

**BEST INTEREST OF A MINOR CHILD:
AN AMERICAN AND RELIGIOUSLY INFORMED
RESPONSE TO CANADA’S *A.C. V. MANITOBA***

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I. INTRODUCTION

Mrs. Malette was wheeled into the emergency room only half-conscious from the car wreck that widowed her.¹ The attending nurse searched her purse and found a card stating she was a Jehovah’s Witness (JW) and that she refused blood products in all circumstances, including the blood transfusion her physician believed was necessary to save her life.²

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1. *Malette v. Shulman*, [1987] 63 O.R. 2d 243, 246 (Can. Ont. H.C.J.).

2. *Id.* at 246–47, 248. Her daughter also confirmed that Mrs. Malette was a practicing JW and would refuse the transfusion if she could speak. *Id.* at 268; see *What Does the Bible Say About Blood Transfusions?*, JEHOVAH’S WITNESSES (last visited Nov. 24, 2017), <https://www.jw.org/en/bible-teachings/questions/bible-about-blood-transfusion/> [https://perma.cc/9828-RGGB]; *Why Don’t Jehovah’s Witnesses Accept Blood Transfusions?*, JEHOVAH’S WITNESSES (last visited Nov. 24, 2017), <https://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-why-no-blood-transfusions/> [https://perma.cc/Y9FU-TS4U].

Despite understanding Mrs. Malette's wishes,³ the physician transfused her himself.⁴ He was guilty of battery.⁵ Any common law court would agree that "[a] conscious, rational patient is entitled to refuse any medical treatment and the doctor must comply, no matter how ill-advised he may believe that instruction to be."⁶ Here, the best thing for the patient is to respect her autonomy. But, what is best when the person refusing is a child?⁷

A.C., a 14-year-old Canadian girl, was ordered to submit to something that she believed would doom her soul to oblivion, along with every other non-JW, while her parents, the faithful, ascended to heaven.⁸ Was that order and subsequent procedure in her best interest? Although the Canadian Supreme Court refined and applied the common law best-interest test in considering her case, it failed to consider her damnation as a possibility. In fact, the Court only concerned itself with A.C.'s interest in her physical health and her autonomy. This was a mistake. Even though the record did not show whether A.C. actually believed her soul would be destroyed, it was possible that she did.

As in this case, courts applying the best-interest test generally fail to consider the claims minors make about their souls. Yet, theists have almost

3. *Malette*, 63 O.R. at 247.

4. *Id.* at 248.

5. *Id.* at 273.

6. *Id.* at 269, 273 (The card represented her considered restriction on treatment.); e.g., *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . ."); *A.C. v. Manitoba*, 2009 SCC 30, [2009] S.C.R. 181, para. 39 (Can.); *Heart of Eng. NHS Found. Tr. v. JB* [2014] EWHC 342 (COP), 2014 WL 640403 (Eng.) ("[A]nyone capable of making decisions has an absolute right to accept or refuse medical treatment, regardless of the wisdom or consequences of the decision. The decision does not have to be justified to anyone.").

7. For a fictional presentation of this issue, consider the novel, *The Children Act* or the science fiction television episode, *Believers*. IAN MCEWAN, *THE CHILDREN ACT* (2014) (set in modern London from the perspective of a High Court Judge who must perform the best-interest test described below for a 17-year-old JW boy); *Babylon 5: Believers* (Warner Brothers Apr. 27, 1994) (An alien child on an Earth-captured space station will die without surgery, but he and his race believe that surgery will release his spirit from his body and permit a demon to maintain the body's life and awareness.).

8. It is not clear the extent to which third-party actors can cause spiritual damage to Jehovah's Witnesses, but this is a plausible interpretation of the Watchtower's publications. See *What Is Hell? Is It a Place of Eternal Torment?*, JEHOVAH'S WITNESSES (last visited Nov. 24, 2017), <https://www.jw.org/en/bible-teachings/questions/what-is-hell/> [<https://perma.cc/8536-737Y>] (regarding the nature of hell); *What Hope Is There for the Dead?*, JEHOVAH'S WITNESSES (last visited Nov. 24, 2017), <https://www.jw.org/en/publications/books/good-news-from-god/what-hope-for-the-dead/> [<https://perma.cc/7NJM-REN7>] (giving an overview of the dead); *Who Go to Heaven?*, JEHOVAH'S WITNESSES (Nov. 24, 2017), <https://www.jw.org/en/bible-teachings/questions/go-to-heaven/> [<https://perma.cc/4TPP-6H5A>] (regarding who goes to heaven and the goodness of an earthly resurrection). Further, based on the assessment of the psychiatrists on record, A.C. worried that submitting to the transfusion would jeopardize her relationship with God. *A.C.*, [2009] 2 S.C.R. at para. 6.

universally believed that the state of the soul is far more important than the state of the body. Insofar as a court is truly concerned with the minor's best interest, her soul must enter the balance.

A.C. v. Manitoba, thus, lies at the nexus of four major legal doctrines: 1) the right to refuse medical treatment (Mrs. Malette's example); 2) the rights of parents to bring up their children as they see fit; 3) the best interest of children; and 4) the right of an individual (child or adult) to practice a religion.

The United Kingdom's case, *Gillick v. West Norfolk*, established the "best-interest" test, which *A.C. v. Manitoba* applied. Using the analysis in *Gillick*, Part II will show that parental rights are derivative of the minor's rights. Part III will first track the use and development of the best-interest test through the U.K., Australia, the United Nations' *Convention on the Rights of Children*, and the United States. It will then consider how the Canadian Supreme Court applied it in *A.C. v. Manitoba* and show how dismissive the Court was of A.C.'s underlying religious claims. Part IV will argue that Canada and the United States are agnostic states and not atheistic and that this fact affects how they should regard the religious claims of their citizens. Part V explores the response agnostic States ought to have to three different types of religious claims by minors.

II. PARENTAL RIGHTS

Parents generally have broad rights to govern the conduct of their children and what is done to them.⁹ In a medical context, they can usually refuse treatment for their child and they might do so for three general reasons. First, they might refuse because they disagree with the doctor that the risks of physical harm of the treatments outweigh the expected physical benefits ("physical rationale"). Second, they might refuse because they believe there is something unethical about the treatment without reference to God or a religion, for example, treatments derived from animal testing ("ethical rationale"). Third, they might refuse based on God's command or a religion ("religious rationale").

Each of these three rationales can reference the interests of either the child or the parents, other-centered and selfish motivations respectively. "Selfish" in this case, does not mean morally repugnant¹⁰ nor does "other-

9. See, e.g., *Gillick v. West Norfolk* [1985] UKHL 7, [1986] 1 AC 112 (HL) 184, 188 (appeal taken from Eng.) (Scarman J.).

10. English does not seem to have a word that describes doing things for oneself that is not infected with negative charge.

centered” mean morally laudable. They only denote the orientation or basis of the action.¹¹

While the parents may believe that the treatment might be too painful for the child, they may also be influenced or even decide based on how difficult it will be for them to see what their child must go through.

With respect to the ethical and religious rationales, parents’ selfish motivations can be especially powerful and might also be laudable. In these two cases, though, “selfish” does not mean “for one’s own benefit” but rather “in keeping with one’s own sense of right and wrong.” The parents certainly act in accord with their ethical or religious principles to maintain their own sense of integrity, but they also do so because they believe the principles to be right and applicable to all, even to their child. Thus, if the parents believe that these treatments are objectively unethical or irreligious, then in keeping with their beliefs, they should selfishly oppose their use in every case. Animal-rights parents, too, should selfishly oppose the use of treatments developed by harming animals. JW parents should selfishly refuse a blood transfusion for their child. Perhaps they are wrong; perhaps their consciences are ill-formed. Nevertheless, they should do as their consciences dictate.

Yet, the parents’ consciences only inform us obliquely about the child’s interests. The touchstone of surrogate decision-making is not the interest of the parents, nor the animals, nor even God himself, but the interest of the patient. The seminal case, *Gillick v. West Norfolk*, addressed this issue, and heavily influenced *A.C. v. Manitoba*. In *Gillick*, the United Kingdom’s House of Lords¹² explained that, under common law, parental rights are not absolute.¹³

Rather, parental rights are “derived from parental duty and exist only so long as they are needed for the protection of the person and property of the child.”¹⁴ These rights consist of “custody, care, and control of the person and guardianship of the property of the child.”¹⁵ Further, parental rights

11. For example, one may eat merely to sustain oneself, which would be selfish and morally neutral (or even laudable). In contrast, one could eat in order to survive long enough to exact revenge, which would be other-centered and morally repugnant.

12. Five Lords decide cases and each write independent opinions. Lords Fraser and Scarman wrote the most extensive and subsequently persuasive opinions for the majority holding, so their opinions are most cited here.

13. Lord Fraser frames Mrs. Gillick’s argument as proposing “an absolute right to be informed of and to veto such advice or treatment [on contraception] being given to her daughters even in the ‘most unusual’ cases” and goes on to reject it. *Gillick*, [1986] 1 AC at 170 (Fraser). This case is discussed more fully below. See *infra* Section III. A.

14. *Gillick*, [1986] 1 AC at 184 (Scarman); see *Gillick*, [1986] 1 AC at 170 (Fraser) (Parental rights “exist for the benefit of the child and they are justified only in so far as they enable the parent to perform his duties towards the child . . .”).

15. *Id.* at 184 (Scarman).

against the claims of third-parties, including against the claims of the State, “exist[] primarily to enable the parent to discharge his duty of maintenance, protection, and education until [the child] reaches such an age as to be able to look after himself and make his own decisions.”¹⁶ The entire rationale for parental rights is thus derivative of the prior rights of the minor and a minor’s ability to think and make decisions does not spontaneously attach to her precisely 18 years after her birth. The law should recognize this and give minors expanding rights to make decisions about their own bodies as they mature.¹⁷ In practice, many parents offer children increasing autonomy as the parents recognize increasing intelligence and understanding in their child.¹⁸ The legal right of a parent over a child is “a dwindling right which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice.”¹⁹

Without an absolute right of parents, there may be some circumstances in which a doctor (and the State as enforcer) will be in a better position to decide what medical advice and treatment conduce to a child’s welfare than the parents (and the child).²⁰ Thus, in the view of one of the *Gillick*-majority, “[t]he only practicable course is to entrust the doctor with a discretion to act in accordance with his view of what is best in the interests of the [child] who is his patient.”²¹

Gillick created a test for a doctor to perform before giving medical advice without parental consent or knowledge. Generalizing the test to apply to other medical situations, before treating a minor patient the doctor must

16. *Id.* at 185 (Scarman); *see id.* at 184–85 (analyzing *Blackstone’s Commentaries* in relevant part).

17. *Id.* at 171 (Fraser).

18. *Id.* at 171 (Fraser); *see id.* at 186 (Scarman) (“[P]arental right[s] yield[] to the child’s right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.”).

19. *Id.* at 172 (Fraser); *Gillick*, [1986] 1 AC at 186 (Scarman) (quoting the same).

20. *Id.* at 173 (Fraser).

21. *Id.* at 174 (Fraser). Courts in the United States are not so convinced that this conclusion follows as quickly as Lord Fraser thinks it does, but at some point, even American courts intervene when they find that the parents are incorrectly evaluating the interests of the child in a particularly egregious way (i.e., child abuse or neglect) and then take temporary (or permanent) custody. *See* Doriane Lambelet Coleman & Philip M. Rosoff, *The Legal Authority of Mature Minors to Consent to General Medical Treatment*, 131 *PEDIATRICS* 786, 789 (Apr. 2013) (explaining that the U.S. refuses to join the Convention of the Rights of the Child discussed below because of the country’s emphasis on parental rights over the child); *see, e.g.*, *Parham v. J. R.*, 442 U.S. 584, 603 (1979) (“The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.”); *R.J.D. v. Vaughan Clinic, P.C.*, 572 So.2d 1225, 1227–28 (Ala. 1990) (“The will of the parents is controlling, except in those extreme instances where the state takes over to rescue the child from parental neglect or to save its life. Similarly, the right to grant or refuse a medical examination of a child belongs not to the child, but to the parents.”).

be satisfied 1) that the patient will understand her advice, 2) that she cannot persuade the patient to inform the patient's parents or to allow her to inform the patient's parents, 3) that without her advice and treatment, the patient's physical or mental health or both are likely to suffer, and 4) that the patient's best interests require her to give advice, treatment, or both without parental consent.²²

This fourth step is what most influences subsequent child-medical-refusal jurisprudence. At the outset, the test presupposes that the person with training in securing physical health will be most adept at securing the minor's best interest. And yet, what makes a doctor a superior decision-maker with respect to the minor's ethical or religious interests, or even her autonomy interests? Parents are the default surrogate decision-makers, but once a physician or State official challenges the parents' decision, a court must intervene to decide what is in the minor's best interest.

III. THE BEST-INTEREST TEST

A. Common Law and Other Sources

The common-law best-interest test is supposed to ensure that the best interest of the minor is secured. In application, it becomes a balancing test that protects two interests of the minor: first, physical integrity and second, autonomy. Autonomy is protected by testing the minor's capacity to make a decision in a given circumstance. As the minor's interest in autonomy grows, the State's interest in ensuring her physical integrity decreases. It was not until *A.C. v. Manitoba* that the test was described this way and even there, not in such a succinct manner. Nevertheless, thinking about the test in this way helps provide order that the various courts lacked while developing the doctrine.²³

As introduced above, the modern iteration of the best-interest test began in *Gillick v. West Norfolk*. Mrs. Gillick sued England's Department of Health and Social Security (DHSS) to ensure her female children would not be advised on the use of contraception under a new statutory and regulatory scheme.²⁴ The National Health Services Act of 1977 had directed the Secretary of State "to arrange . . . for the giving of advice on contraception .

22. *Gillick*, [1986] 1 AC at 174 (Fraser).

23. *A.C. v. Manitoba*, 2009 SCC 30, [2009] 2 S.C.R. 181, para. 53 (Can.) ("[T]he issues of autonomy and "best interests" were conflated to some degree: the question was whether the minor was capable of 'exercis[ing] a wise choice in his or her own interests.'" (quoting *Gillick v. West Norfolk* [1985] UKHL 7, [1986] 1 AC 112 (HL) 188 (appeal taken from Eng.) (Scarman))).

24. *See Gillick*, [1986] 1 AC at 119–20 (Parker).

. . .”²⁵ Pursuant to that duty, the Secretary worked with the DHSS to issue a Memorandum of Guidance to interpret for doctors their duties with respect to contraceptives.²⁶ After emphasizing that parental responsibility and privilege is important, and that in all ordinary cases parents should be consulted before giving medical advice to children under 16,²⁷ the memorandum said that in “exceptional cases”²⁸—such as when parents are “unconcerned, entirely unresponsive, or grossly disturbed”—“the nature of any counselling must be a matter for the doctor or other professional worker concerned and that the decision whether or not to prescribe contraception must be for the clinical judgment of a doctor.”²⁹ Thus, doctors could—in exceptional cases—counsel on and prescribe contraceptives to minors without parental consent or even knowledge.

After reaching the House of Lords, three of the five Lords held that the guidance was a valid interpretation of the statute and that minors could make autonomous medical decisions in certain situations.³⁰ Lords Fraser and Scarman wrote extensive, independent opinions proposing slightly different justifications for these two propositions, and both are often cited for their justifications of the test.³¹

The best-interest test in *Gillick* is a single sentence that is supposed to encapsulate what should be done in every circumstance involving a child: the child gains the “right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision,”³² or, in another formulation, “to enable him or her to understand fully what is proposed.”³³ Otherwise, the law would “impose upon the process of ‘growing up’ fixed limits where nature

25. At section 5(1)(b) as quoted in *Gillick*, [1986] 1 AC at 118 (Parker).

26. *Gillick*, [1986] 1 AC at 118 (Parker).

27. A child in the United Kingdom may make autonomous medical decisions beginning at age 16. Family Law Reform Act 1969, c. 46, § 8(1) (Eng.) (“The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age . . .”).

28. *Gillick*, [1986] 1 AC at 119 (Parker) (also stating that failing to obtain parental consent would be “most unusual”).

29. *Id.*

30. *See id.* at 195 (Bridge) (Lord Bridge “fully agree[s] with the reasons expressed by both” Lords Fraser and Scarman for rejecting Mrs. Gillick’s proposition).

31. *See, e.g.*, *A.C. v. Manitoba*, 2009 SCC 30, [2009] 2 S.C.R. 181, para. 51 (Can.).

32. *Gillick*, [1986] 1 AC at 186 (Scarman).

33. *Id.* at 189; *see also, id.* at 169 (Fraser) (Especially since minors can enter some contracts, sue and be sued, give evidence in court, and consent to sexual intercourse, so long as the patient can understand what is proposed and can express his or her wishes, he or she can validly and effectively give consent to medical treatment.).

knows only a continuous process.”³⁴ Especially in an area so sensitive as personal choice about one’s own body, the State must be particularly careful.

Because this test is so pliable, it can lead to different findings for the same minor with respect to different treatments. For example, the minor may be able to decide whether she wants the physician to set her bone now (before her parents can arrive),³⁵ but unable to decide whether she should have surgery today or wait one more day. In this case, Mrs. Gillick’s female children could consent to receiving advice on and a prescription for contraception,³⁶ but might not be able to refuse life-sustaining treatment over Mrs. Gillick’s opposition.

In a case considering whether parents could sterilize a mentally retarded child, Australia’s High Court adopted *Gillick* as if it were its own case.³⁷ The child’s best interest marks the limit of parental rights,³⁸ which “diminish[] gradually as the child’s capacities and maturity grow and . . . this rate of development depends on the individual child.”³⁹ The Court then reframed *Gillick*’s test for autonomy as a matter of informed consent, saying a “minor is . . . capable of giving informed consent when he or she ‘achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed.’”⁴⁰

Likewise, the United Nations adopted the common law’s best-interest language in the *Convention on the Rights of Children*,⁴¹ to which Canada, the United Kingdom, Australia, and 137 other countries are signatories.⁴² Echoing *Gillick*, the *Convention* requires that “[i]n all actions concerning

34. *Id.* at 186 (Scarman).

35. *Id.* at 169 (Fraser) (“It seems to me verging on the absurd to suggest that a girl or a boy aged 15 could not effectively consent, for example, to have a medical examination of some trivial injury to his body or even to have a broken arm set.”).

36. *Id.* at 169–70.

37. *Sec’y, Dept. of Health & Cmty. Servs. v J.W.B.* (Marion’s Case) (1992) 175 CLR 218, 238 (Austl.); *id.* at 229 (using the phrase “mental retardation”). Because this case considered the capacity of an intellectually disabled child, the Court extended the test to such children’s special circumstances: “[t]he age at which intellectually disabled children can consent will be higher than for children within the normal range of abilities.” *Id.* at 238. Consistent with the overall principal put forward in *Gillick*, intellectually disabled children must be evaluated individually because frequently such a child or adult is, in fact, capable of giving consent. *Id.* (“Any rule which purports to apply to the group of intellectually disabled children [as an undifferentiated whole] therefore involves sweeping generalization.”).

38. *Id.* at 240.

39. *Id.* at 237.

40. *Id.* at 237 (quoting *Gillick*, [1986] 1 AC at 189 (Scarman)).

41. Art. 3(1), Sept. 2, 1990, 1577 U.N.T.S. 3 [hereinafter, *Convention*].

42. *Convention on the Rights of Children*, MTDSG Ch. IV, Sect. 11 (The Clinton administration signed the *Convention* for the United States, but the Senate did not ratify it, so the U.S. is not bound by it. Canada ratified it Dec. 13, 1991.) available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-11.en.pdf>.

children . . . the best interests of the child shall be a primary consideration.”⁴³ Further, signatories “shall respect the responsibilities, rights and duties of parents . . . to provide, *in a manner consistent with the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.”⁴⁴

In the U.S., medical care and family law are traditionally state law matters and surprisingly few states have adopted mature-minor exceptions. As of 2012, 34 states had no exception allowing a child under 18 to make medical decisions and only 8 of the remaining 26 had a broad mature-minor exception.⁴⁵ Many of them consider the issue more in terms of the doctrine of informed consent, which is similar to best-interest, but distinct.⁴⁶ The Supreme Court has referenced the best-interest test in the context of medical treatment only once, but rather than prescribing it for lower courts to apply, it used the phrase only to describe what parents already do with respect to their children.⁴⁷

Thus, before *A.C. v. Manitoba*, the test is a flip switch that “does no more than identify the person whose interests are in question: it does not assist in identifying the factors which are relevant to the best interests of the child.”⁴⁸ The test values the minor’s intelligence level and capacity for understanding the treatment proposed, but it “offers no hierarchy of values . . . [and] in the absence of legal rules or a hierarchy of values, the best interests approach depends upon the value system of the decision-maker.”⁴⁹

B. *A.C. v. Manitoba*

The Canadian Supreme Court adopted and further refined the best-interest test in *A.C. v. Manitoba*, and tried to address these critiques, but in so doing, only made apparent the test’s weakness.

43. *Convention*, art. 3(1); *see also id.*, art. 9 (designating the best-interest test as the test for when it is appropriate to separate a child from her parents against their will).

44. *Convention*, art. 5 (emphasis added); *see also id.*, art. 14(2) (copying the text emphasized in art. 5).

45. Coleman & Rosoff, *supra* note 21, at 787, 790–91 (relating the author’s 50-state survey). The remaining states fell somewhere in-between.

46. Coleman & Rosoff, *supra* note 21, at 790–91 Table 1.

47. *Parham v. J.R.*, 442 U.S. 584, 602, 604 (1979) (“[N]atural bonds of affection lead parents to act in the best interests of their children . . . The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents’ authority to decide what is best for the child.”); *see Wisconsin v. Yoder*, 406 U.S. 205, 232, 236 (1972) (dismissing the State’s appeal to the child’s best interest while holding that Amish parents can withdraw their child from school younger than the State’s minimum).

48. *Marion’s Case*, 175 CLR at 270 (Brennan, J., dissenting).

49. *Id.* at 270–71.

A.C. was a 14-year-old girl in Manitoba, Canada with Crohn's disease and as a Jehovah's Witness, she "treasure[d] her relationship with God."⁵⁰ To fulfill the dictates of her faith, she signed an advanced directive ordering that she not be given a blood transfusion "under any circumstances."⁵¹ Her parents agreed fully with her decision.⁵² A few months later when her physician recommended she have a transfusion lest she die, she refused again.⁵³ The Director of Child and Family Services took custody of her "as a child in need of protection" by the authority of the Child and Family Services Act (CFSA) and sought a court order authorizing the transfusion.⁵⁴ The motions judge concluded that the Act authorized him to order the treatment on his own view of A.C.'s best interests, no matter the child's capacity to decide for herself, and so ordered the transfusion.⁵⁵ A.C. received three units of blood and recovered.⁵⁶

A.C. appealed, arguing that the judge misinterpreted the CFSA and alternatively, that the CFSA was unconstitutional under the *Canadian Charter of Rights and Freedoms* (*Charter*) because it infringed her right to freedom of religion.⁵⁷ The appeals court affirmed that the motions judge had statutory authority to decide as he did, and that for a child under 16, capacity to decide was irrelevant.⁵⁸ Further, section 1 of the Charter justified any infringement of A.C.'s freedom of religion under the Supreme Court's *Oakes*-test.⁵⁹ The Canadian Supreme Court agreed with the appeals court on each of its holdings, except it found that rather than supplanting the common law best-interest test, the CFSA incorporated it.⁶⁰

50. *A.C. v. Manitoba*, 2009 SCC 30, [2009] S.C.R. 181, para. 5–6 (Can.).

51. *Id.* at para. 6; *Why Don't Jehovah's Witnesses Accept Blood Transfusions?*, JEHOVAH'S WITNESSES (Nov. 24, 2017), <https://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-why-no-blood-transfusions/> [<https://perma.cc/Y9FU-TS4U>].

52. *A.C.*, [2009] 2 S.C.R. at para. 6.

53. *Id.* at para. 7.

54. *Id.* at para. 8–9; Child & Family Services Act, C.C.S.M. C80 § 25(8) (Man.) ("[T]he court may authorize . . . any medical . . . treatment that the court considers to be in the best interests of the child.") [hereinafter CFSA].

55. *A.C.*, [2009] 2 S.C.R. at para. 12; CFSA § 25(8).

56. *A.C.*, [2009] 2 S.C.R. at para. 13.

57. *Id.* at para. 14 (The court also considered whether the Act unjustly deprived her of her right to liberty (Charter § 7) or discriminated against her on the basis of religion (Charter § 15).); Canadian Charter of Rights & Freedoms, Part I of the Constitution Act, 1982, § 2(a) *being* Schedule B to the Canada Act 1982, c 11 (U.K.) ("Everyone has the following fundamental freedoms: (a) freedom of conscience and religion . . .") [hereinafter, Charter].

58. *A.C.*, [2009] 2 S.C.R. at para. 15.

59. *Id.* at para. 18; *R. v. Oakes*, [1986] 1 S.C.R. 103, 138–39 (Can.) (Canada's Supreme Court's test for when an infringement is constitutional, discussed *infra*).

60. *A.C.*, [2009] 2 S.C.R. at para. 21, 23.

The best-interest test was a balance between the minor's growing autonomy⁶¹ and the State's interest in her physical health.⁶² And, the Court concluded that "young people under 16 should be permitted to attempt to demonstrate that their views about a particular medical treatment decision reflect a sufficient degree of independence of thought and maturity."⁶³ As the minor matures, her views are to become an "increasingly determinative factor."⁶⁴

This assurance, though, is little comfort to those in A.C.'s position for three reasons. First, the Court surveyed all cases in the U.K. and in Canada, and none of the cases had found a minor under 16 capable of refusing treatment likely to preserve her potential for a healthy future.⁶⁵ Second, rather than undermining any of these cases, the Court suggests that the minor may only decide if the decision is the "right" one according to medical and ultimately judicial authorities.⁶⁶ Third and relatedly, although minors are afforded greater latitude when the stakes are lower,⁶⁷ when the minor's life is at stake, the Court finds an opening in the "ineffability inherent in the concept of 'maturity'" to undermine the minor's autonomy interests.⁶⁸ In the worst cases, "a careful and comprehensive evaluation of the maturity of the adolescent will necessarily have to be undertaken to determine whether his or her decision is a genuinely independent one, reflecting a real understanding and appreciation of the decision and its potential consequences."⁶⁹ Yet, presumably this same rigorous analysis must be done

61. Whereas the Courts in *Gillick* and *Marion* focused on the minor's "capacity" to choose, in *Manitoba*, the Court used "autonomy" interchangeably with "decisional capacity" and similar phrases. *E.g.*, *Gillick*, [1986] 1 AC at 186 (Scarman); *Marion's Case*, 175 CLR at 237; *see, e.g.*, *A.C.*, [2009] 2 S.C.R. at para. 58 ("[T]he proposition advanced in [one case] was not that a "mature minor" was essentially an adult for medical treatment purposes, but rather that courts must give adolescents room to exercise their autonomy to the extent that their maturity allows.").

62. *A.C.*, [2009] 2 S.C.R. at para. 82 ("Mature adolescents . . . have strong claims to autonomy, but these claims exist in tension with a protective duty on the part of the state that is also justified.").

63. *Id.* at para. 87.

64. *Id.* at para. 88.

65. *Id.* at para. 57, 59.

66. *See id.* at para. 83–84 (quoting a Canadian practitioners manual approvingly). The minor's permission only to choose beneficial care or to reject non- or low-beneficial care is sometimes called the "welfare principle." *Id.* at para. 83. However, the Court tries to say that the divide between autonomy and welfare is narrow and often collapses together when one "appreciates" that respecting a truly mature minor's decision is in her best interest. *Id.* at para. 84. These two positions are inconsistent. Either the overriding concern is the health of the minor or it is the ability of a demonstrably mature minor to decide for herself.

67. *Id.* at para. 85.

68. *Id.* at para. 86.

69. *Id.* at para. 95.

any time a provider seeks to overrule a minor in court.⁷⁰ Perhaps the Court presumes a provider will only pursue this option in the most serious situations, but stripped of all the superlative adjectives—careful, comprehensive, genuinely, real—the Court is back to balancing the autonomy against the child’s welfare, the same best-interest test with which the Court began before its analysis.

It is perfectly fair and probably reasonable to believe that 14-year-olds are almost invariably incapable of autonomously deciding to refuse life-saving treatment.⁷¹ But, the degree to which the Court emphasizes the physical health of the minor against her other possible interests, including her budding capacity to choose, highlights how egregiously it ignored the religious interest that motivated A.C. to embrace and permit her own death.⁷² This is most clear in three of the Court’s failures.

First, the Court ignores its constitution’s religious liberty provision. The foundation of religious liberty in Canada is section 2(a) of the Canadian Charter of Rights and Freedoms (Charter), a component of the Canadian Constitution.⁷³ After the preamble to the Charter recognizes that Canada was “founded upon principles that recognize the supremacy of God and the rule of law,” the first fundamental freedom it recognizes is “of conscience and religion.”⁷⁴ As with the rest of the Charter, this freedom is “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (the limitations clause).⁷⁵ In 72 words, the Court disposes of A.C.’s section 2(a) challenge, merely redirecting her to the best-interest test.⁷⁶ Instead, the Court focused almost exclusively on whether compelling treatment violated A.C.’s Charter-based liberty interest.⁷⁷

70. CFSa § 25(8).

71. See, e.g., Tara L. Kuther, *Medical Decision-Making and Minors: Issues of Consent and Assent*, 38 ADOLESCENCE 343, 346–50 (2003) (reviewing psychology literature on minor’s capacity to make medical decisions); Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults?*, 64 AM. PSYCHOL. 583, 583 (Oct. 2009) (considering the American Psychological Association’s seemingly conflicting positions on juvenile’s maturity with respect to juvenile abortion and death penalty).

72. A.C., [2009] 2 S.C.R. at para. 6.

73. Charter, § 2(a). The Charter is the first component of the Constitution Act of 1982. Within an American framework, the Act as a whole might be likened to the American Bill of Rights in that it serves as an alteration of the existing Constitution that addresses numerous, discrete topics. In addition to addressing rights and freedoms, the Act revoked the authority of the British Parliament to amend the Canadian Constitution at the request of the Canadian Parliament, among other things. Canada Act 1982, c 11, § 2 (U.K.).

74. Charter, § 2(a).

75. Charter, § 1 (called the “limitations clause”).

76. A.C., [2009] 2 S.C.R. at para. 113.

77. Charter, § 7; A.C., [2009] 2 S.C.R. at para. 97–108.

Second, the Court ignores its standard test—the *Oakes*-test—for determining when it is constitutional to impose restrictions on the practice of religion.⁷⁸ Throughout the majority opinion, there is only one reference to *Oakes* and that is in the brief paragraph recounting the Court of Appeal’s analysis.⁷⁹

In *R. v. Oakes*, the Canadian Supreme Court analyzed the limitations clause and established a two-prong test for establishing when limitations on religious practice would be constitutional.⁸⁰ First, the objective of the measure must “relate to concerns which are pressing and substantial in a free and democratic society.”⁸¹ Second, the measure must survive a three-part proportionality test:⁸² 1) it must be “rationally connected to the objective” and not “arbitrary, unfair or based on irrational considerations;” 2) it must impair the right or freedom “as little as possible;” and 3) its effects and the objective must be “proportional[.]”⁸³ While this restriction on A.C.’s religious practice could well be justified under this test (as the Court of Appeals found⁸⁴), the Supreme Court does not even perform the test itself.

Third, while considering other parts of the treaty, the court ignores two key articles of the *Convention on the Rights of the Child*.⁸⁵ First, while citing Article 14 for the subsection on the duties of parents to educate the child in

78. *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.). This test is the Canadian equivalent of the American compelling-interest test codified by the Religious Freedom Restoration Act. In the U.S., the threshold issue is whether a government has “substantially burden[ed] a person’s exercise of religion” (*substantial burden*). Religious Freedom Restoration Act (RFRA) of 1993, 42 U.S.C. § 2000bb-1(a) (2012), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidated only as it applies to state laws). Second, the government must survive a form of strict scrutiny: the measure as applied to the plaintiff must be 1) “in furtherance of a compelling governmental interest” (*rationally related* and *compelling governmental interest*) and 2) “the least restrictive means of furthering that compelling governmental interest” (*least restrictive means*). RFRA § 2000bb-1(b). Although the “narrowly tailored” language is neither a part of RFRA nor the cases on which RFRA is based, the Court has paraphrased the “least restrictive means” prong as “narrowly tailored.” RFRA § 2000bb(b)(1) (identifying *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) as the basis for the statute); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775 n. 30 (2014) (An amendment to the bill in question “would not have subjected religion-based objections to the judicial scrutiny called for by RFRA, in which a court must consider not only the burden of a requirement on religious adherents, but also the government’s interest and how narrowly tailored the requirement is.”); *see also, e.g.*, *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 894 (1990) (O’Connor, J., concurring) (using similar language).

79. *A.C.*, [2009] 2 S.C.R. at para. 18.

80. Charter, § 1.

81. *Oakes*, [1986] 1 S.C.R. at 138–39.

82. *Id.* at 139.

83. *Id.* at 139 (internal citations omitted).

84. *A.C.*, [2009] 2 S.C.R. at para. 18.

85. *See id.* at para. 93; for previous discussion of the *Convention*, *see supra* Section A.

their religious practice,⁸⁶ it neglects the two subsections that actually apply to the case at hand.⁸⁷ This case was not so much an issue of what the parents believed as whether A.C. was old enough to believe for herself the things she professed.⁸⁸ The *Convention* in general and Article 14 in particular, in contrast with the common law best-interests test, explicitly addresses the religious interests of the child.⁸⁹ Referring to the child specifically, it says that “[f]reedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.”⁹⁰ This article sets two mandatory conditions for restricting the child’s ability to manifest her religion: that the restriction is enacted under Article 4⁹¹ and that it is necessary for the listed purposes. Restricting children’s ability to refuse treatments as a manifestation of their religion does not fit easily within the listed purposes. While it certainly restricts the rights of parents to manifest their religion against the fundamental rights and freedoms of their child (the selfish motivation⁹²), the only restriction of the minor that would fit would be one to protect the public morals or to protect the minor’s fundamental right to health despite her asserted right to manifest her religion.

Second, when read in conjunction with article 30, restrictions on the minor become even more suspect. The *Convention* reemphasizes that States should protect religious (and other) minorities, that minority children “shall not be denied the right, in community with other members of his or her group, . . . to profess and practise his or her own religion”⁹³ Thus, the minor not only has a right to “manifest” her religion, but also to “practice” it. The question remains what it means for a minor to practice her religion, especially since the *Convention* recognizes only a growing capacity of a child to form her own view,⁹⁴ but the *Convention* supports that it must have some meaning. Further, the clause is not hortatory, but mandatory: their right to practice religion “shall not be denied.” Finally, that Article 30 must enjoin signatories from denying children the right to practice their religion can only mean that it anticipates that children will choose to do things that are at odds

86. *A.C.*, [2009] 2 S.C.R. at para. 93.

87. *See Convention*, art. 14(1), 14(3).

88. *A.C.*, [2009] 2 S.C.R. at para. 5–6.

89. *Convention*, art. 14, 30.

90. *Convention*, art. 14(3).

91. Article 4 requires signatories to bring the treaty into force within the requirements of the signatory’s own legal system.

92. *See supra* Section II.

93. *Convention*, art. 30.

94. *Convention*, art. 12.

with what the law would otherwise require of the child, with what the law would otherwise find rational.

Further, when signing the Convention, Canada made a Statement of Understanding that expressed special concern for its aboriginal peoples and stated that Canada intended to give them deference under Article 30 in how they rear their children.⁹⁵ Although JWs do not have the same historical relationship with the State as Canada's aboriginal peoples, the special concern should apply equally to children who are minorities in other respects. It is therefore conspicuous that the Court does not analyze these sections.

None of these critiques proves the result of the case was incorrect under its Constitution, the *Oakes*-test, or the Convention, but they highlight the degree to which the Court ignored A.C.'s most important, overriding interest, at least from the perspective of the person whose interests the Court was trying to protect. Thus, it becomes important to consider what type of relationship the State should have with the individual and with God.

IV. THE STATE AND GOD

A. Agnosticism Versus Atheism

Although atheism and agnosticism are often used interchangeably, they are and will be treated here as distinct concepts.

Both terms come from Greek. Because of the peculiarities of Greek grammar, "agnostic" means both "unknown" and "not to be known."⁹⁶ Reflecting this dual-meaning, Merriam-Webster defines the English term "agnostic" as "a person who holds the view that any ultimate reality (such as God) is unknown and probably unknowable; *broadly*: one who is not committed to believing in either the existence or the nonexistence of God or a god."⁹⁷

95. UNITED NATIONS TREATY COLLECTION, *Convention on the Rights of Children*, MTDSG Ch. IV, Sect. 11 *available at* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en ("It is the understanding of the Government of Canada that, in matters relating to aboriginal peoples of Canada, the fulfilment of its responsibilities under article 4 of the *Convention* must take into account the provisions of article 30. In particular, in assessing what measures are appropriate to implement the rights recognized in the *Convention* for aboriginal children, due regard must be paid to not denying their right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion and to use their own language.").

96. It is based on the prefix "α" meaning "want" (as in "privation" not "desire") or "absence" and the root "γινώσκω" meaning "to learn to know" or "to know." HENRY G. LIDDELL & ROBERT SCOTT, *AN INTERMEDIATE GREEK-ENGLISH LEXICON* 1, 7, 165 (1889) (Oxford Press reprint).

97. *Agnostic*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/agnostic> [<https://perma.cc/YT4X-QPVN>] (last visited Nov. 25, 2017). The Oxford English Dictionary first defines an "agnostic" as "[a] person who believes that nothing is known or can be known of immaterial things,

The Greek term, “atheism,” on the other hand, means “without God, denying the gods.”⁹⁸ Merriam-Webster defines “atheism” as “a philosophical or religious position characterized by disbelief in the existence of a god or any gods.”⁹⁹ Perhaps as a scientific matter the universe does not need God in order to exist.¹⁰⁰ Even though God may be superfluous, when it is honest with itself, science recognizes that it cannot disprove God’s existence; God is beyond its competence. Or, perhaps there are persuasive philosophical arguments for saying positively that there is no god.¹⁰¹ Even though there may be good arguments, there are no proofs. That there is, in fact, no god is an article of faith.¹⁰²

In an editor’s note, Merriam-Webster clarifies that “*atheist* refers to someone who believes that there is no god (or gods), and *agnostic* refers to someone who doesn’t know whether there is a god, or even if such a thing is knowable.”¹⁰³ This last characterization is how the terms are used here. Atheism is a statement of belief about the existence of God. Agnosticism is a statement of ignorance about the existence and nature of God.

especially of the existence or nature of God. Distinguished from *atheist n.*” “Agnostic, n. and adj.” OXFORD ENG. DICTIONARY ONLINE, <http://www.oed.com/view/Entry/4073?redirectedFrom=agnostic#eid> (last visited Jan. 10, 2018). Second, it defines it as “[i]n extended use: a person who is not persuaded by or committed to a particular point of view; a sceptic.” *Id.* The OED thus disassociates skepticism from questions of belief about God, evidencing the merging of the terms atheism and agnosticism. Further, it makes agnosticism a much more active belief, whereas Merriam-Webster characterizes more as a lack of faith than a positive belief system.

98. LIDDELL & SCOTT, *supra* note 97, at 17. It is based on the same alpha-privative and the root “*θεός*” meaning “God.” *Id.* at 1, 362.

99. *Atheism*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/atheism> [<https://perma.cc/9LEZ-393N>] (last visited Nov. 25, 2017). The Oxford English Dictionary defines *atheist* as “[o]ne who denies or disbelieves the existence of a God.” “*Atheist*, n. and adj.” OXFORD ENG. DICTIONARY ONLINE, <http://www.oed.com/view/Entry/12450?redirectedFrom=atheist#eid> (last visited Jan. 10, 2018).

100. STEPHEN HAWKING & LEONARD MLODINOW, *THE GRAND DESIGN* 180 (2010) (“Spontaneous creation [by the force of gravity] is the reason there is something rather than nothing, why the universe exists, why we exist. It is not necessary to invoke God to light the blue touch paper and set the universe going.”).

101. C. M. Lorkowski, *Atheism*, 8 PHIL. COMPASS 523, 528–31 (2013) (presenting the most common philosophical arguments for atheism).

102. See *Torcaso v. Watkins*, 367 U.S. 488, 490 (1961) (“The power and authority of the State of Maryland thus is put on the side of one particular sort of believers—those who are willing to say they believe in ‘the existence of God.’”); *Atheism*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/atheism> [<https://perma.cc/9LEZ-393N>] (last visited Nov. 25, 2017) (The definition above is the second definition. The first is “a lack of belief or a strong disbelief in the existence of a god or any gods.”). Atheism is not, though, a religion.

103. *Agnostic*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/agnostic> [<https://perma.cc/YT4X-QPVN>] (last visited Nov. 25, 2017).

Consistent with these distinctions, a State can take three general approaches to religion.¹⁰⁴ It can 1) endorse or favor one religion (theist), 2) reject all religion and enforce a strictly secular state (atheist),¹⁰⁵ or 3) it can permit or encourage religious pluralism (agnostic).¹⁰⁶ In the first two, the State makes a particular decision about the existence and nature of God. In the last, it claims ignorance. Although the difference between the second and the third approaches may often escape notice, the two are quite distinct. They explain why some police wear turbans¹⁰⁷ and why some teachers may not wear crucifixes.¹⁰⁸ It is perfectly reasonable and legitimate for a people to believe that there is no god and so found a State on that belief. But it is likewise legitimate, if not also reasonable, for a people to believe there is a god and to found a State on that belief.

B. Canada and the United States are Agnostic, Not Atheistic

Nevertheless, neither Canada nor the United States are so situated. Not only has Canada declared God supreme,¹⁰⁹ but it has also encouraged religious pluralism and religious expression from public officers.¹¹⁰ Whereas the United States Constitution permits “neutral law[s] of general applicability” to override religious concerns,¹¹¹ Canada places the onus on

104. Another commentator divided the approaches the State can take into four categories based on the possible answers to two questions: whether religious truth exists and whether the State should enforce that belief. Michael Stokes Paulsen, *The Priority of God: a Theory of Religious Liberty*, 39 PEPP. L. REV. 1159, 1164 (2013). Thus, there would be: 1) a theist state like Saudi Arabia, enforcing its religious truth on its citizens; 2) a secular state like Israel declaring a religious truth while tolerating the religious practice of others; 3) a secular state like most liberal democracies that makes no religious declaration and usually tolerates idiosyncratic religious practices; and 4) an atheist state that does not tolerate variance from social and legal norms.

105. 1958 CONST. pmbl. art. 1 (“France shall be an indivisible, secular, democratic and social Republic.”).

106. See generally Bruce Ryder, *The Canadian Conception of Equal Religious Citizenship*, in LAW AND RELIGIOUS PLURALISM IN CANADA 87, 157 (Richard Moon ed., 2008) (discussing Canada’s emphasis on religious pluralism).

107. *Grant v. Canada*, [1995] 1 F.C. 158, 213.

108. Elaine Sciolino, *French Assembly Votes to Ban Religious Symbols in Schools*, NY TIMES (Feb. 11, 2004), <http://www.nytimes.com/2004/02/11/world/french-assembly-votes-to-ban-religious-symbols-in-schools.html>.

109. Charter, preamble. Although Canada does declare that God exists and so should technically be considered theistic, it in no way imposes that belief. For example, atheists are welcome to participate in government and receive benefits. The point here is that Canada is neither atheistic nor theocratic.

110. Ryder, *supra* note 106, at 88. For an historical survey of the development of religious liberty in Canada, see Beverley McLachlin, *Freedom of Religion and the Rule of Law: a Canadian Perspective*, in RECOGNIZING RELIGION IN SECULAR SOCIETY: ESSAYS IN PLURALISM, RELIGION, AND PUBLIC POLICY 17–21 (Douglas Farrow ed., 2004) (Author is the Chief Justice of the Canadian Supreme Court.).

111. *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 879 (1990).

the government¹¹² to justify burdens on religious expression, even for neutral rules.¹¹³ When Canada changed its Royal Canadian Mounted Police uniform policy to permit Sikhs to wear their religiously mandated turbans, a change with an explicit religious purpose, the change was constitutionally permitted.¹¹⁴

The United States has not been as explicit as Canada about recognizing and encouraging the centrality of religion and more directly, the primacy of God, in public life, but its history has been quite clear. While the Founders explicitly rejected religious tests in the Constitution,¹¹⁵ many States' versions of the no-religious-test clause explicitly permitted the exclusion of atheists from public office.¹¹⁶

The First Congress in the Bill of Rights named freedom of religion their primary concern, above freedoms of speech and assembly, freedom from

112. In *R. v. Edwards Books & Art Ltd.*, the Court considered an exception to a law that required business to be closed on Sundays that was narrower than Saturday-observers thought constitutional. [1986] 2 S.C.R. 713, 724–25 (Can.). While it found against the Saturday-observers, the Court still held that even laws with secular purposes that were “inoffensive” to the *Charter* rights of conscience and religion required the Court to consider whether they were offensive in effect. *Id.* at 752; see *R. v. Big M Drug Mart, Ltd.*, [1985] 1 S.C.R. 295, 347 (Can.) (While the Court struck down the Sunday-closing law in question, in dicta, it said, “[t]he equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment.”).

Likewise and consistent with the American Supreme Court, the Canadian Court also requires employers “to make a reasonable effort to accommodate the religious needs of the employee, short of undue hardship . . .” *Ontario Human Rights Comm’n v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 553 (Can.) (referencing American Supreme Court cases for this formulation). In *Simpsons-Sears*, the Court found that an employer must accommodate a Seventh-Day Adventist’s Saturday-Sabbath observance even though Saturday was the busiest day of the week and the employer required all employees to work two of every three Saturdays for a non-discriminatory reason. *Id.* at 539–40.

113. Though the U.S. does this by statute, as discussed *supra* note 78.

114. *Grant v. Canada*, [1995] 1 F.C. 158, 213.

115. U.S. CONST. art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

116. See Note, *An Originalist Analysis of the No Religious Test Clause*, 120 HARV. L. REV. 1649, 1669 (2007) (“Oaths were taken seriously at the Founding, and an individual who bound himself through an oath was considered solemnly bound to keep his word and to fulfill exactly the promise he had uttered. Anything less would breach the covenant that the individual had formed with God and with the state when he took the oath.”).

Many State constitutional provisions remain on the books, despite their invalidation by *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). *E.g.*, ARK. CONST. art. 19, § 1 (“No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any Court.”); MD. CONST. art. 37 (“That no religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God; nor shall the Legislature prescribe any other oath of office than the oath prescribed by this Constitution.”); TEX. CONST. art. I, § 4 (“No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being.”).

unwarranted search and seizure and the right to a jury, and all others.¹¹⁷ In the Judiciary Act of 1789, the same Congress required—and still requires—all U.S. judges to pray for the help of God in completing their duties.¹¹⁸ It established and funded a chaplaincy, still in place today, for the House and Senate.¹¹⁹ It asked President Washington to proclaim a day of thanksgiving for the “favours of Almighty God.”¹²⁰

While the Supreme Court has rejected attempts by various levels of government to participate directly in religious expression,¹²¹ it has upheld the chaplaincy and legislative prayer,¹²² and has expressed disinterest in declaring unconstitutional numerous governmental recognitions of the supremacy of God over American affairs: on its money, in its pledge,¹²³ at the start of court sessions,¹²⁴ and in its officer’s oaths.¹²⁵

And even though it might be hard to think of American voters electing a niqab-wearing woman,¹²⁶ it is unthinkable that once elected she would be

117. U.S. CONST. amend. I; *Hosanna-Tabor Evangelical Lutheran Church v. Equal Emp’t Opportunity Comm’n*, 565 U.S. 171, 189 (2012) (unanimously finding that the First Amendment “gives special solicitude to the rights of religious organizations” not enjoyed by secular groups); see *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 902 (1990) (O’Connor, J., concurring) (“[T]he text of the First Amendment itself ‘singles out’ religion for special protections.” (internal citations omitted)); see *Frazee v. Illinois Dep’t of Emp’t Sec.*, 489 U.S. 829, 833 (1989) (“[O]nly beliefs rooted in religion are protected by the Free Exercise Clause. Purely secular views do not suffice.” (internal citations omitted)); Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 *Notre Dame L. Rev.* 1597, 1598 (1997) (“The Free Exercise Clause only makes sense on the assumption that God exists; that God makes claims on the loyalty of human beings; and that these claims are prior to and superior in obligation to the claims of the State.”); see generally, Dmitry N. Feofanov, *Defining Religion: an Immodest Proposal*, 23 *HOFSTRA L. REV.* 309 (1994) (arguing why religion should be treated differently than secular ethical systems); *id.* at 327 n. 93 (“[R]eligion is singled out for special treatment.”).

118. Judiciary Act of 1789, ch. 20, § 8, 1 Stat. 73, 76; 28 U.S.C. § 453 (2012) (“I, ____, do solemnly swear . . . So help me God.”).

119. *Marsh v. Chambers*, 463 U.S. 783, 788 (1983).

120. *McCreary Cty. v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 886 (2005) (Scalia, J., dissenting).

121. *Id.* at 886 (forbidding a 10 Commandments display at a courthouse); *Cty. of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 579 (1989) (forbidding a crèche display on government property at Christmas); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (forbidding public school prayer).

122. *Marsh*, 463 U.S. at 795.

123. *Cty. of Allegheny*, 492 U.S. at 603 (in dicta, calling references to God on money and in the pledge “ceremonial deism” and therefore, unbecoming); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 4-5 (2004) (dismissing challenge to “under God” in Pledge of Allegiance on standing grounds).

124. *Marsh*, 463 U.S. at 786 (suggesting in dicta that “God save the United States and this Honorable Court” does not pose an Establishment Clause problem).

125. *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010), *cert. denied*, 563 U.S. 1001 (2011).

126. See Justin McCarthy, *In U.S., Socialist Presidential Candidates Least Appealing*, *GALLUP NEWS* (Jun. 22, 2015), <http://news.gallup.com/poll/183713/socialist-presidential-candidates-least-appealing.aspx> [https://perma.cc/5CDN-N4TC] (reporting a poll that found that all other things being

barred from wearing her niqab in office.¹²⁷ “We are a religious people whose institutions presuppose a Supreme Being.”¹²⁸ Even if it is too much to say the United States was founded as a Christian nation or on Judeo-Christian values, it is far too much to say the inverse: that it was founded as an atheist nation.¹²⁹

Neither Canada nor the U.S. endorse any particular form of worshipping God, and, in fact, eschew such endorsement. Yet, neither country embraces atheism; rather, both celebrate, honor, and protect their citizens’ independent and diverse worship of God. Thus, the Canadian and American constitutions and governments are, and ought to be, considered agnostic, rather than atheistic.¹³⁰

C. Agnosticism and the State’s Relationship with God

If there is any afterlife, this life fills an infinitesimally smaller period of time than the one to follow. An atheistic state should disregard this possibility because it has already judged it impossible. An agnostic state, though, cannot disregard this possibility, because it recognizes its own ignorance on the matter. In such a state, then, the eternal status of the soul must enter the conversation about the propriety of any governmental coercion. Whether what follows this life is nonexistence, bliss, or an existence wherever one is judged to go, that status will last much longer than

equal, only 60% of Americans would vote for a Muslim; only 58% and 47% would vote for an atheist or a socialist respectively).

127. See Angelique Chrisafis, *Full-Face Veils Outlawed as France Spells Out Controversial Niqab Ban*, GUARDIAN (Mar. 3, 2011), <https://www.theguardian.com/world/2011/mar/03/niqab-ban-france-muslim-veil> [<https://perma.cc/JLW5-HES3>].

128. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *Marsh*, 463 U.S. at 792; see generally Paulsen, *supra* note 117 at 1598 (taking it one step further and arguing that we are also “a people whose Constitution presupposes a Supreme Being”).

129. See *Everson v. Bd. of Educ. of Ewing Tp.*, 330 U.S. 1, 18 (1947) (The First “Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.”)

Justice Breyer, the swing vote in the two 2005 10 Commandments cases, found for himself that the Constitution only demands “noninterference and noninvolvement,” not “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious.” *Van Orden v. Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring); see *McCreary Cty. v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 848 (2005). Four justices were happy to go much further and say that the government can favor religion over irreligion. *Van Orden*, 545 U.S. at 684, 684 n. 3 (plurality) (citing four other Supreme Court opinions); but see *McCreary Cty.*, 545 U.S. at 875 (plurality including Breyer, J.) (saying the direct opposite with O’Connor, J., being the only Justice not to join either opinion); see also *Sherbert v. Verner*, 374 U.S. 398, 415–16 (1963) (Stewart, J., concurring alone) (The First Amendment “affirmatively requires government to create an atmosphere of hospitality and accommodation to individual belief or disbelief.”).

130. For an in-depth argument that the American Constitution is agnostic and is not atheistic, see generally Steven D. Smith, *Our Agnostic Constitution*, 83 N.Y.U.L. REV. 120 (2008).

this present status. When considering the best-interest of its citizens, law and policy should take note.¹³¹

There are four distinct ways in which God (or gods¹³²) and an afterlife¹³³ may exist or not exist. First, God may not exist. Second, God may exist, but pass no judgment on the actions of people, giving them eternal bliss (or not) regardless of how they lived their lives. Third, God may exist and judges people without reference to their moral culpability (an amoral god).¹³⁴ Fourth, God may exist and judge actions based on a person's moral culpability for evil choices freely made (a moral god).

With respect to how a State should act, though, the four ways can be reduced to three. First are the instances where this life has no bearing on the afterlife. If there is no god or afterlife—the standard atheist position—then all of a person's actions cease to matter as to her at her death. Atheists may contrive great moral systems to obtain for the most number of people food, drink, and merriment, but tomorrow they die, and none of it matters to them anymore whatsoever. All life ends in final death. Paradoxically likewise, if there is an afterlife consisting of a common place of bliss, torment, or mere shadowy subsistence, with no regard for how a person lived her earthly life, neither then does this life have any bearing on the person's eternal state. Further, if there is no such thing as choice and all things we call choice are merely chemical responses determined by external stimuli, then any afterlife cannot be based on moral judgment anyway. Similarly, if human life is subject to random reincarnation, the analysis is the same as the common afterlife. Therefore, in either system, whatever policy a State pursues with regard to any person is inconsequential because life itself is meaningless with respect to a person's eternal state, be it annihilation or a common afterlife for all.

Second, if God differs a person's eternal state based on characteristics or events involuntary to the person, then a State's actions can directly and adversely affect that person's eternal state. If God forbids transfusion on pain

131. Ruth Macklin writes widely on topics of conscience, bioethics, and Jehovah's Witnesses in particular. However, she and many others find the value of natural life and the value of patient autonomy to create a "moral dilemma [that] has no clear solution." Ruth Macklin, *Consent, Coercion, and Conflicts of Rights*, 20 *PERSP. IN BIOLOGY & MED.* 360, 363 (1977). This is because she and others disregard the issue of eternity, against which irrelevant considerations shrink in the distance.

132. Admittedly, the following language is most consonant with monotheistic religions with which I anticipate most readers are most familiar, but it is equally applicable to polytheistic religions or religions that include reincarnation based (or not) on moral culpability during life.

133. Without an afterlife, State coercion or even action makes little ultimate difference as discussed below.

134. The latter possibility is typical of Calvinism and is called (double) predestination. In legal terms, it might be likened to strict scrutiny. Baptists and Presbyterians are notable modern off-shoots of Calvinism, though many in those denominations no longer believe in predestination.

of damnation and the State forces it, even against the child's will, the child is damned.

Third, if God judges people based on their moral culpability or merit,¹³⁵ State action is divided into two classes: compulsion and coercion. Compulsion is forcing an individual to do (or submit) to something, whereas coercion is inciting an individual to do something, usually in a manner the one using the term believes is too much.

For example, the JW-blood-transfusion cases are most easily understood as involving State compulsion. The State does not care whether the minor (or her parents) submit to the transfusion; it is willing to use all force necessary—including sedation for the minor and temporary restraint for the parents—to ensure the minor is transfused. An involuntary, but compelled transfusion is not morally culpable.

A coerced transfusion, where the minor (or parents) have a true choice whether or not to submit, is morally culpable. That said, coercion can encourage—though not cause—a person to sin. State coercion, thus, only indirectly affects the person's eternal state. The threat of compulsion itself is coercive, but in the face of overwhelming force, peaceful resignation is not typically considered culpable.

V. EFFECT OF AGNOSTICISM ON MINORS

A State's interest in a minor is derivative of the minor's interest in herself. Thus, insofar as the State has not rejected the possibility of the existence of God, the minor's spiritual claims about God's commands should go to the heart of the analysis of her best interest.

That analysis has five possible results. 1) Minors who have been found to be mature with respect to their particular treatment are to be treated like adults and to be allowed to reject their treatment on whatever basis.¹³⁶ They are adults for medical decision-making purposes; this is simply what legal maturity means.

The remaining four results are divided based on whether the minor can articulate a clear religious position (even though legally immature) and whether that position concerns a moral god or an amoral god: 2) minors who believe in a moral god, 3) surrogates who assert the religious interests of the child with respect to a moral god, 4) minors who believe in an amoral god, and 5) surrogates who assert the religious interests of the child with respect to an amoral god.

135. Included here are most groups who speak of God as judge, including Catholics and many other Christian denominations. *E.g.*, CATECHISM OF THE CATHOLIC CHURCH ¶¶ 678–79 (2d. 1997).

136. *E.g.*, *A.C. v. Manitoba*, 2009 SCC 30, [2009] 2 S.C.R. 181, para. 46 (Can.).

A. Minors and Surrogates, and a Moral God

If the minor believes in a moral god or her parents assert such an interest, then, by that religious position's own terms, State compulsion does not matter as to her spiritual state. The harm here is compulsion, not damnation. The harm is against the minor's (religious) self-fulfillment, not directly against her soul. Compulsion is an external, involuntary force, so it can have no bearing on an individual who will be judged solely on voluntary acts. To avoid moral culpability, a minor should vehemently resist treatment, as should her parents. Then the State should do whatever it finds consonant with the minor's interest in physical health and autonomy. The minor and the parents have fulfilled their moral obligation by exerting their will against the violation of God's command and the State has fulfilled its obligation to ensure that the minor remains healthy and truly has capacity when she makes such a consequential decision. The minor's right to practice a religion is protected by the autonomy prong of the best-interest test in which the court determines if the minor is even capable of making a choice. If she can, then she is mature and can decide as she pleases. If she cannot, the State decides for her. Thus, with respect to compulsion, the State need show no more restraint than if it were atheist. This is not to say that the State might not have other reasons for restraint—such as respect for the minor's interest in autonomy—but only that it should be no different than if it were atheist.

Further, in no meaningful respect can State compulsion—especially in the context of a forced transfusion—be characterized as coercion. The minor and parents have no opportunity to make a morally culpable choice. In most other contexts that require the unwilling to participate, State coercion can have spiritual ramifications that requires the special concern of a court.¹³⁷ But, this is one of the few contacts that the State has with religious practice that has little, if any spiritual significance because there is no choice.

Thus, the Court only needs to establish that the minor (or her parents, as appropriate) believe in a moral god and then simply balance the minor's interest in her physical health and her interest in autonomy. In the face of a clear physical need, all the weight then gets put on the analysis of her autonomy interest. God need not be placed on the scales at all.

137. This is so because the State would be encouraging the individual to sin. For example, when the State threatens a pro-life gynecologist with termination at the state-hospital if she does not perform an abortion. Whereas coercing someone to violate a deeply held secular ethic is abhorrent in its own right, coercing someone to violate her religious tenant is even worse because it is driving her to perdition, that is, an afterlife that is eminently possible according to an agnostic State. To be clear, with respect to a moral god, when coercing, the State does not *cause* the person to violate her ethic or sin, but *facilitates* and *encourages* the person to do so.

B. Minors and an Amoral God

In this category fall legally immature minors who can, nevertheless, fully articulate a well-considered religious position in a way that satisfies the court that it is not mere parroting. Minors that fall below this threshold are considered in the following section.

Whereas the minor's interests in her own autonomy and in her physical health sufficed to answer how the State should act for the minor who claimed a moral god, here, it no longer suffices. Because the minor is claiming that the State can inflict direct harm on her soul, if not destroy it, the minor's immortal spiritual state should be a third, independent and overriding factor in the best-interest analysis.

The State must decide how the minor's clear interests in her physical health and in having capacity to make a life-or-death decision before making it weigh against her asserted interest in her immortal soul. In an agnostic State, the State does not know if God demands that people not take blood products or what the penalty would be to the individual for blood products being forced on her. To be consistent with its agnosticism, the State should, therefore, defer to the immature minor on the spiritual claim and permit her to allow herself to die; the State should allow the 8-year-old JW to die.

If instead the State compels lifesaving treatment on a minor, the State effectively says one of two things, both of which are religious claims. First, the State could be saying that no god would make such a demand; no god would hold an immature minor culpable for what was forced on her against her will. Such a claim would be consistent with the claims about God of most of the world's theists, who believe in a moral god. But, it is still a religious claim. Second, the State could claim that the soul's (immortal) status after death is of less concern or value than the value of renewed physical health and the additional opportunity to experience physical life (however fleeting).¹³⁸

Although it may seem tempting, it cannot be that the State is only saying that the odds that the universe is governed by the minor's amoral god is sufficiently small relative to the odds that it is either governed by a moral god or by no god at all, that the State is willing to risk the immature minor's eternal state in order to preserve for the minor her health and opportunity to attain maturity. This is merely a restatement of the second claim and does not escape that the State is making a religious claim.

138. See HOMER, *THE ODYSSEY* bk. 11, verse 488–91 (Richmond Lattimore trans., HarperCollins 2007) (Achilles, hero of the Greeks at Troy now dead in Hades, described his perspective on the afterlife to Odysseus: “. . . never try to console me for dying. / I would rather follow the plow as thrall to another / man, one with no land allotted him and not much to live on, / than be a king over all the perished dead. . . .”).

Because of the possibilities of medicine and the occurrence of these religious claims, the State must do one of two seemingly unconscionable things. It must either allow an 8-year-old to die from an eminently curable ailment or adopt a statement of faith about the nature of God.

Common law countries seem to have already drawn a line for these cases. Children can refuse treatment as long as the treatment would not almost assuredly be lifesaving. If the religious refusal probably will not majorly affect the life of the minor, she may do so.¹³⁹ If the minor probably will die even with the treatment, she may refuse it.¹⁴⁰ When the only thing standing between death and a healthy physical life is the minor's refusal, the State will force treatment.¹⁴¹ This is a reasonable place to draw the line, but it is founded on a religious assumption.¹⁴² In the first two situations, the balancing of the minor's religious interest weighs in favor of deference: her interest in physical health weighs against deference, and her autonomy interest weighs either way, but it all results in deference. In the final situation, the minor's religious interest is insufficient to overcome her other interests.

The State is free to adopt this nuanced religious position, just as much as it is free to reject the existence of God altogether or adopt a doctrine about his nature. But, especially in an agnostic State, it should do so plainly. It should openly state that although otherwise agnostic, the State does not believe that God, if he exists, is amoral, or that physical life is more important than any possible life after.

C. Surrogates and an Amoral God

In this final category fall those minors incapable of expressing belief for themselves. Some readers may not be convinced that there are minors

139. *E.g.*, Gillick v. West Norfolk [1985] UKHL 7, [1986] 1 AC 112 (HL) 169 (appeal taken from Eng.) (Fraser).

140. *E.g.*, A.C. v. Manitoba, [2009] S.C.R. at para. 62–63 (citing two lower Canadian court opinions that refused to allow the State to take custody of children refusing treatment when the odds the treatment would restore the children to health was low).

141. *E.g.*, *id.* at para. 57, 59.

142. The American Supreme Court drew a line between religious opposition to all war and religious opposition to only some wars because it would be too difficult to sort out cowardly draft dodgers from those with sincere religious conviction. *Gillette v. United States*, 401 U.S. 437, 454–460 (1971). Similarly, the Court drew a line between Government use of the Social Security number of a child and her father's concern that the Government's using the number would harm her child's spirit. *Bowen v. Roy*, 476 U.S. 693, 695, 698 (1986). The Court decided both on practical, worldly considerations. This Note in no way attempts to say this is wrong because it is a different issue for a different Note. *Gillette* and *Bowen* are distinguishable because the Court is not directly considering the best interest of the petitioners so a religious assumption was not required. When looking at the best interest of the child, her true best interest includes her afterlife which she believes she can expect and the State cannot deny. Deciding against her requires a religious assumption whereas deciding against the conscientious objectors and the father does not.

that fall in the previous section, in which case all legally immature minors would fall here.

Because this category couples uncommon and unpopular religious positions with surrogacy, it is particularly contentious. In a child-labor case, the American Supreme Court was quite clear: “Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.”¹⁴³

Yet, both Canada and the U.S. permit parents to make religious decisions for their child, even ones that harm them. Namely, parents may have their son circumcised.¹⁴⁴ Although this is a narrow exception to the general prohibition that parents not permit their children be harmed, it is an example of parents receiving deference to harm or risk harming their children for religious, or even secular, reasons.¹⁴⁵

As disposed of earlier, there is no justification for permitting parents who believe in a moral god from refusing on religious grounds healthful treatments accepted by broader society. The State certainly has the power to intervene and exercises it quite visibly in cases of child abuse or neglect. However, in most cases where the State takes custody of the child, it is readily apparent that the parents are failing their obligation to secure the welfare of the minor. In those cases, the minor is being physically harmed out of no other interest for the minor.

An agnostic State, by definition, does not know whether parents, when they refuse treatments because of the commands of an amoral god, are permitting physical harm for the sake of a countervailing, superior interest of the minor. Parents are always allowed to and, in fact, are required to authorize a physician to set a minor’s broken bone or to perform surgery to remove a malignant tumor. Parents permit one physical harm out of the minor’s broader interest in physical health. Likewise, parents permit the risk that minors be injured in sports in part for the sake of their leadership and team-orientation development (quasi-autonomy interests).

143. *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (finding that children may not sell religious pamphlets on street corners, even when accompanied by a parent); *id.* at 166–67 (“The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”).

144. See generally, Adam Cohen, *San Francisco’s Circumcision Ban: An Attack on Religious Freedom?*, TIME (June 13, 2011), <http://content.time.com/time/nation/article/0,8599,2077240,00.html> (presenting an overview of an attempt to ban male circumcision, even circumcisions for religious reasons).

145. Neither country proscribes piercing infant’s ears, even though the infant does not assent, piercing has no health benefit, and it risks harming the infant even beyond the immediate pain.

Both the State's and parents' interest in minors are derivative of the minor's own rights. The State is a surrogate as much as the parents. If the State is agnostic, then, as far as the State is concerned, the parents' evaluation of the minor's interest is quite possibly correct.

For many, the idea that God could demand that a child be allowed to die rather than transfused is so foreign that it must be wrong and there cannot be a justification for it.¹⁴⁶ Yet, the whole point of the inquiry is the best interest of the child, so if one accepts that it is a possible divine command, as well as the spiritual agnosticism of the State, then letting sincere religious belief decide the issue is not such an outlandish proposition.

If it remains unconscionable that a minor be allowed to die, then the State should say so, but it should say so plainly. It should not hide this religious position on the nature of God and the soul in a discussion about the minor's interest in self-expression. With a moral god, establishing the extent of the minor's decision-making capacity suffices. With an amoral god, it does not suffice and the question of the nature of God should not be ignored as if it did.

VI. CONCLUSION

This Note does not propose to answer whether the State should take the religious position or not. Rather, it has tried to encourage courts applying the best-interest test to consider a minor's religious interest seriously. Doing so may not often lead to a result different than a simple test for decision-making capacity. Nevertheless, a State that says in its constitution that it takes religious liberty seriously, should do so in practice. It must speak plainly when it favors one religious position over another. Ignoring a minor's religious interest when investigating her best interest is insufficient.

146. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("Although the practice of animal sacrifice may seem abhorrent to some, religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." (internal citations omitted)).