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# Deference to Duplicity: Wisconsin's Selective Recognition of the Mature Minor Doctrine

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# DEFERENCE TO DUPLICITY: WISCONSIN'S SELECTIVE RECOGNITION OF THE MATURE MINOR DOCTRINE


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## I. INTRODUCTION

In early 2012, Sheila, a fifteen-year-old girl, was diagnosed with a rare and serious condition that, absent blood transfusions, would prove fatal.[1] Sheila was also a practicing Jehovah's Witness,[2] a faith that bars receiving blood transfusions.[3] Sheila's parents did not consent to the

1. Dane Cnty. v. Sheila W., 2013 WI 63, ¶ 42, 348 Wis. 2d 674, 835 N.W.2d 148 (Gableman, J., dissenting). Shelia was diagnosed with aplastic anemia. *Id.* Aplastic anemia occurs when the body stops producing a sufficient amount of new blood cells. Mayo Clinic Staff, *Diseases and Conditions: Aplastic Anemia*, MAYO CLINIC, http://www.mayoclinic.org/diseases-conditions/aplastic-anemia/basics/definition/CON-20019296 (Mar. 18, 2014), *archived at* http://perma.cc/MYP2-9CXT. Sheila was given medication to attempt to treat the condition, but the medications were not effective, leaving blood transfusions as the only treatment option remaining. *Sheila W.*, 2013 WI 63, ¶ 12 (Prosser, J., concurring).

2. *Sheila W.*, 2013 WI 63, ¶ 13 (Prosser, J., concurring).

3. R.T. Penson & P.C. Amrein, *Faith and Freedom: Leukemia in Jehovah Witness Minors*, 27 ONKOLOGIE 126, 126 (2004), *available at* http://www.karger.com/Article/Pdf/76900, *archived at* http://perma.cc/Z2HY-4WXB. *Genesis* 9:3–4, *Leviticus* 17:10–14, and *Acts*

transfusion, believing that Sheila was mature enough to make the decision for herself, and indicated that they would support Sheila's decision either way.[4] Sheila refused to consent to the transfusions based on her religious beliefs.[5] Sheila expressed that she "would rather die not receiving the transfusions than survive, but have the stigma of having received a transfusion"; that a blood transfusion "would be 'devastating to [her] mentally and physically'"; and that it is "[her] body, [her] belief, [her] wishes."[6] Underscoring how offensive Sheila considered blood transfusions, she expressed her belief that a transfusion is tantamount to "rape,"[7] a not uncommon sentiment among Jehovah's Witnesses.[8]

Not persuaded by Sheila's pleas, the county filed a petition for protection or services[9] and a petition for temporary physical custody of Sheila.[10] The circuit court held a hearing and appointed a temporary guardian[11] with the power to consent to medical treatment for Sheila's benefit.[12] Sheila appealed the order appointing a temporary guardian,[13] but before the appeal was heard, the guardian consented to the recommended blood transfusions, Sheila's affliction subsided, and the

15:21–29 are Bible passages that prohibit the ingestion of blood and are the foundation for Jehovah's Witness' objection to blood transfusions. *Id.*

4. *Sheila W.*, 2013 WI 63, ¶ 13 (Prosser, J., concurring).

5. *Id.* ¶ 14.

6. *Id.* (internal quotation marks omitted).

7. *Id.* (internal quotation marks omitted).

8. Rachel Olding, *Jehovah's Witness Teen Loses Appeal Over Life-Saving Transfusion*, SYDNEY MORNING HERALD (Sept. 27, 2013, 12:13 PM), http://www.smh.com.au/nsw/jehovahs-witness-teen-loses-appeal-over-lifesaving-transfusion-20130927-2uib6.html, *archived at* http://perma.cc/P558-CTC (discussing an Australian Jehovah's Witness teen's objection to a blood transfusion and comparing it to rape).

9. *Sheila W.*, 2013 WI 63, ¶ 15 (Prosser, J., concurring); WIS. STAT. § 48.255 (2013–2014) (noting that, in certain circumstances, the court may find a child in need of protection or services).

10. *Sheila W.*, 2013 WI 63, ¶ 15 (Prosser, J., concurring); WIS. STAT. § 48.205(1)(b) (stating that custody may be granted if "[p]robable cause exists to believe that the parent, guardian or legal custodian of the child or other responsible adult is neglecting, refusing, unable or unavailable to provide adequate supervision and care and that services to ensure the child's safety and well-being are not available or would be inadequate").

11. *Sheila W.*, 2013 WI 63, ¶ 15 (Prosser, J., concurring); WIS. STAT. § 54.50 ("If it is demonstrated to the court that a proposed ward's particular situation . . . requires the immediate appointment of a temporary guardian of the person or estate, the court may appoint a temporary guardian under this section.").

12. *Sheila W.*, 2013 WI 63, ¶ 15 (Prosser, J., concurring); *see* WIS. STAT. § 54.50(2).

13. *Sheila W.*, 2013 WI 63, ¶ 2 (per curiam).

guardianship order expired.[14] Due to the sequencing of events, the court of appeals held the matter to be moot.[15] Sheila petitioned the Wisconsin Supreme Court for review.[16]

Sheila requested Wisconsin's high court recognize the mature minor doctrine.[17] Under the mature minor doctrine, minors that exhibit the requisite level of maturity and understanding of the consequences of their actions are allowed to make independent medical treatment decisions.[18] The petition for review was granted, the matters were briefed, and oral arguments were held.[19] Inexplicably,[20] the court issued a per curiam opinion[21] in which it agreed with the conclusion of the court of appeals that the issue presented was moot and refused to decide the case on the merits.[22]

*Sheila W.* provided the perfect canvas for the Wisconsin Supreme Court to lay out the state's stance on the mature minor doctrine as it relates to the rights of minors to make their own medical treatment decisions. Instead, the court chose to dodge the matter and leave it to the legislature to take up at its leisure.[23] The court's approach, while convenient and deferential, is most aptly described by the dissent in *Sheila W.* as "abdication dressed as modesty."[24] The court's legislature-centric stance regarding recognition of a mature minor doctrine fails to recognize one reality and completely ignores another.

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14. *See id.* ¶ 15 (Prosser, J., concurring).

15. *Id.* ¶ 2 (per curiam); *id.* ¶ 15 (Prosser, J., concurring).

16. *See id.* ¶ 1 (per curiam).

17. *Id.* ¶ 16 (Prosser, J., concurring).

18. *Id*. (quoting FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE § 5.01[B][3], at 5-10 (4th ed. 2007)).

19. *Sheila W.*, 2013 WI 63.

20. I say inexplicably because the per curiam opinion states that the case "undoubtedly presents issues of great public importance" and presents an issue that is "capable and likely of repetition and yet will evade appellate review." *Id.* ¶ 7 (per curiam). Thus, according to the per curiam opinion, the case represents two of the recognized situations that are exceptions to mootness. *Id.* ¶ 6.

21. *Sheila W.*, 2013 WI 63. A concurrence was filed by Justice Prosser, and a dissent was filed by Justice Gableman and joined by Justices Roggensack and Ziegler.

22. *See id.* ¶ 24 (Prosser, J., concurring) (agreeing the matter is moot but discussing the preference that such matters of "profoundly important policy determinations about the rights of minors" should be left to the legislature).

23. *Id.* ¶ 8 (per curiam) (stating that the legislature is better situated to address such public policy questions).

24. *Id.* ¶ 53 (Gableman, J., dissenting).

First, the court referenced a prior decision in which the same "defer to the legislature" rationale was used,[25] but as the dissent pointed out, the per curiam opinion failed to mention that the legislature took twenty-five years to address the matter at issue.[26] Further, Jehovah's Witnesses' numbers are not so great[27] and their beliefs not so mainstream as to engender sympathy among the masses that could lead to a groundswell of support spurring legislative action. The dissent in the case cited by the per curiam opinion sums up this flaw nicely: "[A]part from any aversion legislators may have to addressing a controversial question, there is the added practical problem of the press of legislative business. The thousands of problems presented to the legislature tax its ability to respond thoughtfully to the multiple problems of society."[28] The court's message-in-a-bottle to the legislature requesting rescue and clarification on this issue will likely bob around aimlessly at sea for decades before perhaps washing up on the shores of the legislature's to-do list many years from now. In the meantime, cases will come before courts in this state where an articulated stance on the mature minor doctrine would be at worst helpful guidance and at best dispositive to the matters before them.[29]

Second, whether to recognize the mature minor doctrine is more than a simple policy question akin to states making the choice whether to adopt comparative or contributory negligence in tort matters. The mature minor doctrine concerns rights of constitutional magnitude, and it is exactly the court's place to speak to them.[30] A minor's constitutional rights to due process, bodily integrity, and, in Sheila's

25. *Id.* ¶ 8 (per curiam) (citing Eberhardy v. Circuit Court for Wood Cnty., 102 Wis. 2d 539, 307 N.W.2d 881 (1981)).

26. *Id.* ¶ 51 (Gableman, J., dissenting).

27. In 2012, less than 0.4% of the U.S. population were considered practicing Jehovah's Witnesses (with 1,156,150 practicing individuals out of the U.S. population of 315,800,438). *United States Jehovah's Witness Publisher Statistics*, JWFACTS.COM, (last visited Jan. 25, 2015), http://www.jwfacts.com/statistics/charts/us/statistics-watchtower-us.pdf, *archived at* http://perma.cc/KGA3-JDJ3.

28. *Sheila W.*, 2013 WI 63, ¶ 51 (Gableman, J., dissenting) (quoting *Eberhardy*, 102 Wis. 2d at 605 (Callow, J., dissenting)) (internal quotation marks omitted).

29. *See id.* ¶ 52 (pointing out that without any standard put forth by the high court, lower courts have no guidance in like situations that will come before them).

30. *See* THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.").

case, religious freedom are implicated when a minor asserts her wishes to make her own medical treatment decisions. It is axiomatic that state legislatures are not the gatekeepers to constitutional rights.[31] For legislative action that implicates constitutional rights, the courts are unquestionably the final arbiters of its constitutionality.[32] A court may find legislative action either constitutional or unconstitutional, but it is a novel stance indeed to suggest that the legislature, and the legislature alone, determine whether certain classes of citizens enjoy fundamental constitutional rights. If the court remains silent on this matter and evades the question while at the same time prodding the legislature to make its stance known, it is ceding its authority and skirting its duty to delineate the reach and limits of constitutional rights in this state. While the legislature ruminates (or more likely does not) over whether mature minors should be able to make their own medical treatment decisions, the question of to what degree, if at all, minors possess due process, bodily integrity, and religious liberty rights in this area remains without reply or input from the state's highest court.

This Comment proposes that Wisconsin courts recognize the mature minor doctrine in the context of medical treatment decisions so it can be considered in cases where minors of sufficient age and maturity who demonstrate the ability to understand and accept the consequences of their decisions are allowed to make independent medical treatment decisions. Adopting the doctrine would ensure a measure of consistency in Wisconsin law when it comes to treatment of minors, especially when such treatment concerns constitutional rights. In addition, acceptance of the doctrine would further validate and exemplify Wisconsin's history of religious liberty protection enshrined in its constitution.[33]

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31. *Id.* at 393 ("[E]very act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.").

32. *See, e.g.*, Kroner v. Oneida Seven Generations Corp., 2012 WI 88, ¶ 105 & n.9, 342 Wis. 2d 626, 819 N.W.2d 264 (Roggensack, Ziegler & Gableman, JJ., concurring) (citing State v. Jerrell C.J., 2005 WI 105, ¶ 172, 283 Wis. 2d 145, 699 N.W.2d 110) (Roggensack, J., concurring in part, dissenting in part); State v. Forbush, 2011 WI 25, ¶ 69, 332 Wis. 2d 620, 796 N.W.2d 741 (Abrahamson, C.J., & Bradley, J., concurring).

33. WIS. CONST. art. I, § 18 ("The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies,

The mature minor doctrine is not a complicated concept. Simply put, it posits that at some point some minors are mature enough to make their own decisions when it comes to medical treatment, and those decisions should be respected and followed.[34] As easy as the concept is to understand, the matters to be considered in the adoption and defense of the doctrine are vast and disparate. This Comment will confine the argument for the adoption of the mature minor doctrine in Wisconsin to what are the most important and compelling justifications for its recognition. Part I contains an overview of the mature minor doctrine, including a brief survey of jurisdictions that have recognized it. Part II examines the rights implicated by the doctrine, constitutional jurisprudence regarding those rights, and whether the identified constitutional rights are generally applicable to minors. Part III provides the basis for recognition of the mature minor doctrine in Wisconsin as a logical and consistent conclusion based upon the state's current treatment of minors and their rights in other areas of the law. Part IV argues for the adoption of the mature minor doctrine by exposing the inconsistencies present, absent formal recognition.

## II. MATURE MINOR DOCTRINE OVERVIEW AND RECOGNITION

The mature minor doctrine is a common law concept[35] and is recognized as a "definite exception" to the general rule that requires parental consent for treatment of a minor.[36] Some states have codified a form of the mature minor doctrine,[37] while others have adopted it via

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or religious or theological seminaries.").

34. *See* ROZOVSKY, *supra* note 18, § 5.01[B][3], at 5-10.

35. *Id.* § 5.01[B], at 5-7 (Supp. 2014).

36. *Cf.* ROZOVSKY, *supra* note 18, § 5.01[A], at 5-5 to -6 (Supp. 2010) ("The restrictions on minors under traditional common law principles reflect the opinion that they were deemed incapable of exercising sufficient judgment. Similarly, the law has traditionally viewed minors as being incapable of executing contracts except those for necessaries. Because the physician–patient relationship often is viewed as being contractual in nature, the inability of a minor to execute binding contracts strengthened the traditional argument that a minor was incapable of giving valid consent. The logical conclusion was that the authority to consent to medical treatment on a minor's behalf must be vested in someone else. That power has developed to the natural guardians of the minor—his or her parents."); Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL L. REV. 311, 314; Shellie K. Park, Comment, *Severing the Bond of Life: When Conflicts of Interest Fail to Recognize the Value of Two Lives*, 25 U. HAW. L. REV. 157, 166 (2002).

37. *Sheila W.*, 2013 WI 63, ¶ 18 (Prosser, J., concurring) (identifying Arkansas, New Mexico, South Carolina, and Virginia as states that have adopted some form of the mature

judicial decision.[38] Because of the subjective nature of maturity, the factors that make a minor "mature" for the purposes of the mature minor doctrine vary from jurisdiction to jurisdiction.[39] Whether by statute or judicial determination, states that have adopted a form of the mature minor doctrine have a process in place to allow a minor who displays the "sufficient understanding . . . of the nature and consequences of treatment despite their chronological age" to make their own medical treatment decisions.[40] In other words, the doctrine recognizes that in certain situations "[a]lthough they are chronologically still children, . . . medical conditions have . . . jolted them into adulthood."[41]

Jurisdictions that have adopted some form of the doctrine have recognized that, in certain instances regarding medical treatment of minors, the age of the minor patient does not automatically preclude the patient from the treatment decision process. Different jurisdictions approach the matter in their own ways. The Tennessee Supreme Court adopted the Rule of Sevens, which posits that a child under seven should "rarely, if ever" be medically treated without parental consent, a child from age seven to fourteen has a rebuttable presumption of no capacity regarding medical treatment decisions, and a child fourteen and older has a presumption of capacity to participate in his or her own medical treatment decisions.[42] Virginia has a statute allowing a "sufficiently mature" child of fourteen or older to refuse medical treatment if other conditions are satisfied.[43] New Mexico's statute is not age restricted and provides that a minor that "has capacity sufficient to understand the nature of . . . [the] medical condition [and] the risks and benefits of the treatment . . . shall have the authority to withhold or

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minor doctrine via statute).

38. *Id.* ¶ 20 (identifying Illinois, Kansas, Maine, Massachusetts, Michigan, Mississippi, Tennessee, and West Virginia as states that have adopted some form of the mature minor doctrine via judicial action).

39. *See infra* notes 42–44 and accompanying text.

40. ROZOVSKY, *supra* note 18, § 5.01[B][3], at 5-10.

41. *Id.* § 5.09[C], at 5-134 (Supp. 2013).

42. Cardwell v. Bechtol, 724 S.W.2d 739, 745, 748–49 (Tenn. 1987) (holding that, guided by the Rule of Sevens, a seventeen-year-old minor had the maturity to consent to medical treatment).

43. VA. CODE ANN. § 63.2-100.2 (2012) (stating that if a decision is made jointly with the parents, other treatment options have been considered, and the parents have a good-faith belief that the decision is in the best interests of the child, a sufficiently mature child age fourteen and older will have his or her medical treatment decisions followed).

withdraw life-sustaining treatment."[44] However each individual state has chosen to recognize the mature minor doctrine, underlying its recognition is the premise that a bright-line age of majority rule for consent to medical treatment in all circumstances is unappealing and unjustified.

It is important to note that the mature minor doctrine does not automatically lower the age of consent within any given jurisdiction and is not centrally fixated on the age of the minor involved. The applicability of the doctrine "necessarily involves a case-by-case analysis to determine" the minor patient's maturity in light of the case-specific situation.[45] As such, a fifteen-year-old may be found to possess the requisite amount of maturity in one case, while a seventeen-year-old's maturity may be found deficient in another.[46] Such a fact-specific, case-by-case inquiry demonstrates that "*age* and *maturity* of the minor patient" are to be considered jointly in determining a minor's maturity in a given situation.[47]

If a minor is adjudged to possess the required amount of maturity to make his or her own medical decisions, that right is not absolute.[48] The right to refuse treatment must be balanced against the recognized state interests of "(1) preserving life; (2) safeguarding the integrity of the medical profession; (3) preventing suicide; and (4) protecting innocent third parties."[49] In addition, even if a minor is adjudged to be mature enough to make his or her own medical treatment decisions, the views of the parents are not completely discounted.[50] In the case of a mature minor, "if the desires of the parents are aligned with those of the mature minor, the decision is easier for courts faced with a determination to refuse potentially life-saving care."[51]

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44. N.M. STAT. ANN. § 24-7A-6.1.C (LexisNexis 2006 & Supp. 2013).

45. ROZOVSKY, *supra* note 18, § 5.09[C], at 5-132 (Supp. 2013).

46. *See id.* at 5-132, 5-136 (Supp. 2013).

47. *Id.* at 5-133 (Supp. 2013) (emphasis in original).

48. *See id.* at 5-132 (Supp. 2013).

49. Lenz v. L.E. Phillips Career Dev. Ctr., 167 Wis. 2d 53, 90, 482 N.W.2d 60, 74 (1992) (citing *In re* Conroy, 486 A.2d 1209, 1223 (N.J. 1985)).

50. *In re* E.G., 549 N.E.2d 322, 323, 328 (Ill. 1989) (reasoning that if the parents opposed a seventeen-year-old minor's opposition to blood transfusions for treatment for leukemia on religious grounds, that fact would "weigh heavily" on the minor's right to make the decision to forego treatment.).

51. ROZOVSKY, *supra* note 18, § 5.09[C], at 5-134 (Supp. 2013).

## III. THE RIGHTS IMPLICATED BY THE MATURE MINOR DOCTRINE

The right to make one's own medical treatment decisions has been given constitutional weight. From forced sterilization[52] to the ability to refuse life-saving treatment,[53] the U.S. Supreme Court has recognized that such treatment decisions implicate fundamental constitutional rights.[54] To the point, the Court has "assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment."[55] In addition, when a patient makes a treatment decision based on a sincerely held religious belief, the patient's rights under the Free Exercise Clause of the First Amendment must be considered.[56]

In Wisconsin, the right to refuse unwanted medical treatment is found in "the common law right of self-determination . . . , the personal liberties protected by the Fourteenth Amendment, and from the guarantee of liberty in Article I, section 1 of the Wisconsin Constitution."[57] The rights guaranteed by the U.S. Constitution act as a floor rather than a ceiling, and states are free to extend rights to their citizens *beyond* what the U.S. Supreme Court has held to be the outer limits of federal constitutional protection.[58] For the purposes of the mature minor doctrine, this Comment makes no distinction between Wisconsin and federal constitutional protections in the area of Fourteenth Amendment Due Process. However, in situations that demand an examination of an individual's Free Exercise rights, it is plain to see that Wisconsin has chosen to broaden its citizens' Free Exercise rights beyond those afforded by the federal system.[59]

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52. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

53. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.")

54. *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (noting that refusing medical treatment implicates the Due Process Clause).

55. *Id.*

56. *In re* E.G., 515 N.E.2d 286, 290 (Ill. App. Ct. 1987), *aff'd in part, rev'd in part*, 549 N.E.2d 322 (Ill. 1989) (placing emphasis on the minor's right of freedom of religion as the basis for refusing medical treatment).

57. Lenz v. L.E. Phillips Career Dev. Ctr., 167 Wis. 2d 53, 67, 482 N.W.2d 60, 65 (1992).

58. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1975); Lego v. Twomey, 404 U.S. 477, 489 (1972); Cooper v. California, 386 U.S. 58, 62 (1967) (reasoning that the states have the power to impose higher standards for government restrictions on citizens than those required by the federal Constitution).

59. *See* WIS. CONST. art. I, § 18.

There is controversy regarding if, when, how, and which constitutional rights exist in the context of *minors*.[60] In *Washington v. Glucksberg*, the U.S. Supreme Court reaffirmed "the traditional right to refuse unwanted lifesaving medical treatment" with the caveat that the person enforcing the right is competent.[61] Generally speaking, minors are not considered competent,[62] but there is precedential basis to consider treating minors as competent when constitutional rights are being infringed upon by the state.[63] On more than one occasion, the U.S. Supreme Court has stated constitutional rights exist for minors: "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone";[64] "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[65] Minors have been found to possess constitutional rights in the following areas: procedural due process in court proceedings,[66] procuring an abortion,[67] the right to free speech,[68] the right to exercise religion,[69] protection from unreasonable searches,[70]

60. *Compare supra* notes 56–59, *and infra* notes 61–72 and accompanying text, *with infra* notes 73–78 and accompanying text.

61. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (citing Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990)).

62. *See supra* note 36.

63. *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (noting that "the right of privacy of the competent minor mature enough to become pregnant" cannot be eclipsed by the parents' interest in terminating her pregnancy absent a sufficiently compelling state interest).

64. *In re* Gault, 387 U.S. 1, 12–13 (1967) (referencing other decisions that indicate minors have access to constitutional protections).

65. *Danforth*, 428 U.S. at 74.

66. *In re Gault*, 387 U.S. at 33–34 ("Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.").

67. *Danforth*, 428 U.S. at 75 (holding minors' access to abortion cannot be restricted without requisite justification).

68. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) ("The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.").

69. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631 (1943) (holding a statute that compelled salutating the flag was unconstitutional). A concurrence stated, "We believe

and the right to substantive due process.[71] Also, perhaps most notably, the Court has recognized minors' equal protection claims on par with those of adults.[72]

The unqualified nature of the statements confirming the existence of constitutional protections for minors and the supporting case law notwithstanding, a minor's constitutional rights have been found to be less than those of adults in a number of circumstances: the right to travel,[73] the right to privacy,[74] the right to a trial by jury,[75] and the right to freedom of speech.[76] Representative of the conclusions in these diminished rights cases is a simple and straightforward statement of the Court: "[U]nemancipated minors lack some of the most fundamental rights of self-determination . . . ."[77] As with the preceding paragraph, there is precedential basis to treat a minor's constitutional rights as less than those of adults when a claim is made that a right is being violated.[78]

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that the statute before us fails to accord full scope to the freedom of religion secured to the appellees by the First and Fourteenth Amendments." *Id.* at 643 (Black & Douglas, JJ., concurring).

70. Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. 364, 365 (2009) (syllabus) ("Under the resulting reasonable suspicion standard, a school search 'will be permissible . . . when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.'" (quoting New Jersey v. T.L.O., 469 U.S. 325, 342 (1985))).

71. Bellotti v. Baird, 443 U.S. 622, 635 (1979) (noting that the Court had previously held that "children may not be deprived of certain property interests without due process").

72. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

73. Hutchins v. D.C., 188 F.3d 531, 548 (D.C. Cir. 1999) (en banc) ("[T]he First Amendment defense by definition provides full protection, [so] any residual deterrent caused by the curfew would pose at most an incidental burden on juveniles' expressive activity or rights of association.").

74. Veronia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664–65 (1995) ("Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional.").

75. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[T]rial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.").

76. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("A school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986))).

77. *Veronia*, 515 U.S. at 654.

78. *See supra* notes 61–72 and accompanying text.

## IV. BASIS FOR THE RECOGNITION OF THE MATURE MINOR DOCTRINE

The Wisconsin legislature has chosen not to address the mature minor doctrine as it relates to consent for medical treatment decisions.[79] The Wisconsin Supreme Court has chosen the same path.[80] This lack of attention should not be construed as rejection of the doctrine because common law concepts often escape legislative and judicial review. Examined in the context of medical treatment decisions, Wisconsin statutory law, the persuasive reasoning of other authorities and jurisdictions, and the individual constitutional protections guaranteed by the Wisconsin and U.S. Constitutions seem to logically mandate recognition of the mature minor doctrine for medical treatment decisions in Wisconsin.

### *A. Existing State Law*

To say Wisconsin does not recognize the mature minor doctrine is not entirely accurate. Wisconsin currently recognizes certain classes of minors and affords them atypical treatment in some areas of medical consent.[81] Those under the age of majority in Wisconsin are allowed to access contraceptive care,[82] obtain pregnancy tests and obstetrical healthcare or screening,[83] be tested and treated for sexually transmitted diseases,[84] procure an abortion,[85] obtain drug and alcohol treatment,[86]

79. *See Sheila W.*, 2013 WI 63, 348 Wis. 2d 674, 835 N.W.2d 148.

80. *Id.*

81. *See infra* notes 82–91 and accompanying text.

82. Wisconsin does not have a statute specifically authorizing access to contraception. However, the U.S. Supreme Court in *Planned Parenthood of Central Missouri v. Danforth* held that reproductive privacy is a protected right under the U.S. Constitution and cannot be denied solely as the result of age. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74–75 (1976); *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 694 (1977) ("Since the State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy, the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is *a fortiori* foreclosed.").

83. *See supra* note 82.

84. WIS. STAT. § 252.11(1m) (2013–2014) ("A physician may treat a minor infected with a sexually transmitted disease or examine and diagnose a minor for the presence of such a disease without obtaining the consent of the minor's parents or guardian.").

85. Wisconsin law allows an emancipated minor to procure an abortion. *Id.* § 48.375(7)(c)(1). According to the statute,

control the release of mental health records,[87] make decisions for a child if the mother is a minor,[88] donate bone marrow,[89] donate blood,[90] and make a decision to donate an anatomical gift after death.[91] Beyond the medical consent realm, Wisconsin will treat a minor as an adult if the minor is married,[92] is enrolled in the military,[93] has committed a certain type of crime,[94] or has committed any crime at all if older than

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> "Emancipated minor" means a minor who is or has been married; a minor who has previously given birth; or a minor who has been freed from the care, custody and control of her parents, with little likelihood of returning to the care, custody and control prior to marriage or prior to reaching the age of majority.

*Id.* § 48.375(2)(e).

86. *Id.* § 51.47(1) ("[A]ny physician or health care facility licensed, approved, or certified by the state for the provision of health services may render preventive, diagnostic, assessment, evaluation, or treatment services for the abuse of alcohol or other drugs to a minor 12 years of age or over without obtaining the consent of or notifying the minor's parent or guardian . . . .").

87. *Id.* § 51.30(5)(a)–(b) ("A minor who is aged 14 or more may consent to the release of confidential information in court or treatment records without the consent of the minor's parent, guardian or person in the place of a parent . . . . The parent, guardian or person in the place of a parent of a developmentally disabled minor shall have access to the minor's court and treatment records at all times except in the case of a minor aged 14 or older who files a written objection to such access with the custodian of the records.").

88. *See* ROZOVSKY, *supra* note 18, § 5.02[A][6], at 5-27 to -28 ("[T]he law of consent imposes no prohibition on consent by a minor parent, . . . [but] in the absence of such legislation, it would seem legally incorrect to require consent from a minor parent's father or mother or from the youthful parent's adult sister or brother. . . . The better approach in the absence of legislation is to obtain consent to treatment from the minor parent. Such a policy is in keeping with the longstanding common law rule that a parent must consent to care for his or her unemancipated child.").

89. WIS. STAT. § 146.34(4)(a) ("A minor who has attained the age of 12 years may, if the medical condition of a brother or sister of the minor requires that the brother or sister receive a bone marrow transplant, give written consent to be a donor if . . . [certain conditions are met].").

90. *Id.* § 146.33 ("Any person who is 17 years old or older may donate blood in any voluntary and noncompensatory blood program . . . .").

91. *Id.* § 157.06(4)(a) (noting that a donor who is at least fifteen-and-one-half years of age may make the decision to make a posthumous anatomical gift).

92. *Id.* § 765.02(2) (stating that a minor aged sixteen or greater may obtain a marriage license with parental consent); La Crosse Cnty. v. Vernon Cnty., 233 Wis. 664, 666, 290 N.W. 279, 280 (1940) (stating that marriage emancipates a minor).

93. *See* Niesen v. Niesen, 38 Wis. 2d 599, 602, 157 N.W.2d 660, 662 (1968) (recognizing that joining the military can be an act of self-emancipation).

94. WIS. STAT. § 938.18(1) (stating that minors as young as fourteen can be charged as adults if certain crimes have been committed).

seventeen.[95] In addition, Wisconsin law calls for what can be described as maturity hearings in cases of bone marrow donation[96] and judicial waiver for parental consent to an abortion.[97] In Wisconsin, it appears that the question is not *if* a minor will be afforded, or subjected to, age of majority treatment but rather *when* and under what circumstances.

The U.S. Supreme Court has declared the right of bodily integrity to be the most "sacred" common law right,[98] and the Tennessee Supreme Court has recognized that minors "achieve varying degrees of maturity and responsibility" as they grow older.[99] It only stands to reason that, as a minor achieves greater degrees of maturity, the minor's ability to exercise the most "sacred" of common law rights is more readily recognized. One court has indicated it would be antithetical to conclude otherwise.[100]

As stated above, Wisconsin already subjectively employs the mechanisms of the mature minor doctrine and has recognized this "sacred right" in the context of minors—in certain instances, those under the age of majority are considered sufficiently mature (sometimes determined by a hearing or expert testimony) and are afforded rights and protections of competent adults despite their chronological age.[101] While all treatment decisions, considerations, state interests, and

95. *Id.* § 938.02(10m) ("'Juvenile', when used without further qualification, means a person who is less than 18 years of age, except that for purposes of investigating or prosecuting a person who is alleged to have violated a state or federal criminal law or any civil law or municipal ordinance, 'juvenile' does not include a person who has attained 17 years of age.").

96. *Id.* § 146.34(4)(b) (noting that minors who attain the age of twelve may donate bone marrow if a psychiatrist or psychologist has determined the minor has attained the requisite level of maturity to make such a decision).

97. *Id.* § 48.375(7)(c)(1) (recognizing that a petition for judicial procedure to bypass the parental consent requirement to obtain an abortion will be granted if the court determines "[t]hat the minor is mature and well-informed enough to make the abortion decision on her own").

98. Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person . . . .").

99. Cardwell v. Bechtol, 724 S.W.2d 739, 744–45 (Tenn. 1987) ("[R]ecognition that minors achieve varying degrees of maturity and responsibility (capacity) has been part of the common law for well over a century.").

100. Belcher v. Charleston Area Med. Ctr., 422 S.E.2d 827, 837 (W. Va. 1992) ("It is difficult to imagine that a young person who is under the age of majority, yet, who has undergone medical treatment for a permanent or recurring illness over the course of a long period of time, may not be capable of taking part in decisions concerning that treatment.").

101. *See supra* notes 82–97 and accompanying text.

circumstances in the situations mentioned above no doubt are distinguishable from a situation like Sheila's, the fact that Wisconsin evidences a historical willingness to consider the age and maturity of a minor in light of a specific situation argues for a mature minor doctrine in the area of refusal of medical treatment, especially on religious grounds.[102]

### *B. Other Jurisdictions and Persuasive Authority*

Obviously, Wisconsin's legislature and judiciary are not bound by the policy decisions or judicial opinions of other states. However, it is worth noting that a number of states have recognized the doctrine in the context of refusing medical treatment, and no state has expressly rejected its application when a minor wished to forego lifesaving medical treatment.[103] In addition, the foremost treatise on the subject[104] and the professional associations whose members are intimately involved with minor patients already assign great weight to the minor's wishes regarding treatment.[105]

A number of state courts have recognized the mature minor doctrine,[106] and others have indicated that, should it come before them, they would recognize it as well.[107] Other states have had cases that have not explicitly affirmed the mature minor doctrine but have recognized a

102. *See supra* Part IV.C.2.

103. While individual mature minor doctrine claims have been rejected in some jurisdictions, the basis of the rejection was either a lack of sufficient maturity on the part of the individual making the claim or a general absence of state authority upon which to make the claim. The doctrine itself has not been rejected. *See In re* Long Island Jewish Med. Ctr., 557 N.Y.S.2d 239, 243 (N.Y. App. Div. 1990); O.G. v. Baum, 790 S.W.2d 839, 842 (Tex. App. 1990); Novak v. Cobb Cnty.–Kennestone Hosp. Auth., 849 F. Supp. 1559, 1576 (N.D. Ga. 1994).

104. ROZOVSKY, *supra* note 18.

105. *See infra* notes 118–22 and accompanying text.

106. *See In re* E.G., 549 N.E.2d 322, 325 (Ill. 1989); Younts v. St. Francis Hosp. & Sch. of Nursing, Inc., 469 P.2d 330, 338 (Kan. 1970); *In re* Swan, 569 A.2d 1202, 1205–06 (Me. 1990); *In re* Rena, 705 N.E.2d 1155, 1157 (Mass. App. Ct. 1999); Bakker v. Welsh, 108 N.W. 94, 96 (Mich. 1906); Gulf & Ship Island R.R. Co. v. Sullivan, 119 So. 501, 502 (Miss. 1928); Cardwell v. Bechtol, 724 S.W.2d 739, 748–49 (Tenn. 1987); Belcher v. Charleston Area Med. Ctr., 422 S.E.2d 827, 837–38 (W. Va. 1992).

107. *In re* Green, 292 A.2d 387, 392 (Pa. 1972) (reasoning that a mature minor's wishes should be taken into account in the context of a parent's withholding of medical treatment for minor); State v. Koome, 530 P.2d 260, 266–67 (Wash. 1975) (recognizing that competency and maturity are relevant to a minor's right to consent).

minor's right to refuse treatment.[108] Still others have enacted statutes codifying the doctrine.[109] Of the cases addressing the doctrine, *In re E.G.*[110] from the Illinois Supreme Court is most analogous to Sheila's situation. *In re E.G.* involved a seventeen-year-old Jehovah's Witness who "would likely die within a month" without blood transfusions that both E.G. and her parent refused.[111] The Illinois Supreme Court could see "no reason" why the common law "right of dominion over one's own person should not extend to mature minors."[112] The court also found that the state's interest in protecting children was valid, but that interest decreased as the age and maturity of the minor increased.[113] The court also implied that the decision to respect E.G.'s decision was made easier due to the fact that she and her mother were unified in the decision.[114]

Scholarly commentary and professional associations also support recognition of the doctrine. A widely cited treatise on the issue of treatment consent also documents the growing recognition of the mature minor doctrine.[115] As the number of jurisdictions that recognize the mature minor doctrine grows, "there seems to be little justification for compelling treatment in cases involving minors."[116] The treatise goes on to counsel that "[t]he physician is treating the minor—*not* the

108. Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1893–94 (1996) (discussing two California cases in which trial courts allowed a minor to refuse medical treatment); Chistine Gorman, *A Sick Boy Says "Enough!,"* TIME, June 27, 1994, at 65, 65 (discussing a Florida court's finding that a fifteen-year-old is mature enough to understand the fatal consequences of his decisions to refuse continued medical treatment after a liver transplant).

109. ARK. CODE ANN. § 20-9-602(7) (2005 & Supp. 2013); N.M. STAT. ANN. § 24-7A-6.1.C (LexisNexis 2006 & Supp. 2013); *see* S.C. CODE ANN. § 63-5-340 (2010); *see also* VA. CODE ANN. § 16.1-241.W (2010 & Supp. 2012) (recognizing a minor's ability to petition the court to procure an abortion).

110. *In re* E.G., 549 N.E.2d 322 (Ill. 1989).

111. *Id.* at 323.

112. *Id.* at 326.

113. *Id.* at 327.

114. *See id.* at 328.

115. *See* ROZOVSKY, *supra* note 18, §§ 5.01–.02. The publisher notes the treatise has been cited by more than twenty court decisions, including the U.S. Supreme Court, and over ninety law review articles. *Consent to Treatment: A Practical Guide, Fourth Edition*, WOLTERS KLUWER L. & BUS. (last visited Jan. 30, 2015), http://www.wklawbusiness.com/store/products/consent-treatment-practical-guide-fifth-prod-1454843039/looseleaf-item-1-1454843039; *archived at* http://perma.cc/7MWT-6R5H.

116. ROZOVSKY, *supra* note 18, § 5.09[C], at 5-135 (Supp. 2013).

parents—and a reasonable refusal on the minor's part should be heeded."[117] Those responsible for the treatment of minors accept these presumptions. The American Academy of Pediatrics (AAP) and the Midwest Bioethics Center (MBC) have released policy statements directly on point.[118] The AAP has noted, "[A]dolescents, especially those age 14 and older, may have as well developed decisional skills as adults for making informed healthcare decisions."[119] The AAP takes the clear position that "[i]n cases involving . . . mature minors with adequate decision-making capacity, . . . physicians should seek informed consent directly from the patients."[120] The MBC policy statement is in accord: "[M]inors with decisional capacity should be allowed to make treatment decisions including refusal of treatment . . . ."[121] Finally, there is support for the proposition that a plurality of doctors believe that, regarding treatment of minors, it is their "ethical obligation to honor an adolescent patient's decision" rather than defer to the parent's decision in the matter.[122]

As illustrated above, the maturity of minors in the context of medical treatment is already a reality in many jurisdictions and is often an assumed course of conduct within the medical profession.[123] The doctrine at issue here is not an obscure and mysterious tenet of a bygone era but rather a contemporary and widely sanctioned recognition of what law and society already know—as children get older they become more mature and are afforded greater responsibility in the direction of their own lives. Wisconsin knows and accepts this as well, but its failure

117. *Id.* (emphasis in original).

118. MIDWEST BIOETHICS CTR. TASK FORCE ON HEALTH CARE RIGHTS FOR MINORS, HEALTH CARE TREATMENT DECISION-MAKING GUIDELINES FOR MINORS, BIOETHICS FORUM (1995), *available at* http://www.practicalbioethics.org/files/member/documents/Guidelines_11_4.pdf [hereinafter MIDWEST BIOETHICS CTR.]; Am. Acad. of Pediatrics Comm. on Bioethics, *Informed Consent, Parental Permission, and Assent in Pediatric Practice*, 95 PEDIATRICS 314 (1995), *available at* http://pediatrics.aappublications.org/content/95/2/314.full.pdf+html, *archived at* http://perma.cc/UMY9-ZSD3 [hereinafter *Informed Consent*].

119. *Informed Consent*, *supra* note 118, at 317.

120. *Id.*

121. MIDWEST BIOETHICS CTR., *supra* note 118, at A/12.

122. Rhonda Gay Hartman, *Adolescent Decisional Autonomy for Medical Care: Physician Perceptions and Practices*, 8 U. CHI. L. SCH. ROUNDTABLE 87, 119 (2001) ("39.9 percent (n=69) agreed with [the proposition that the law should allow mature minors to make their own healthcare decisions], 30.7 percent (n=53) disagreed, and 24.9 percent (n=43) were undecided.").

123. *See supra* notes 106–14, 118–22 and accompanying text.

to fully examine or even consider this truism in the context of minors and medical treatment decisions—essentially pretending it does not exist, regardless of all the reason and support for it—is a case study in willful blindness.

### *C. Constitutional Considerations*

Failure to consider the mature minor doctrine necessitates the need for a constitutional rights analysis.[124] This is especially true when the decision is based on sincerely held religious convictions.[125] Both the U.S. Constitution and the Wisconsin constitution protect the right to refuse unwanted medical treatment[126] and the right to free exercise of religion.[127] As discussed previously, the examination of constitutional rights in the context of minors has yielded conflicting and confusing results.[128] Nevertheless, a survey of the application of applicable rights to minors in the medical treatment context and the right to religious liberty clearly argue for adoption of the mature minor doctrine in Wisconsin.

#### 1. Due Process

A mature minor's right to make his or her own medical treatment decisions, including refusal of lifesaving treatment, should be as

124. *See In re* E.G., 549 N.E.2d 322, 328 (Ill. 1989) (reasoning that constitutional analysis unnecessary because the court recognized a minor's common law right to refuse medical treatment). It is reasonable to assume that if the common law right was not conferred, the court would engage in a constitutional analysis.

125. *In re* E.G., 515 N.E.2d 286, 290 (Ill. App. Ct. 1987), *aff'd in part, rev'd in part*, 549 N.E.2d 322 (Ill. 1989) (placing emphasis on the minor's right of freedom of religion as the basis for refusing medical treatment).

126. Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("We have . . . assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment."); Lenz v. L.E. Phillips Career Dev. Ctr., 167 Wis. 2d 53, 67, 482 N.W.2d 60, 65 (1992) (finding the right to refuse medical treatment exists in the Due Process Clause and the Wisconsin constitution, article I, § 1).

127. U.S. CONST. amend. I, ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise there of . . . ."); WIS. CONST. art. I, § 18 ("The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.").

128. *See supra* Part III.

constitutionally justified as a mature minor's right to procure an abortion.[129] If one is constitutionally protected, so must be the other. A brief survey of the relevant case law reveals the foundation for this proposition. The U.S. Supreme Court has noted that in the context of abortion minors can be considered competent.[130] In the context of abortion, the U.S. Supreme Court has stated the following: (1) it is unconstitutional for a statute to allow withholding of judicial authorization from a minor that was found to be "mature and fully competent" to make the decision to have an abortion;[131] (2) it is unconstitutional to disregard "the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made";[132] (3) where a minor "satisfies a court that she has attained sufficient maturity to make a fully informed decision, she then is entitled to make her abortion decision independently";[133] (4) a state cannot make a "blanket determination" that anyone under a certain age is unable to make the abortion decision independently;[134] and (5) denial of the right to abortion cannot be based solely on the basis of chronological age, and a case-by-case assessment of maturity is required.[135] Taken together, these statements make clear that the right to an abortion materializes when the person seeking the procedure is found to be mature enough to make such a decision. The U.S. Supreme Court has further justified this stance by reasoning that states may restrict a number of activities based on chronological age, even those that have constitutional protections associated with them, because the rights are merely "postponed."[136] However, the Court reasoned that, in the case of abortion, a minor who is prohibited from

129. *See In re* E.G., 515 N.E.2d at 290.

130. *See* Bellotti v. Baird, 443 U.S. 622 (1979).

131. *Id.* at 651.

132. *Id.* at 650.

133. *Id.*

134. City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 440 (1983) ("[The state] may not make a blanket determination that *all* minors under the age of 15 are too immature to make this decision or that an abortion never may be in the minor's best interests without parental approval."), *overruled on other grounds by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

135. *See id.* at 439–40 (noting prior jurisprudence calls for a case-by-case determination of a minor's maturity to make the decision to have an abortion).

136. *Bellotti*, 443 U.S. at 642–43 ("[T]he abortion decision is one that simply cannot be postponed, or it will be made by default with far-reaching consequences.").

obtaining one has lost that right permanently.[137]

If the mature minor enjoys some constitutional protections in regard to procuring an abortion, there is no reasonable basis for failing to confer a similarly justified constitutional protection to the mature minor who wishes to refuse medical treatment. After all, the right to an abortion does not exist in the text of the Constitution or in a vacuum; it is based upon general notions of due process and bodily integrity.[138] A minor who is unable to refuse medical treatment suffers loss of due process and bodily integrity the same as a minor who is unable to obtain an abortion. A minor who is unable to refuse medical treatment is foreclosed from that right permanently the same as a minor who is denied an abortion. There is little daylight between the interests, reasoning, and justifications underlying the right of mature minors to obtain an abortion and the right to make their own medical treatment decisions. However, the difference in recognition is profound and exposes the intellectual dishonesty of those who support minors' abortion rights while also supporting limits on when minors can make life-or-death decisions outside of the procreation realm and allowing medical treatment rights for similarly situated mature minors to "come into being magically only when one attains the state-defined age of majority."[139] The Jehovah's Witnesses may not have the politically connected lobby needed to effectuate change through the legislature, but their religious beliefs should not be marginalized and dismissed out of hand while pretending that what they seek to have recognized is not available in this state when, in reality, it appears it is reserved only for those with the right kind of "affliction."[140]

The U.S. Supreme Court in *Parham v. J.R.* noted that "[m]ost children, even in adolescence, simply are not able to make sound judgments . . . , including their need for medical care or treatment."[141] This statement does not foreclose recognition of the constitutional right of mature minors to make their own medical treatment decisions; in

137. *Id.*

138. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) (noting that *Roe v. Wade*, 410 U.S. 113 (1973), was grounded in due process protections as well as "personal autonomy and bodily integrity").

139. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (showing the illogical nature of withholding recognized rights until one attains the "magical" age determined by the state).

140. *See supra* notes 65–72 and accompanying text.

141. 442 U.S. 584, 603 (1979).

fact, it argues in favor of it. If "most children" are incapable of making such decisions, it stands to reason that some children are. That is the very point of the mature minor doctrine—to determine if a given minor, in a given situation, has the requisite maturity to make his or her own medical treatment decision.[142] The logical conclusion drawn from statements such as the one the Court made in *Parham* is that there is a general assumption that minors are unable to make sound judgments regarding their medical treatment decisions, but there will be situations where the general assumption is inapplicable.[143] Wisconsin recognizes the general assumption of minor incapacity in the medical treatment context,[144] but to this point it has failed to provide a mechanism to provide the recognized constitutional rights in this area when the general assumption does not apply.

2. Religious Liberty

A case such as Sheila's also requires a discussion of constitutional protections for religious freedom. In the area of religious freedom, it is necessary to lay out the different protections afforded by the federal and Wisconsin systems. The First Amendment to the U.S. Constitution guarantees the right to free exercise of religion.[145] The U.S. Supreme Court's interpretation of this freedom has fluctuated throughout history.[146] In 1879, the Court interpreted the clause to protect religious *belief* only and not religious *action*.[147] Subsequently, the Court moved from this narrow interpretation and extended protection to actions

142. *See supra* Part II.

143. *Parham*, 442 U.S. at 603, 620.

144. *See* WIS. STAT. § 48.979 (2013–2014) (describing the ability for a parent to delegate power "regarding the care and custody" of a child); *supra* note 36.

145. U.S. CONST. amend. I; *see also, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

146. The U.S. Supreme Court has interpreted the clause narrowly, Reynolds v. United States, 98 U.S. 145, 164–67 (1879) (interpreting the Free Exercise Clause to protect religious beliefs but not actions), moved to a more broad interpretation, as in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (protecting proselytizing), *Sherbert*, 374 U.S. at 406–09 (protecting an employee for refusing to work during Sabbath), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (limiting compulsory education of children in the Amish community), then back to a more narrow interpretation in *Employment Division v. Smith*, 494 U.S. 872 (1990) (holding that laws that act to restrict free exercise are allowable as long as the law is neutral as to religion and applicable to the general public).

147. *Reynolds*, 98 U.S. at 166–67 ("Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.").

based on religious convictions such as proselytizing,[148] refusing to work during Sabbath,[149] and compulsory education of children.[150] These decisions established a test commonly described as the *Sherbert-Yoder* test by which a state action that interferes with the free exercise of religious liberty must be justified by a sufficiently compelling state interest.[151] The *Sherbert-Yoder* balancing test was the settled law until 1990.[152] That year the Court decided *Employment Division v. Smith*.[153] In *Smith*, the Court held that if a law is general in nature and is neutral to religion, the Free Exercise Clause is not implicated.[154] The Court distinguished the cases that applied the compelling interest balancing test by classifying them as "hybrid" cases in which the free exercise claim was connected with other constitutional protections.[155] The effect of *Smith* is clear: Laws that impair the free exercise of religion will be subject to heightened scrutiny (proof of a compelling state interest) if the challenged law *specifically* targets religious practices or implicates

148. *Cantwell*, 310 U.S. at 310 ("To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.").

149. *Sherbert*, 374 U.S. at 412 (Douglas, J., concurring) ("For the Free Exercise Clause is written in terms of what the government cannot do to the individual . . . .").

150. *Yoder*, 406 U.S. at 223–24 ("There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.").

151. *Sherbert*, 374 U.S. at 406 ("We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice[] in this highly sensitive constitutional area . . . .").

152. *See* Emp't Div. v. Smith, 494 U.S. 872, 884–85 (1990).

153. 494 U.S. 872.

154. *Id.* at 885 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 451 (1988)) ("We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.'").

155. *Id.* at 881–82 ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections . . . .").

other constitutional rights.[156]

In 1993, Congress passed the Religious Freedom and Restoration Act (RFRA) criticizing the *Smith* decision and reinstating the *Sherbert-Yoder* balancing test for laws that burden the free exercise of religion.[157] In 1997, the U.S. Supreme Court once again had its say and refused to apply RFRA to the states by way of the Fourteenth Amendment.[158] Congress's best efforts notwithstanding, the Court's decision in *Smith* still stands as the controlling authority for Free Exercise claims under the First Amendment.[159]

Article I, section 18 of the Wisconsin constitution embodies the right of religious liberty for Wisconsinites.[160] Multiple annotations to article I, section 18 show that the constitutional religious freedom protections in Wisconsin are intended to be greater than the protections provided by the First Amendment to the United States Constitution.[161] A representative annotation is illustrative: "Freedom of conscience as guaranteed by the Wisconsin constitution is not constrained by the boundaries of protection set by the U.S. Supreme Court for the federal provision."[162] As robust as the Wisconsin constitutional rights are concerning religious liberty, the state is considering amending article I,

156. *Id.* at 882–90.

157. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, § 2(b)(1), (codified as amended at 42 U.S.C. § 2000bb(b)(1) (2012)) (stating that the purpose of the law is "to restore the compelling interest test . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened").

158. City of Boerne v. Flores, 521 U.S. 507, 536 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

159. *See Smith*, 494 U.S. 872.

160. *See* WIS. CONST. art. I, § 18.

161. WIS. CONST. art. I, § 18 annot. ("Freedom of conscience as guaranteed by the Wisconsin constitution is not constrained by the boundaries of protection set by the U.S. Supreme Court for the federal provision." (citing State v. Miller, 202 Wis. 2d 56, 65–66, 549 N.W.2d 235, 239 (1996))); *id.* ("The Wisconsin Constitution offers more expansive protections for freedom of conscience than those offered by the 1st amendment. When an individual makes a claim that state law violates his or her freedom of conscience, courts apply the compelling state interest/least restrictive alternative test, requiring the challenger to prove that he or she has a sincerely held religious belief that is burdened by application of the state law at issue. Upon such a showing, the burden shifts to the state to prove that the law is based in a compelling state interest that cannot be served by a less restrictive alternative." (citing Noesen v. Wis. Dep't of Regulation & Licensing, Pharmacy Examining Bd., 2008 WI App 52, ¶ 25, 311 Wis. 2d 237, 751 N.W.2d 385)).

162. *Id.* (citing *Miller*, 202 Wis. 2d at 65–66).

section 18 to provide even more religious liberty protection.[163]

Wisconsin's supreme court has likewise sought to differentiate itself from its federal counterpart regarding the free exercise of religion. In *State v. Miller,* the court pushed back against the U.S. Supreme Court's decision in *Smith* and went so far as to "disavow" the lower court's conclusion that Wisconsin should interpret article I, section 18 as the federal courts construe the Free Exercise Clause in the First Amendment.[164] To further distance Wisconsin from the holding in *Smith*, the court continued, "[O]ur analysis of the freedom of conscious as guaranteed by the Wisconsin Constitution is not constrained by the boundaries of protection the United States Supreme Court has set for the federal provision."[165] Applying the Wisconsin constitution, the court held the compelling interest/least restrictive alternative test repudiated by *Smith* to be the "time-tested standard" for application in freedom of conscious matters.[166]

Wisconsin's constitution, legislature, and supreme court have made clear that Wisconsin grants greater religious liberty protection than the federal government[167] and that the caveats placed on Free Exercise protection by *Smith* do not apply *in* Wisconsin.[168]

As applied to a situation like Sheila's, her constitutional rights were violated when her sincere religious beliefs were disregarded and she was not allowed to refuse a blood transfusion.[169] Even under the more restrictive federal regime, denying a minor the opportunity to freely exercise her religion in the context of refusing medical treatment is a violation of the U.S. Constitution. While the law requiring parental consent for medical treatment would be considered neutral to religion and generally applicable to the population as a whole,[170] a case in which

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163. Alexander Podkul, *Wisconsin Is About to Change How It Deals With Religion—And It's About Time*, POL'Y MIC (August 29, 2013), http://www.policymic.com/articles/61553/Wisconsin-is-about-to-change-how-it-deals-with-religion-and-it-s-about-time, *archived at* http://perma.cc/NCE8-NFSU.

164. *Miller*, 202 Wis. 2d at 63.

165. *Id.* at 65–66.

166. *Id.* at 69.

167. *See* Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, 2009 WI 88, ¶¶ 59–60, 320 Wis. 2d 275, 768 N.W.2d 868.

168. *See* WIS. CONST. art. 1, § 18; *Miller*, 202 Wis. 2d at 65–66 (noting that in the area of freedom of religion, Wisconsin is not constrained by the protections set forth in the U.S. Constitution).

169. *See Sheila W.*, 2013 WI 63, ¶¶ 14–15, 348 Wis. 2d 674, 835 N.W.2d 148.

170. *See supra* note 144. The statute and developed common law are generally

a minor refuses medical treatment based on religious grounds would place the matter squarely within the "hybrid" case exception allowed by *Smith* and require the state to produce a compelling justification for refusing to respect the minor's wishes.[171] As discussed above, denial of the right to make one's own medical treatment decisions is a violation of due process,[172] and under *Smith*, when the free exercise of religion is also implicated, the "hybrid" violation of multiple constitutional rights may result in a finding that the Free Exercise Clause has been violated.[173] Under *Smith*, denying a mature minor the right to determine and consent to medical treatment on religious grounds could violate the Free Exercise Clause of the U.S. Constitution.

If a minor's refusal of medical treatment on religious grounds violates the U.S. Constitution, it is certain that it will also violate the Wisconsin Constitution due to Wisconsin granting superior protection in the area of religious liberty.[174] Wisconsin courts have yet to speak to this issue, but there is evidence from a similarly situated state that the proposition is accurate. Like Wisconsin courts recognizing heightened protections under the state constitution, Illinois enacted a religious freedom statute that reinstated the compelling interest standard for religious freedom violations and repudiated the decision in *Smith* that restrained religious liberty.[175] It can be said that, like Wisconsin, Illinois chose to provide its citizens with religious liberty protections beyond those afforded by federal law.

In the case of *In re E.G.*, the Illinois Appellate Court dealt squarely with the constitutional aspects of a seventeen-year-old Jehovah's Witness who was suing a hospital for administering a blood transfusion contrary to her desires and religious convictions.[176] With respect to the treatment decision of the minor, the court stated, "Given the paramount importance of religious freedom in the history of our nation, we find it

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applicable to the population as a whole and are not directed at any particular religion.

171. *See* Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).

172. *See supra* Part IV.C.1.

173. *See Smith*, 494 U.S. at 881–82.

174. *See supra* notes 160–68 and accompanying text.

175. Religious Freedom Restoration Act, Pub. Act No. 90-806, § 10(6), 1998 Ill. Laws 5015, 5016 (codified at 775 ILL. COMP. STAT. ANN. 35/10(a)(6) (West 2011)) (restoring the *Sherbert-Yoder* compelling interest test discarded by the U.S. Supreme Court in *Employment Division v. Smith*).

176. *In re* E.G., 515 N.E.2d 286, 287–88 (Ill. App. Ct. 1987), *aff'd in part, rev'd in part*, 549 N.E.2d 322 (Ill. 1989).

difficult to consider seriously an argument that such freedom should be afforded less protection from government infringement [than] the rights at issue in the abortion cases."[177] The court further stated that the "appellant had made a mature, independent decision to follow her religious beliefs. This finding obviates any state interest in protecting immature minors, . . . [so the] appellant cannot be prevented from exercising a constitutional right solely because of her minority."[178] The Illinois Supreme Court affirmed this decision on other grounds while not rejecting the lower court's constitutional analysis.[179]

This decision and reasoning should be enlightening for Wisconsin courts. Wisconsin, like Illinois, has chosen to provide its citizens with enhanced religious liberty protections above those offered by the federal government.[180] One can only assume these protections are meant to be more than merely words published in a book. Courts are in no position to favor a particular religion over another[181] or pass judgment on the religious views on an individual.[182] By refusing to recognize a sincerely held religious belief as the basis for refusing medical treatment, Wisconsin is dangerously close to proclaiming a state-sponsored view that the views of the Jehovah's Witness religion are unworthy of protection. Such an implication in a state that purports to go above and beyond the federal government in protecting religious freedom is paradoxical. Illinois has provided an example of what enhanced religious protection looks like in application. If Wisconsin's constitution and case law are to engender the deference and respect they are seemingly due, it would further that cause if the public protections contained within them were employed with respect to the

177. *Id.* at 290.

178. *Id.* at 290–91.

179. *In re* E.G., 549 N.E.2d 322, 328 (Ill. 1989). The court did not speak to the lower court's constitutional analysis "[b]ecause [it found] that a mature minor may exercise a common law right to consent to or refuse medical care [and] decline[d] to address the constitutional issue." *Id.*

180. *See supra* notes 161–69, 175 and accompanying text.

181. Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 15 (1947) ("The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.").

182. *In re* Estate of Brooks, 205 N.E.2d 435, 442 (Ill. 1965) ("Courts . . . have nothing to do with determining the reasonableness of the belief. That is necessarily a matter of individual conscience." (quoting Barnette v. W. Va. State Bd. of Educ., 47 F. Supp. 251, 253 (S.D. W. Va. 1942)) (internal quotation marks omitted)).

people they are meant to govern.

## V. RECOGNITION OF THE MATURE MINOR DOCTRINE AS A LOGICAL CONCLUSION

Respecting the decision of a minor to forgo medical treatment, especially treatment that will save or extend the minor's life, seems counterintuitive to societal instincts to protect children. That notwithstanding, should society defer to instinctual impulses as the basis for governance, a substantial overhaul of settled law would be required. Instead, our system of laws and recognized rights are generally the byproduct of a thoughtful and deliberate process of judicial decision making and legislative action. Unfortunately, in some instances, certain areas of law or individual rights have failed to produce a sufficiently reasoned stance in light of all considerations. A mature minor's right to make her own medical treatment decisions outside of the procreation context is a glaring example of legislative and judicial failure to apply an even hand to accepted and recognized individual rights.

In the context of minors making their own medical decisions, the current state of Wisconsin law allows for revealing dichotomies: a sixteen-year-old can get married and become emancipated, thereby attaining the right to make his or her own medical treatment decisions,[183] but an unmarried minor a single day short of his or her eighteenth birthday cannot;[184] a minor may be allowed to make medical treatment decisions for a child she has given birth to[185] but not for herself until she reaches the age of eighteen;[186] and the rights allowing for a minor to procure an abortion are recognized,[187] but the same rights are denied to minors seeking to make other medical decisions until they reach the age of majority.[188]

Perhaps such dichotomies are the reason Wisconsin courts have refused to address this issue directly—allowing minors to make decisions that may result in the end of their life may be exceedingly uncomfortable, but a denial of the doctrine is undoubtedly logically inconsistent with settled Wisconsin law. There is no basis or reasonable

183. *See supra* note 92.
184. *See supra* note 144.
185. *See supra* note 88.
186. *See supra* note 144.
187. *See supra* note 85 and accompanying text.
188. *See supra* note 144.

argument to consider a married sixteen-year-old more capable of making medical treatment decisions than a minor who has endured years of treatment for a particular condition. A marriage certificate in no way, shape, or form confers any functional maturity upon its recipient, but in Wisconsin it is treated as a magic ticket to adulthood for the purposes of medical treatment decisions.[189]

It is equally illogical to confer the right upon a mother under the age of majority to make medical treatment decisions for a child she bore while withholding the same right as applied to her own body. The curious conclusion we are to draw from this scenario is that the state has an interest in protecting the *mother* from her own immaturity in relation to medical treatment decisions, but the same not-mature-enough mother's medical treatment decisions as they relate to her more vulnerable *child* are to be respected. For Wisconsin to create and maintain such curious outcomes is confounding.

The blatant inconsistencies regarding the recognition of abortion rights and willful blindness of the same underlying rights for minors seeking to make their own medical treatment decisions have been discussed earlier. However, it is worth highlighting the hypocrisy of this reality. In Wisconsin, a minor that seeks to procure an abortion is recognized to have the due process and bodily integrity rights to do so, but *only* if she seeks an abortion.[190] These rights simply vanish if the medical treatment decision the minor wishes to make is not in one of the limited state-approved areas.[191] This is so even if the minor, in the context of making that decision, is exercising her Free Exercise right.[192] Such a reality exposes the sad truth that, in Wisconsin, more important than the right being exercised is the social nature of the act. Allowing mature minors the right to procure an abortion while preventing the same mature minors from making other medical decisions, especially when religious liberty is implicated, is little more than specious political folly clothed as thoughtful jurisprudence.

## VI. CONCLUSION

In summary, recognition of the mature minor doctrine in the context

189. *See supra* note 183 and accompanying text.
190. *See supra* note 95.
191. *See supra* notes 82–91 and accompanying text.
192. *See supra* Part IV.C.2.

of medical treatment decisions is neither novel nor rare. Wisconsin currently affords minors adult status in a number of circumstances.[193] While the decisions relating to medical treatment have different interests and concerns than most of the other situations where adult status is conferred upon minors, these interests have already been found to be subservient to the minor's rights at issue in the context of abortion.[194] There is no reasonable rationale why such rights should exist for minors only in the arena of procreation. Wisconsin has chosen to deny minors like Sheila W. their rights to due process, bodily integrity, and freedom of religion. Wisconsin has maintained this duplicitous stance without input from the state's highest court. As long as this status quo is maintained, Wisconsin is running afoul of the existing statutory spirit in the state, accepted common law, scholarly and professional authority, the U.S. Constitution, the purported "more expansive protections for freedom of conscience than those offered by the First Amendment"[195] in the Wisconsin Constitution, and common sense. Although it is unlikely the legislature will soon accept the Wisconsin Supreme Court's invitation to take up the mature minor doctrine, one branch of government should have the courage to address this pressing issue and extend the already-recognized constitutional protections of due process and bodily integrity to minors beyond certain politically expedient realms.

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193. *See supra* notes 82–95 and accompanying text.

194. *See supra* Part IV.C.

195. *See* WIS. CONST. art. I, § 18 annot. (citing Noesen v. Wis. Dep't of Regulation & Licensing, Pharmacy Examining Bd., 2008 WI App 52, ¶ 25, 311 Wis. 2d 237, 751 N.W.2d 385).