases have demonstrated that this protection is not absolute, nor is it available to all beliefs, regardless of the sincerity of the believer. To those whose beliefs were found not to be religious, and who were therefore not entitled to free exercise protection, what message does it send if atheism is

found to be a religion? Courts would be saying that not only are these groups not entitled to free exercise protection, but also that they would be more likely to be protected if their belief were completely non-existent. Understandably, a line has to be drawn as to what does and what does not constitute a religion for First Amendment purposes. However, drawing that line behind atheism is, at a minimum, illogical, and possibly even threatening to the viability of the Clause.

C. Threats to the Religion Clauses

Classifying atheists as religious arguably lessens the effectiveness of the Clauses overall. If atheists are "religious," then who is not? If nonreligion is a religion, then does the Free Exercise Clause now cover everyone? What about those whose beliefs the courts have specifically held to be "nonreligious"? Do decisions like *Kaufman* permit beliefs previously adjudicated as "nonreligious" to now be entitled to protection? Arguably, those groups could now bring claims under the Free Exercise Clause claiming that it protects both religious and non-religious groups, entitling them to protection regardless of their classification.

All of these issues lead to the biggest potential problem: a reconsideration of the non-preferentialist interpretation of the Establishment Clause. *Kaufman* does not *seem* wrong on its face—it seems to make sense. The problem is that, based on *Kaufman*, nonreligious groups can now seek protection under the Free Exercise Clause. Over time, as the Free Exercise Clause begins to cover more and more people, its effectiveness will be diminished. The outcome will likely be an unintended consequence of the *Kaufman* decision. The havoc that could result could potentially lead the Supreme Court to

reconsider its non-preferentialist approach.[45] Arguably, the extension of benefits to more and more nonreligious people will threaten to undermine the Religious Clauses. If courts are forced by precedent to extend religious protections to nonreligious groups, the Supreme Court could potentially consider a reversion to the non-preferentialist approach. Although non-preferentialism may not have been "fair," it was, arguably, more consistent than the Establishment Clause analyses courts are applying today.

## V. CONCLUSION

Imagine an atheist government employee forced to wear a T-shirt declaring his belief in god. The employee brings suit for violation of his rights under the Free Exercise and Establishment Clauses. A knee-jerk reaction might be for the court to find that the government's actions constituted an Establishment Clause violation, and that the employee's Free Exercise Clause right to "practice" his atheism has been violated. The correct response, however, is that although the Establishment Clause has been violated, this employee has no standing to bring a free exercise claim. This result may seem harsh, but it is not—the employee will still receive the relief he's seeking, even if his free exercise claim is dismissed. Further, imagine if, instead of an atheist, the employee worshipped cat food.[46] The result would be the same, though the denial of the second employee's free exercise claim may feel more appropriate than does the denial of the first employee's claim. The truth, however, is that one nonreligion is equal to all others under

[45] A return to a non-preferentialist approach would not be completely unfounded. Many scholars opine that the non-preferentialist approach most accurately reflects the Framers' intent. *See generally* Robert Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 Harv. J.L. & Pub. Pol'y 129 (1986); *see also* Douglas Laycock, "*Non-preferential Aid to Religion" A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 876 (providing a list of notable figures who have all made arguments in favor of non-preferentialism).

[46] *See, e.g., Brown v. Pena*, 441 F.Supp. 1382 (S.D. Fla. 1977) (finding that the belief in Kozy Kitten Kat Food is not a religion for First Amendment purposes).

the First Amendment. The Free Exercise Clause protects only the religious, and it should be applied in that manner.

Giving up a claim to a right, especially a constitutional one, is not appealing. Shouldn't atheists be fighting for their free exercise rights? But atheists aren't really *giving up* anything—they've never really been entitled to Free Exercise rights, *Kaufman* notwithstanding. Also, the protections atheists may think they are "losing" under the Free Exercise Clause are already afforded to them under the Establishment Clause. The results of the protections are the same—the government cannot interfere with an atheist's right NOT to believe. Further, a real possibility exists that the Supreme Court may seek to change its interpretation of the First Amendment in reaction to the over-extension of Religious Clause protections. Therefore, it is in the best interests of atheists and other non-religious groups to refrain from unnecessary free exercise claims, or they risk losing the protections they currently enjoy.