

NATURAL LAW, PARENTAL RIGHTS, AND THE
DEFENSE OF “LIBERAL” LIMITS
ON GOVERNMENT:
AN ANALYSIS OF THE MORTARA CASE AND
ITS CONTEMPORARY PARALLELS

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This Article explores parallels between integralists’ defense of the Mortara case (in which Pius IX removed a child from his parents’ care in order to provide him with a Catholic education) and contemporary progressive arguments for overriding the authority of parents who do not want their gender-dysphoric children to undergo social or medical gender transition. In Part I, I offer an overview of the natural law case for limited government, then in Part II I turn more specifically to a natural law defense of parental rights as an essential aspect of limited government. In the following Part, I return to the Mortara case, analyzing it in light of the principles presented in the previous sections to show why the Pope’s actions (however well-intentioned) were contrary to natural law. Finally, in Part IV I argue that the Mortara case has troubling parallels in the attempts of contemporary progressives (also presumably well-intentioned) to allow gender-dysphoric children to undergo social transition and begin hormone therapies without parental knowledge or consent, and to justify the removal of such children from the homes of loving parents who persist in opposing such interventions. I thus attempt to show, through these concrete examples related to parental rights, how natural law principles can save liberal political institutions not only from their integralist critics, but also from liberalism’s own contemporary progressive excesses.

INTRODUCTION

Edgardo Mortara, born in 1851 to Jewish parents living in the Papal States, was forcibly removed from his parents’ custody by the police

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when he was six years old.¹ Pope Pius IX had ordered the child's removal after it had been discovered that, while gravely ill as an infant, Edgardo's Catholic nanny had secretly baptized him. According to canon law, baptized children have a right to a Catholic education, and the Pope believed that it was his duty to provide such an education for young Edgardo. He ordered that Edgardo be brought to Rome and took him in as his ward, personally supervising his education and upbringing.² In his memoirs, Edgardo—who later became a priest—praised the Pope's actions and expressed his gratitude for everything the Pope had done for him.³

The case generated significant public outcry at the time, bringing “the opprobrium of the world upon Pius IX.”⁴ That controversy has resurfaced in recent years with the publication of Mortara's memoirs, and particularly with the publication of an article by Romanus Cessario in *First Things* defending the Pope's actions. Cessario argues that the Pope was right to say “*Non possumus*” (“We cannot”) in response to worldwide public demands that Edgardo be returned to his parents. His argument, in brief, is that “the law of the Church and the laws of the Papal States stipulated that a person legitimately baptized receive a Catholic upbringing.”⁵ Cessario claims that these laws are “not arbitrary,” but rather follow from the indelible nature of baptism and the duty of the Church to educate Catholics.⁶ Further, given that Pius IX had temporal authority over the Papal States, Cessario argues that it was his duty to “uphold the civil law,” including the “not unreasonable” law requiring that baptized children receive a Catholic education.⁷

The publication of Cessario's article was an important moment in the development of Catholic integralism (defined below), stirring up significant controversy even outside Catholic circles, and attracting

1 The facts of the case are publicly available in numerous articles, mostly book reviews and commentaries on Mortara's recently published memoirs. See VITTORIO MESSORI, KIDNAPPED BY THE VATICAN? THE UNPUBLISHED MEMOIRS OF EDGARDO MORTARA (Michael J. Miller trans., Ignatius Press 2017) (2005); Romanus Cessario, *Non Possumus*, FIRST THINGS, Feb. 2018, at 55; David I. Kertzer, *The Doctored 'Memoir' of a Jewish Boy Kidnapped by the Vatican*, THE ATLANTIC (Apr. 15, 2018), <https://www.theatlantic.com/international/archive/2018/04/edgardo-mortara-doctored-memoir/554948/> [<https://perma.cc/TF7T-229S>]; Ronald J. Rychlak, *The Controversy over Edgardo Mortara*, CATH. LEAGUE (May 25, 2018), <https://www.catholicleague.org/the-controversy-over-edgardo-mortara/> [<https://perma.cc/Z36V-NKST>].

2 See Rychlak, *supra* note 1.

3 *Id.*

4 Cessario, *supra* note 1, at 55.

5 *Id.*

6 *Id.* at 56.

7 *Id.*

public attention to the movement.⁸ While the article focuses on a particular case, the arguments used to justify the Pope’s actions in the case are representative of the movement’s key tenets.⁹ The article presumes, for instance, that it is legitimate for the Catholic Church to use coercive civil power to achieve spiritual ends—in this case, to forcibly remove Edgardo from his parents’ care so that he can be given a Catholic upbringing—and that it is unproblematic for ecclesiastical and civil authority to be united (as it was in the Papal States at the time of the Mortara case). Relatedly, the article claims that “putative civil liberties”—including the rights of parents to direct the care, education, and upbringing of their children—do not “trump the requirements of faith,” and accuses those who disagree of failing to “prize the gifts of supernatural grace that ennoble human nature.”¹⁰ The implied argument seems to be that the priority of spiritual over temporal goods translates into a justification for the use of coercive civil power to achieve spiritual goods.

We see these claims highlighted in Edmund Waldstein’s “Integralism in Three Sentences”:

Catholic Integralism is a tradition of thought that, rejecting the liberal separation of politics from concern with the end of human life,

8 See, e.g., Harold Brackman & Yitzchok Adlerstein, *Edgardo Mortara’s Mother’s Tears Should Not Be Forgotten*, JERUSALEM POST (Mar. 20, 2018, 9:40 PM), <https://www.jpost.com/opinion/edgardo-mortaras-mothers-tears-should-not-be-forgotten-546610/> [https://perma.cc/8GGB-WPNZ]; Tara Isabella Burton, *Why a 150-Year-Old Kidnapping Case Has Catholics Arguing Today*, VOX (Jan. 26, 2018, 5:50 PM), <https://www.vox.com/identities/2018/1/26/16933192/edgardo-mortara-kidnapping-case-catholics/> [https://perma.cc/7VWB-LZ2D]; Charles J. Chaput, *The Mortara Affair, Redux*, JEWISH REV. BOOKS (Jan. 29, 2018), <https://jewishreviewofbooks.com/articles/2979/mortara-affair-redux/> [https://perma.cc/XL54-Z9EQ]; Rod Dreher, *The Edgardo Mortara Case*, AM. CONSERVATIVE (Jan. 9, 2018, 10:42 PM), <https://www.theamericanconservative.com/the-edgardo-mortara-case/> [https://perma.cc/HW4N-92HN]; Kertzer, *supra* note 1; Robert T. Miller, *The Mortara Case and the Limits of State Power: First Things Should Disavow Fr. Cessario’s Defense of Pius IX in the Mortara Case*, PUB. DISCOURSE (Jan. 11, 2018), <https://www.thepublicdiscourse.com/2018/01/20868/> [https://perma.cc/WTF4-4KDU]; Anna Momigliano, *Why Some Catholics Defend the Kidnapping of a Jewish Boy*, THE ATLANTIC (Jan. 24, 2018), <https://www.theatlantic.com/international/archive/2018/01/some-catholics-are-defending-the-kidnapping-of-a-jewish-boy/551240/> [https://perma.cc/5KJJ-74JE]; Aiden Pink, *Catholic Magazine Justifies Kidnapping, Converting Jewish Baby*, FORWARD (Jan. 11, 2018), <https://forward.com/fast-forward/391967/catholic-magazine-justifies-kidnapping-converting-jewish-baby/> [https://perma.cc/D5S3-N8NS]; *Simon Wiesenthal Center Condemns Justification of Kidnapping of Jewish Child That Is the Subject of a Steven Spielberg Film*, SIMON WIESENTHAL CTR. (Jan. 1, 2018), <https://www.wiesenthal.com/about/news/simon-wiesenthal-center-91.html> [https://perma.cc/WZ5K-QZ3N].

9 Unsurprisingly, therefore, an article in the integralist journal *The Josias* defends Cessario against his critics. Frater Asinus, *Debemus: In Defense of Fr. Cessario, Bl. Pius IX, and the Catholic Faith*, JOSIAS (Feb. 7, 2018), <https://thejosias.com/2018/02/07/debemus-in-defense-of-fr-cessario-bl-pius-ix-and-the-catholic-faith/> [https://perma.cc/2ZFE-Q8EY].

10 Cessario, *supra* note 1, at 58.

holds that political rule must order man to his final goal. Since, however, man has both a temporal and an eternal end, integralism holds that there are two powers that rule him: a temporal power and a spiritual power. And since man's temporal end is subordinated to his eternal end, the temporal power must be subordinated to the spiritual power.¹¹

More broadly, as Patrick Deneen puts it, integralism “rejects the view that Catholicism and liberal democracy are fundamentally compatible.”¹² Deneen posits that they are incompatible because “liberalism is premised on a contrary view of human nature (and even a competing theology) to Catholicism,” an individualist view in which “human beings are essentially separate, sovereign selves who will cooperate based upon grounds of utility,” by contrast with the Catholic view of human beings as “by nature relational, social and political creatures.”¹³ Integralism thus “tends to view America as a deeply flawed project, and fears that the anthropological falsehood at the heart of the American founding is leading inexorably to civilizational catastrophe.”¹⁴ These claims are further developed in Deneen's influential book *Why Liberalism Failed*,¹⁵ read and recommended even by former President Barack Obama.¹⁶

At the same time, Cessario's article and the broader integralist claims that it presupposes have been sharply criticized by many Catholics,¹⁷ including Catholics working within the so-called “new natural law” (NNL) tradition,¹⁸ the key moral and political principles of which are explained and defended in John Finnis's seminal work, *Natural Law and Natural Rights*. According to Finnis and other NNL thinkers,

11 Edmund Waldstein, *Integralism in Three Sentences*, JOSIAS (Oct. 17, 2016), <https://thejosias.com/2016/10/17/integralism-in-three-sentences/> [https://perma.cc/X8B6-KGMH].

12 Patrick J. Deneen, *A Catholic Showdown Worth Watching*, AM. CONSERVATIVE (Feb. 6, 2014, 9:15 AM), <https://www.theamericanconservative.com/a-catholic-showdown-worth-watching/> [https://perma.cc/L5NG-RCRG].

13 *Id.*

14 *Id.*

15 PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018).

16 Clare Foran, *Here's What's on Barack Obama's Reading List*, CNN (June 16, 2018, 4:03 PM), <https://www.cnn.com/2018/06/16/politics/barack-obama-reading-list-mitch-landrieu/> [https://perma.cc/CCF5-V8GD].

17 See, e.g., Chaput, *supra* note 8; Dreher, *supra* note 8; Nathaniel Peters, *Grace Builds upon and Doesn't Destroy Nature: On First Things, Baptism, and the Natural Family*, PUB. DISCOURSE (Jan. 15, 2018), <https://www.thepublicdiscourse.com/2018/01/20884/> [https://perma.cc/FF4H-DULA].

18 See, e.g., Robert P. George, *You Can't Take a Child from His Parents, Even if You Think You're Saving His Soul*, CATH. HERALD (July 30, 2021, 10:00 PM), <https://catholicherald.co.uk/you-cant-take-a-child-from-his-parents-even-if-you-think-youre-saving-his-soul/> [https://perma.cc/8FNV-KL22].

such as Robert George, Patrick Lee, Christopher Tollefsen, Ryan Anderson, and others (including myself), while Catholicism and the Aristotelian-Thomistic natural law tradition more generally are indeed incompatible with liberalism understood as a *philosophy*, they are not incompatible with what we commonly refer to as “liberal” political institutions.¹⁹ On the contrary, NNL theorists argue that such institutions—such as representative government, constitutionalism, the rule of law, the protection of civil liberties, and the separation of church and state (which I will refer to collectively as “limited government”)—can actually be better defended on natural law grounds than on the grounds of liberal philosophy.²⁰

It should be acknowledged, however, that the growing popularity of integralism among young Catholic intellectuals is in large part a reaction to what they see as the increasingly intolerant and totalitarian character of contemporary progressive forms of liberalism.²¹ Particularly on issues related to sexuality and identity, contemporary progressivism is not shy about using government coercion to compel affirmation of its orthodoxies,²² not least by indoctrinating children in its teachings against parents’ wishes, even to the point of taking children away from parents whose childrearing decisions are contrary to the progressive creed.²³ Particularly egregious in this regard—and strik-

19 See Melissa Moschella, *Natural Law, the Common Good, and Limited Government: Friends, Not Foes*, PUB. DISCOURSE (Aug. 10, 2022), <https://www.thepublicdiscourse.com/2022/08/83850/> [<https://perma.cc/FG2U-J22R>].

20 See, e.g., Ryan T. Anderson & Robert P. George, *The Baby and the Bathwater*, NAT’L AFFS., Fall 2019, at 172; Moschella, *supra* note 19.

21 See, e.g., Adrian Vermeule, *A Christian Strategy*, FIRST THINGS, Nov. 2017, at 41, 41 (“The problem is the relentless aggression of liberalism, driven by an internal mechanism that causes ever more radical demands for political conformism, particularly targeting the Church.”); Sohrab Ahmari, *After the Liberalism Debates*, AM. CONSERVATIVE (Nov. 2, 2021, 12:01 AM), <https://www.theamericanconservative.com/after-the-liberalism-debates/> [<https://perma.cc/6978-FHTB>] (“There’s no hankering for peace once you’ve faced the sharp end of liberals’ efforts to neutralize threats to their regime On the personal front, meanwhile, liberalism’s aggressions against one’s true loves—in my case, the Catholic Church, my children’s innocence—have a way of focusing the mind and heart.”).

22 See, e.g., Gerard V. Bradley, *Sexual Identity Politics and Religious Freedom in a Secular Age*, PUB. DISCOURSE (Apr. 28, 2019), <https://www.thepublicdiscourse.com/2019/04/50836/> [<https://perma.cc/3D6X-TURN>].

23 See, e.g., Josh Boswell, *EXCLUSIVE: ‘I Knew the Hormones Wouldn’t Work. Why Did They Play with Her Life?’ Bereaved Mom Blames LA County for Her Teenage Daughter’s Suicide, Claiming School Pushed Her to Transition to a Male Instead of Properly Treating Her Depression*, DAILY MAIL (Mar. 30, 2022, 9:25 AM), <https://www.dailymail.co.uk/news/article-10612285/California-mom-claims-LA-school-encouraged-daughter-transition-blame-suicide.html> [<https://perma.cc/ELD3-ZWZM>]; Melissa Moschella, *Legal Kidnapping*, NAT’L REV. (Feb. 28, 2014, 9:00 AM), <https://www.nationalreview.com/2014/02/legal-kidnapping-melissa-moschella/> [<https://perma.cc/NG9J-UP3K>].

ingly similar to the Mortara case—are efforts to promote gender-dysphoric children’s gender transition and provide them with puberty-blocking or cross-gender hormones without parents’ knowledge or consent, and to remove such children from parents’ custody if they persist in opposing those measures.²⁴ For in both cases, the separation of children from parents is justified by appeals to the child’s fundamental rights: in the Mortara case, the fundamental right of the baptized child to a Christian education (with eternal life hanging in the balance); and in the case of gender-dysphoric children, the fundamental right to identity affirmation (and ultimately the preservation of physical life via suicide prevention).

In this Article, I first offer an overview of the natural law case for limited government, then turn more specifically to a natural law defense of parental rights as an essential aspect of limited government. In the next section, I return to the Mortara case, analyzing it in light of the principles presented in the previous sections to show why the Pope’s actions in the case (however well-intentioned) were contrary to natural law. Finally, I argue that the Mortara case has troubling parallels in the attempts of contemporary progressives (also presumably well-intentioned) to allow gender-dysphoric children to undergo social transition and begin hormone therapies without parental knowledge or consent, and to justify the removal of such children from the homes of loving parents who persist in opposing such interventions. I thus attempt to show, through these concrete examples related to parental rights, how natural law principles can save liberal political institutions not only from their integralist critics, but also from liberalism’s own contemporary progressive excesses.

24 See, e.g., Roy Abernathy, *Seeking Remedies for LGBTQ Children from Destructive Parental Authority in the Era of Religious Freedom*, 26 WASH. & LEE J.C.R. & SOC. JUST. 625 (2020); Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 DUKE L.J. 75, 135–42 (2021); Samuel Dubin, Megan Lane, Shane Morrison, Asa Radix, Uri Belkind, Christian Vercler & David Inwards-Breland, *Medically Assisted Gender Affirmation: When Children and Parents Disagree*, 46 J. MED. ETHICS 295 (2019); Patrick D. Murphree, *Schools in the Middle: Resolving Schools’ Conflicting Duties to Transgender Students and Their Parents*, 86 UMKC L. REV. 405 (2017); Maura Priest, *Transgender Children and the Right to Transition: Medical Ethics When Parents Mean Well but Cause Harm*, AM. J. BIOETHICS, no. 2, Feb. 2019, at 45; Boswell, *supra* note 23.

I. THE NATURAL LAW CASE FOR LIMITED GOVERNMENT

According to NNL theory, morality is ultimately about respecting and promoting the integral flourishing of human persons, both as individuals and in community.²⁵ NNL identifies basic dimensions of human flourishing, or basic human goods, each of which can provide a sufficient reason for action. These goods (or, more precisely, categories of good) include life and health, knowledge and appreciation of beauty, and excellence in work and play, as well as various forms of interpersonal and intrapersonal harmony: marriage (conjugal union and the family relations that flow from it), friendship and sociability (interpersonal harmony), integrity and authenticity (harmony within oneself and between one’s judgments and actions), and religion (harmony with God).²⁶ To say that these goods can each provide a sufficient reason for action is to say that what makes an action intelligible is that it is ultimately aimed at one or more of these goods. According to NNL, we come to recognize these goods as ultimate reasons for action through reflection on our acts and our judgments of others’ acts.²⁷ Actions that have an obvious connection to one or more basic goods—such as reading a book or calling a friend—are immediately intelligible to us, while actions that do not—such as eating dirt or counting blades of grass all day—strike us as unintelligible and perhaps even pathological.

NNL theorists argue that the standard for morally upright action is respect for the human good in its integrity.²⁸ In other words, morally upright actions are not merely intelligible, aiming at one good or other, but are rather *fully reasonable*, respecting the integral directive-ness of practical reason, which tells us to preserve and promote *all* of the basic goods, for *all* people. This moral standard can be articulated as the requirement that our choices and actions be in line with a will toward integral human fulfillment—i.e., the fulfillment of all human beings, as individuals and in community, with respect to all of the basic goods.

25 The account presented in the following paragraphs is a synthesis of the work of various new natural law theorists, though it should be noted that the term “new natural law theory” was coined by critics of the theory who saw it as a departure from the work of Thomas Aquinas. See RUSSELL HITTINGER, *A CRITIQUE OF THE NEW NATURAL LAW THEORY* (1987). Nonetheless, because the label is now used by proponents and critics alike, I use it here for the sake of convenience. Influential articulations of the theory can be found in JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 59–133, 442–57 (2d ed. 2011), and Germain Grisez, Joseph Boyle & John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 *AM. J. JURIS.* 99 (1987).

26 See FINNIS, *supra* note 25, at 85–90.

27 See, e.g., *id.* at 85–86.

28 See, e.g., *id.* at 450–452.

The implications of this master moral principle can be specified in various intermediate moral principles. One of these is the principle forbidding intentional damage or destruction of basic human goods, which is the basis for absolute moral prohibitions forbidding actions such as murder, rape, or torture. Other principles include the Golden Rule—which requires fairness in determining *whose* goods to prioritize when the goods of various individuals or groups conflict—as well as a principle forbidding arbitrary prioritization of one good over another, which requires that we establish a reasonable order of priorities among goods on the basis of our vocational commitments and other obligations.

These basic principles and norms of natural law may seem far removed from questions about the proper ordering of political society, but in fact they provide the foundations for answering such questions. Most fundamentally, the moral imperative to act in a way that is compatible with integral human fulfillment—combined with the obvious fact that human beings can only flourish in community, and that subpolitical communities like the family and civic associations are not self-sufficient to achieve their ends and meet the full range of human needs—is the basic justification for political community and corresponding political authority.

Subpolitical communities lack self-sufficiency because they require mutual coordination, and thus an overarching coordinating authority, to justly and efficiently address four types of needs: (1) provision of public goods and services, such as utilities and infrastructure; (2) defense against external threats; (3) protection from internal threats and administration of justice; and (4) providing for the community's needy and dependent members who have no else to care for them.²⁹ I will call all these needs “coordination problems” for the sake of convenience, but this term should be understood in the broadest sense to encompass all of the areas in which subpolitical communities require a coordinating authority in order to achieve their ends and facilitate human flourishing.

Because an overarching—i.e., political—authority is required to solve these coordination problems in the service of the common good, the establishment of a political community with corresponding political authority is a requirement of practical reason.³⁰ As already noted, the fundamental moral requirement of natural law is to respect and promote integral human fulfillment, which is synonymous with the concept of the universal common good (the all-around flourishing of

29 See Christopher Tollefsen, *Pure Perfectionism and the Limits of Paternalism*, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 204, 208–09 (John Keown & Robert P. George eds., 2013).

30 See *id.* at 208–09.

the whole human community). Usually the most effective and direct way to promote the universal common good is to promote the common good of the particular communities to which one belongs (though always in a way that respects and is alive to the requirements of the universal common good)—beginning with one’s family, church, workplace, local community, etc., and extending to the political community which is necessary for these subpolitical communities to survive and thrive.³¹

The specifically political common good³²—the purpose of political community—is thus limited and subsidiary,³³ corresponding to the four areas in which subpolitical communities lack self-sufficiency. More generally, the political common good can be defined as the conditions that facilitate the pursuit of flourishing by the individuals and subpolitical communities that compose it. The purpose of (and justification for) political authority is to serve the political common good by justly and efficiently resolving the coordination problems mentioned above.

Because political authority has a limited purpose and justification, it also has a correspondingly limited scope. The limits on political authority can be understood as requirements of justice. First of all, political authority must be exercised in accord with the principles of natural law, for no law contrary to natural law can actually promote the common good. This requirement serves as the most basic substantive limitation on government. As Aquinas argues, all positive laws ultimately have their moral force from the natural law, either directly (such as laws forbidding rape and murder), or through the *determinatio* (“determination” or “specification”) of the legislator (such as laws establishing a system of taxation to pool resources for public services).³⁴

31 See *id.*

32 I refer to the specifically political common good—which sets the purpose and limits of state authority—to distinguish it from what Finnis calls the “all-inclusive common good” of the political community which consists in the overall flourishing of its members. JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 235 (1998).

33 New natural law theorists often refer to the political common good as instrumental, but this term is confusing, for it refers specifically to “the instrumental character of state governance” for the four ends listed above. John Finnis, *Reflections and Responses*, in *REASON, MORALITY, AND LAW*, *supra* note 29, at 459, 518. However, Finnis recognizes that the political community is not merely instrumental in certain respects, for it instantiates the basic human good of friendship both insofar as political governance requires and involves a certain degree of civic friendship, and insofar as the restoration of justice through state judicial organs can also be seen as an aspect of the good of friendship. See *id.* at 514.

34 See THOMAS AQUINAS, *SUMMA THEOLOGIAE I-II Q. 95 art. 2* (Fathers of the Eng. Dominican Province trans., 2d rev. ed. 1920) (c. 1270), <https://www.newadvent.org/summa/> [<https://perma.cc/3Z96-KPPZ>].

Importantly, however, Aquinas does not think that *all* precepts of the natural law should be enforced by political authorities, but rather that governments should limit themselves to prohibiting “only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.”³⁵ Moreover, Tollefsen argues that political authority goes beyond its sphere of competence when it is exercised to secure goods beyond the limited ends that justify it (that is, resolution of the coordination problems outlined above).³⁶ For this reason, purely paternalistic legislation—legislation aimed to promote the private good of an individual by, for instance, forbidding a purely private vice—is, in Tollefsen’s view, unjust in principle.³⁷

The limited purpose of political authority also implies that the use of political authority for primarily *spiritual* ends is out of bounds. This point will be of particular relevance when considering the Mortara case in the following section. The Second Vatican Council’s Declaration on Religious Liberty (*Dignitatis Humanae*), puts the argument as follows:

The religious acts whereby men, in private and in public and out of a sense of personal conviction, direct their lives to God transcend by their very nature the order of terrestrial and temporal affairs. Government therefore ought indeed to take account of the religious life of the citizenry and show it favor, since the function of government is to make provision for the common welfare. However, it would clearly transgress the limits set to its power, were it to presume to command or inhibit acts that are religious.³⁸

Finnis argues that this position reflects Aquinas’s view of the essential distinction between temporal (political) and spiritual (ecclesial) authority, with the former existing for the purpose of promoting earthly peace and justice within its territory, and the latter existing for the purpose of helping all human persons achieve eternal beatitude.³⁹ This distinction implies certain limits on political authority. As Finnis states, “Aquinas himself is very clear (at the level of principle) that the coercive jurisdiction of temporal political authority extends only to external and interpersonal acts—acts which implicate the community’s

35 *Id.* at I-II Q. 96 art. 2.

36 *See* Tollefsen, *supra* note 29, at 217.

37 *See id.*

38 POPE PAUL VI, *DIGNITATIS HUMANAЕ* para. 3 (1965), *reprinted in* THE SIXTEEN DOCUMENTS OF VATICAN II 491, 494 (Marianne Lorraine Trouvé ed., 1999).

39 *See* John Finnis, *Religion and State: Some Main Issues and Sources*, 51 *AM. J. JURIS.* 107, 120 (2006) (citing FINNIS, *supra* note 32, at 321–22).

peace and justice."⁴⁰ This is the natural law basis for the separation of church and state, and the limitation of political authority to the promotion of earthly peace and justice (which can be considered a summary of the four purposes of political community outlined above).

Other limitations on government flow from the recognition that freedom is essential for the pursuit of a variety of human goods. On this basis, the natural law view can provide a robust defense of civil liberties, such as freedom of speech, association, and religion, as well as a defense of economic freedom and private property. Freedom of speech makes possible the free exchange of ideas that is necessary for the attainment of knowledge. Freedom of association respects the basic good of friendship and recognizes that—as a communion of wills—genuine human communities can only be formed freely, and require a certain degree of privacy to facilitate the sharing of personal information and the building up of trust. Religious freedom can also be defended with reference to the special, architectonic role that the good of religion plays in the lives of those who are fully aware of its demands, together with the recognition that—like friendship—this good can only be participated in freely, for coerced religious acts do not instantiate the good of religion at all, but are actually contrary to human flourishing with respect to both religion and authenticity.⁴¹ With regard to private property, a natural law account recognizes that—while property rights are not absolute, for the earth's resources are fundamentally for the good of all⁴²—private ownership is instrumentally necessary not only for the efficient use and care of material resources,⁴³ but also for the self-constitution of individuals, and thus for what Finnis refers to as the "good of personal autonomy in community."⁴⁴

40 *Id.*; see also FINNIS, *supra* note 32, at 222–45.

41 These arguments have been developed at length elsewhere. See, e.g., ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1993); Melissa Moschella, *Beyond Equal Liberty: Religion as a Distinct Human Good and the Implications for Religious Freedom*, 32 *J.L. & RELIGION* 123, 140 (2017).

42 FINNIS, *supra* note 25, at 172 (“[N]atural resources are essentially common stock . . .”).

43 See *id.* at 170; AQUINAS, *supra* note 34, at II-II Q. 66 art. 2.

44 FINNIS, *supra* note 25, at 169. Finnis summarizes the argument for private ownership and its inherent limits as follows:

The point, in justice, of private property is to give owners first use and enjoyment of their thing and its fruits (including rents and profits), for it is this availability that enhances their reasonable autonomy and stimulates their productivity and care. But beyond a reasonable measure and degree of such use for them and their dependants' or co-owners' needs, they each hold the remainder of their property and its fruits as part (in justice if not in law) of the common stock. . . . From this point, owners have, in justice, duties not altogether unlike those of a trustee in English law.

Another substantive requirement of justice limiting the scope of political authority is sometimes referred to as the principle of subsidiarity, which indicates that larger, overarching communities like the political community exist to *assist* the smaller, more basic communities like the family that compose them, and that in providing this assistance the overarching community has an obligation to respect the self-governance of these more basic communities.⁴⁵ This principle flows from the very nature and purpose of political authority, as noted above, as well as from respect for individuals' capacity for self-constitution, and thus for the basic goods of integrity and authenticity, as well as the basic goods of friendship, sociability, and marriage.⁴⁶ The principle protects these goods by ensuring that subpolitical communities are not swallowed up by the political community, but rather that their proper spheres of competence and authority are protected (thus also enabling them to make their proper contribution to the overall common good of the political community).⁴⁷ Subsidiarity is also an extension of the natural law principle, mentioned above, requiring that individuals and communities avoid arbitrary prioritization of goods by establishing priorities in line with reasonably chosen vocational commitments. For to follow this requirement, individuals and groups need a certain sphere of freedom from government intrusion within which they can direct their own affairs. This principle will be of particular relevance when considering parental rights in the next Part.

There are also important procedural requirements of justice that limit political authority, particularly the requirement that government exercise its authority through the rule of law, which applies not only to the characteristics of particular laws, but to the system of government

Id. at 173.

45 This principle has been consistently articulated in the social teaching of the Catholic Church. See, e.g., POPE JOHN PAUL II, CENTESIMUS ANNUS para. 48 (1991), reprinted in THE ENCYCLICALS OF JOHN PAUL II 588, 639 (J. Michael Miller ed., 1996) (“[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.”).

46 FINNIS, *supra* note 25, at 168–69.

47 Russell Hittinger has argued that the principle of subsidiarity is best understood as circular, not only limiting “higher” communities, but also requiring that the “lower” communities support (provide *subsidiium* to) the larger whole, promoting the overall common good “according to the social competencies of each.” Russell Hittinger, *Social Pluralism and the Principle of Subsidiarity*, AM. AFFS. (Dec. 20, 2021), <https://americanaffairsjournal.org/2021/12/social-pluralism-and-the-principle-of-subsidiarity/> [https://perma.cc/3SXX-9WC2].

as a whole.⁴⁸ It requires, in other words, that government itself be governed by a set of laws, a *constitution*, that identifies the scope and limits of power for each branch of government, as well as the requisite procedures for legislation and other governmental acts. As Finnis states at the beginning of *Natural Law and Natural Rights*, “There are human goods that can be secured only through the institutions of human law, and requirements of practical reasonableness that only those institutions can satisfy.”⁴⁹ While Finnis’s entire book is basically an elaboration on this claim, the key arguments for the importance of the rule of law can be summarized as follows. First, the clarity, stability, and predictability of the rule of law make it possible for individuals and communities to carry out long-term projects in pursuit of various goods without fear that the rules and regulations affecting their pursuits will change frequently or without warning. Relatedly, the stability and predictability of laws are conditions for the exercise of human agency, and thus show respect for that agency.⁵⁰ Finally, by requiring that rulers themselves follow the law, the rule of law embodies a spirit of fairness, respect, and reciprocity between ruler and ruled. The rule of law can thus be seen as a kind of institutional embodiment of the Golden Rule.

The above overview should make it clear that there are important similarities between a natural law account of politics and a liberal account, for both support limited government, the rule of law, respect for civil liberties, separation of church and state, and respect for a private sphere of freedom from government intrusion. Yet it should also be clear that the natural law account’s *justification* of these limits on government power are quite different from those typically offered by liberal thinkers. While liberalism encompasses a variety of perspectives, liberal justifications of individual freedom and related arguments against purely paternalistic laws are often based on claims that the state should not govern with a view toward any particular substantive account of the human good, thus eschewing perfectionism.⁵¹ By contrast, the natural law account outlined here defends liberty and limited government on perfectionist grounds—as instrumental to human

48 Lon Fuller has articulated eight basic characteristics of the rule of the law. Laws are: general, public, prospective, clear, coherent with each other, possible to follow, relatively stable over time, and binding on both ruler and ruled. See LON L. FULLER, *THE MORALITY OF LAW* 33–94 (rev. ed. 1969).

49 FINNIS, *supra* note 25, at 3.

50 See Robert P. George, *Reason, Freedom, and the Rule of Law: Their Significance in the Natural Law Tradition*, 46 AM. J. JURIS. 249 (2001); Melissa Moschella, *What a Pandemic Reveals About the Rule of Law*, RENOVATIO (Oct. 17, 2022), <https://renovatio.zaytuna.edu/article/what-a-pandemic-reveals-about-the-rule-of-law> [<https://perma.cc/SD3J-QRKH>].

51 See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 21–22 (1977); JOHN RAWLS, *POLITICAL LIBERALISM*, at xvi–xvii (1993). Joseph Raz, however, argues for a perfectionist liberal account of politics. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 157–62 (1986).

flourishing—rather than as a requirement of government neutrality about the good.

In addition, the natural law account differs from the liberal account in that it justifies political authority as a requirement of practical reason, due to its instrumental necessity for the resolution of coordination problems in view of the common good. Thus, the natural law account recognizes that human beings are political by nature, meaning that the formation of political communities is natural to human beings because it is necessary for human flourishing in all of its dimensions. Liberal justifications of political authority, on the other hand, tend to view political community and political authority as in some sense artificial (absent from the “state of nature”), and therefore argue that it can only be justified with reference to actual or hypothetical consent.⁵² The natural law account does recognize that—where authoritative rules for the location of authority do not yet exist—the notion of consent may provide a helpful “rule of thumb” indicating that “someone’s stipulation has authority when practically reasonable subjects, with the common good in view, would think they *ought* to consent to it.”⁵³ Ultimately, however, on the natural law view the source of political authority’s legitimacy is not consent but rather the ability of that authority to justly and efficiently resolve coordination problems for the common good.⁵⁴

II. PARENTAL RIGHTS AS ESSENTIAL TO LIMITED GOVERNMENT

As noted above, one of the fundamental aspects of limited government is respect for the principle of subsidiarity, according to which the government should respect the self-governance of subpolitical communities and refrain from intruding coercively into their internal affairs (absent compelling justification). The most fundamental of these subpolitical communities is the family, which the natural law view sees as the basic unit of society (another contrast with liberalism, which tends to see the basic unit of society as the individual adult).⁵⁵ The principle of subsidiarity thus requires that the government respect the family’s sphere of authority, central to which are the custody, care, and education of children.

52 See, e.g., JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 4, 89 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690); RAWLS, *supra* note 51, at 15–16.

53 FINNIS, *supra* note 25, at 251.

54 *Id.* at 250–51.

55 See Melissa Moschella, *Social Contract Theory and Moral Agency: Understanding the Roots of an Uncaring Society*, in CARE PROFESSIONS AND GLOBALIZATION: THEORETICAL AND PRACTICAL PERSPECTIVES 87, 87 (Ana Marta González & Craig Iffland eds., 2014).

Thomas Aquinas offers a powerful metaphor for the family's sphere of authority when discussing the question of whether Jewish children should be baptized against the will of their parents—a topic quite relevant to the Mortara case, which I will return to in the next Part. Aquinas answers this question with a clear “no,” arguing that just as a child prior to birth is “enfolded within its mother's womb,” after birth “it is enfolded in the care of its parents, which is like a spiritual womb.”⁵⁶ Intruding into this “spiritual womb”—by, for instance, taking the child “away from its parents' custody,” or doing anything to the child “against its parents' wish”—is “contrary to natural justice.”⁵⁷ The “spiritual womb” is thus a metaphor for the sphere of parental decision-making authority over children, a sphere within which parents make vicarious judgments about what is in the child's best interests on behalf of the child, until the child reaches maturity and becomes capable of rational self-governance.⁵⁸ A crucial part of parents' task as the child grows within the spiritual womb of the family is precisely to educate the child so that he can eventually make reasonable decisions for himself, and thus be “born” into the larger community as a relatively independent and responsible agent.⁵⁹ In addition to exercising this paternalistic, substitutional authority over the child, parents also exercise coordinating authority over the family community with a view toward the common good of the family as a whole. Thus, parental authority is not only about making decisions with a view toward the best interests of a particular child, but about making decisions that fairly balance the needs and interests of all members of the family community, including themselves.

I have argued elsewhere that the uniquely intimate relationship between parents and children—parents are (in the focal case) the biological cause of their children's very existence and identity at the biological level—generates special and, in part, nontransferable parental obligations.⁶⁰ The aspect of parental obligations that is absolutely nontransferable is the obligation that parents have to love their children, with love understood not as an emotion, but as a high-priority commitment to the well-being of the child. Even though others can love and care for children—and perhaps do so better than the biological par-

56 AQUINAS, *supra* note 34, at II-II Q. 10 art. 12.

57 *Id.*

58 See Gregory Brown, *The Spiritual Womb: Thomas Aquinas on Parent and Child*, PUB. DISCOURSE (June 22, 2017), <https://www.thepublicdiscourse.com/2017/06/19319/> [<https://perma.cc/FG3L-QNNG>].

59 See MELISSA MOSCHELLA, TO WHOM DO CHILDREN BELONG?: PARENTAL RIGHTS, CIVIC EDUCATION AND CHILDREN'S AUTONOMY 25–45, 61–68 (2016).

60 *Id.* at 34–37.

ents—the *specific* love of those who brought one into being is irreplaceable precisely because it is based on a unique, personal bond. Analogously, if a woman’s husband dies, she may choose to remarry, but her new husband’s love cannot *replace* the love of her deceased husband, because love is not fungible. You can miss—and be harmed by—the lack of a specific person’s love, even if you are well loved by others. So it is with the love of biological parents for their children, as attested to by empirical work on adopted and donor-conceived children.⁶¹

Usually, the only way for biological parents to love their children adequately is to raise those children themselves, for failure to do so will later be reasonably interpreted by children as reflecting rejection or abandonment, except when biological parents are incompetent and there are serious child-centered reasons that favor placing the child for adoption, thus enabling the child to later understand the adoption plan as an act of love rather than abandonment.⁶² Fulfilling the natural obligation to love and raise one’s children requires making decisions on their behalf, because children are not capable of making reasonable decisions for themselves. Thus, parental child-rearing authority is the flipside of parents’ natural obligation to love and raise their children, which flows (in the focal case) from the very nature of the biological parent-child relationship. This argument defending the natural child-rearing obligations of biological parents supports Aquinas’s “spiritual womb” metaphor for parents’ sphere of authority to make decisions regarding the care and upbringing of their children.

Of course, adoptive parents have the same duties and rights as biological parents, but these duties and rights can only be identified by looking at the focal case of biological parenthood.⁶³ For although adoptive parenthood is true parenthood and nothing I say here should be taken to denigrate it,⁶⁴ adoptive parenthood is dependent on biological parenthood, both in the sense that without biological

61 See, e.g., ELIZABETH MARQUARDT, NORVAL D. GLENN & KAREN CLARK, COMM’N ON PARENTHOOD’S FUTURE, MY DADDY’S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION 21 (2010); DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 17 (2012); Rosanna Hertz, Margaret K. Nelson & Wendy Kramer, *Donor Conceived Offspring Conceive of the Donor: The Relevance of Age, Awareness, and Family Form*, 86 SOC. SCI. & MED. 52, 63 (2013); Michele Merritt, *Rediscovering Latent Trauma: An Adopted Adult’s Perspective*, 130 CHILD ABUSE & NEGLECT 105445 (2022); A.J. Turner & A. Coyle, *What Does It Mean to Be a Donor Offspring? The Identity Experiences of Adults Conceived by Donor Insemination and the Implications for Counselling and Therapy*, 15 HUM. REPROD. 2041, 2046–47 (2000).

62 See MOSCHELLA, *supra* note 59, at 38–45.

63 For more on adoptive parenthood, see *id.* at 42–45.

64 Indeed, my husband and I are seeking to adopt, and we have many good friends with adopted children.

parenthood there would be no children to adopt, and also in the sense that adoptive parents make a commitment to take on the responsibilities that biological parents have by nature.

The spiritual-womb metaphor suggests an interesting analogy between the family and a sovereign nation. While there are obviously many differences between the two, both are communities with authority to govern their internal affairs, and coercive external intervention is justified only in exceptional cases. Generally, coercive intervention by the international community into the internal affairs of a sovereign nation is justified only when necessary to stop grave human-rights abuses, or for the preservation of international peace and order.⁶⁵ Judging the decisions of a nation's government to be suboptimal or even contrary to the well-being of that nation's citizens is not sufficient to justify coercive intervention. So it is with the family. Political authorities are not justified in intervening coercively in the family sphere merely because they disagree with parents about what is best for their children or believe that parents' decisions are contrary to children's well-being. Rather, coercive intervention into the family sphere is justified only in situations analogous to the cases that justify international intervention into the affairs of a sovereign nation: when parents have clearly demonstrated themselves to be unfit through abuse or neglect of their children, or when the family's actions constitute a direct threat to the public order (as would be the case if, for instance, the parents were training their children to be criminals).⁶⁶

A few clarifications are in order about the meaning of abuse and neglect. Federal law defines abuse and neglect as an "act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . . , or an act or failure to act which presents an imminent risk of serious harm."⁶⁷ As Katherine Drabiak comments, traditional concepts of abuse and neglect "entail intentional harm, reckless indifference, or callous disregard" for the child's well-being.⁶⁸ These standards seem to be in line with the principles articulated above, insofar as they limit coercive government intrusion to cases in which the unity of the family community has already been demonstrably broken and parents have shown themselves to be unfit. While what counts as abuse or neglect may be debatable at the margins, my account of parental rights implies that a defer-

65 See, e.g., MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 101 (1977).

66 See MOSCHELLA, *supra* note 59, at 66–69.

67 42 U.S.C. § 5101 note (2018) (Definitions).

68 Katherine Drabiak, *Resolving Physician-Parent Disputes Involving Pediatric Patients*, 20 HOUS. J. HEALTH L. & POL'Y 353, 379 (2021).

ential and nonideological standard should be used. Practically speaking, this means that parental practices or decisions which may be controversial but do not “entail intentional harm, reckless indifference, or callous disregard” for the child’s well-being—such as, for instance, free-range parenting practices—should generally not be considered abusive or neglectful, even if some people strongly disagree with them and consider them harmful.⁶⁹ In other words, as long as parents’ decisions and actions can be understood as consistent with their parental obligations—manifesting due consideration for the child’s well-being and avoiding intentional harm—their authority constitutes what Joseph Raz calls an *exclusionary reason*, a reason not to act on one’s own best judgment about what ought to be done, but instead to defer to the judgment of the parents despite disagreeing with it.⁷⁰ The exceptions to this are cases in which the decisions and actions of even well-intentioned parents will result in serious physical impairment or death, as when Jehovah’s Witness parents refuse to allow their child to receive a lifesaving blood transfusion out of concern for the child’s spiritual welfare. There is no intent to harm nor disregard of the child’s well-being in such cases, but the state’s duty to protect the life of the child warrants overriding this decision (though if there are ways to save the child’s life without a blood transfusion, those methods should be used out of respect for the parents’ authority). Further, according to the natural law view I am proposing, poverty alone does not constitute neglect, and thus does not warrant removal of children from parents’ custody, as other less intrusive remedies are available (such as assistance in obtaining adequate housing, food, employment, etc.).⁷¹ This view

69 *Id.*

70 See JOSEPH RAZ, PRACTICAL REASON AND NORMS 39 (Oxford Univ. Press 1999) (1975). For more on this point, see MOSCHELLA, *supra* note 59, at 62.

71 “[T]he majority of children removed from their homes are removed for neglect, which is a subjective term at best and one closely associated with the circumstances of poverty” DeLeith Duke Gossett, The Client: *How States Are Profiting from the Child’s Right to Protection*, 48 U. MEM. L. REV. 753, 822 (2018). Gossett explains that, unfortunately, federal funding incentivizes states to place children in foster care and eventually terminate parental rights, rather than to assist poor families so that the children can remain in their parents’ custody:

Under the Title IV-B Child Welfare Services and Promoting Safe and Stable Families program, federal funds are available for struggling families facing hardships such as the loss of a home, lack of food, or addiction, but the law caps those funds at a low amount, and the states receive fewer dollars in matching funds if the child welfare agencies choose this route. In other words, the state must spend more money to enable children to remain with their families; or, simply stated, more incoming federal funds mean less state spending. Therefore, agencies often disregard family preservation services in favor of placing the child in foster care and receiving the non-capped Title IV-E federal funds.

also implies that parents should be presumed fit until *proven* otherwise—mere accusation or suspicion is not enough to warrant coercive intervention.⁷²

Given how important it is for the health of the broader political community that parents fulfill their child-rearing obligations and prepare children to be responsible and self-supporting adults, the natural law view also recognizes that it can be reasonable for the state to enact laws requiring parents to fulfill their most essential responsibilities. Compulsory education laws can be justified on this basis. As the Supreme Court noted in *Meyer v. Nebraska*, “Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the States . . . enforce this obligation by compulsory laws.”⁷³ What is crucial to notice, however, is that the Supreme Court (in line with the common-law tradition that is in continuity with the natural law account I am offering here) recognizes education as *the parents’* obligation, which the state can legitimately enforce to promote its interest in an educated citizenry. This also means that the state must respect the principle of subsidiarity and the parents’ natural sphere of authority in the way that it goes about promoting this interest. Accordingly, the *Meyer* Court finds that the Nebraska law at issue—which forbids the teaching of foreign languages prior to ninth grade—is an unconstitutional violation of parental rights, recognized as among “those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,” and thus as implicit in the liberty guaranteed by the Fourteenth Amendment’s Due Process Clause.⁷⁴

Id. at 806 (footnotes omitted); see also Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 451 (2003) (“Social policy analysts have suggested that the ‘combination of fixed funding’ sources for prevention and support services to needy children and their families, but ‘open-ended’ funding for ‘out-of-home care, creates an incentive for public agencies’ to use foster care placement as their most frequent means of response rather than offer other services that could keep the family intact.” (quoting Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, FUTURE CHILD., Spring 1998, at 88, 92)).

72 Parents’ due process rights—including their right to legal counsel—should also be respected, but unfortunately the right to legal counsel in parental-rights termination proceedings has not been recognized by the Supreme Court. See Gossett, *supra* note 71, at 810.

73 *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

74 *Id.* at 399. For those skeptical of substantive due process claims, this same argument could support a constitutional anchor for parental rights in the Fourteenth Amendment’s Privileges or Immunities Clause. For a critique of substantive due process rights, and an argument for recognizing the existence of some enumerated constitutional rights via the Privileges or Immunities Clause, see Justice Thomas’s concurring opinion in *McDonald v. City of Chicago*, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring in part and concurring in the judgment).

What is of particular interest here is the *Meyer* Court's argument that, even though the state admittedly has a legitimate interest in "foster[ing] a homogeneous people with American ideals prepared readily to understand current discussions of civic matters," the Nebraska law nonetheless pursues this interest by means that "exceed the limitations upon the power of the State," precisely because it intrudes into the parents' sphere of protected liberty.⁷⁵ Even more telling in this regard is that the *Meyer* Court likens the Nebraska law to Plato's proposal for communal child-rearing in the *Republic*, and to the ancient Spartan practice of taking all male children from their families at seven years old to be educated by official guardians.⁷⁶ The Court comments:

Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.⁷⁷

At first glance, the Court's comparison of the Nebraska law at issue to these extreme communal child-rearing practices seems exaggerated and far-fetched. After all, the law did not remove children from parents' custody or even forbid parents from privately teaching their children a foreign language at home. The comparison only begins to make sense if one takes seriously the claim that the family is a prepolitical community with authority to direct its internal affairs, that the state's sphere of competence in the educational arena is limited by parental authority, and that respecting the self-governance of subpolitical groups, especially the family, is essential to limited government. Only with these claims in mind does it become clear that the Nebraska law, by interfering "with the power of parents to control the education of their own," violates the same basic principle of limited government that was violated by ancient Spartan communal child-rearing practices.⁷⁸ The violation is undoubtedly less severe in the case of the Nebraska law, but the Court uses these seemingly extreme comparisons to highlight the totalitarian logic implicit in any law that invades fit parents' natural sphere of authority and intrudes coercively into the spiritual womb of the family without compelling justification.⁷⁹

75 *Meyer*, 262 U.S. at 402.

76 *See id.* at 401–02.

77 *Id.* at 402.

78 *Id.* at 401.

79 Hannah Arendt argues that what distinguished totalitarianism from other forms of tyranny is that totalitarian regimes eliminate the self-governance of *all* mediating communities between the individual and the state, including the family, whereas nontotalitarian tyrannies leave the family intact. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 474–

III. APPLICATION TO THE MORTARA CASE

The principles outlined in the previous two sections make it clear that, while presumably well-intentioned, Pius IX's intrusion into the "spiritual womb" of the Mortara family violated natural law. Given that political authority's purpose is to resolve the coordination problems mentioned above, removing Edgardo from his parents' care for the sake of his spiritual welfare was beyond the competence of political authority, and therefore unjust. Second, and relatedly, in going beyond their proper sphere of competence as civil authorities, the Pope and his officials trespassed into the sphere of competence proper to the family, violating the principle of subsidiarity as well as the rights of Edgardo's parents.

Cessario and others who defend Pius IX's action in the case take issue with these claims. They argue, first, that Edgardo's baptism was valid, because, although the Church generally forbids baptizing children without their parents' consent, canon law makes an exception for cases in which the child is in danger of death.⁸⁰ Second, they claim that because Edgardo had been baptized validly, he was truly a Catholic and had a right to Catholic education.⁸¹ Third, they note that "the law of the Church and the laws of the Papal States stipulated that a person legitimately baptized receive a Catholic upbringing."⁸² Finally, they argue these laws are "not unreasonable," and that the Pope, as the legitimate civil ruler of the Papal States, acted rightly in upholding them.⁸³

In response to critics of Cessario's argument, particularly Nathaniel Peters's claim that Cessario's view is contrary to Aquinas's defense of the natural rights of parents,⁸⁴ Frater Asinus claims (mistakenly, as I will explain below) that Aquinas's position actually supports

75 (new ed. 1966) ("It has frequently been observed that terror can rule absolutely only over men who are isolated against each other and that, therefore, one of the primary concerns of all tyrannical government is to bring this isolation about. . . . Political contacts between men are severed in tyrannical government and the human capacities for action and power are frustrated. But not all contacts between men are broken and not all human capacities destroyed. . . . Totalitarian government, like all tyrannies, certainly could not exist without destroying the public realm of life, that is, without destroying, by isolating men, their political capacities. But *totalitarian domination as a form of government is new in that it is not content with this isolation and destroys private life as well.*" (emphasis added)).

80 See Cessario, *supra* note 1, at 55–56; cf. 1983 CODE c.868, § 2. Matthew Tapie, however, has persuasively argued that this exception is based on a faulty rationale in Matthew A. Tapie, *Spiritualis Uterus: The Question of Forced Baptism and Thomas Aquinas's Defense of Jewish Parental Rights*, 35 BULL. MEDIEVAL CANON L. (n.s.) 289, 305–06 (2018). Tapie's argument will be discussed below.

81 Cessario, *supra* note 1, at 55.

82 *Id.*

83 *Id.* at 56.

84 Peters, *supra* note 17.

the Pope's actions. Asinus quotes from the *sed contra* portion of the same article in the *Summa Theologiae* in which Aquinas argues that the children of Jewish parents should not be baptized against their parents' will.⁸⁵ The *sed contra* portion of the article states: "it would be an injustice to Jews if their children were to be baptized against their will, since they would lose the rights of parental authority over their children as soon as these were Christians."⁸⁶

Frater Asinus claims, on the basis of this text, that "[t]he *reason* we do not baptize [the children of Jewish parents] is because the baptism would in fact effect a loss of rights of parental authority . . . of the Jewish parents."⁸⁷ He goes on to argue that this loss of parental authority is justified on the grounds that baptism effects a true "death and resurrection" of the soul, marking it "as a distinct and new creation," and thus relativizing all "natural relationships."⁸⁸ He then observes that "the rights of parents have limits," and that "[i]t is universally agreed that there are times that parents can act in a way inimical to the good of their children, and if the case is extreme enough, the state must intervene."⁸⁹ The Mortara case, claims Asinus, is indeed such a case, for Edgardo's parents' unwillingness to educate him as a Catholic "deprive[d] him of the inheritance due to him" by baptism, making them "a danger to Edgardo" to the point of becoming "his enemies."⁹⁰

Asinus's argument (and the similar arguments of Cessario and others) is seriously flawed in several respects. First, Asinus is mistaken to presume that the argument put forth in the *sed contra* section of Aquinas's text actually reflects Aquinas's own view. As Matthew Tapie argues, "The 'sed contra' can easily be mistaken for Aquinas's own position because the 'sed contra' typically represents something close to Aquinas's position. However, it is inadequate on its own since he may only agree with part of it."⁹¹ Tapie goes on to explain that "the argument Aquinas places in the 'sed contra' is the preferred legal argument of the day," but clarifies that "this is not Aquinas's position."⁹² Rather, Aquinas's view, while sharing the conclusion of the legal argument, rests on a very different rationale, "in that he establishes the rights of

85 Aquinas's arguments in the *Summa Theologiae* follow a formal structure in which Aquinas first lays out several objections to his position, then in the *sed contra* cites some authority whose view is closer to his own position, then in the *respondeo* lays out his own position, and finally responds in turn to each of the objections.

86 AQUINAS, *supra* note 34, at II-II Q. 10 art. 12.

87 Asinus, *supra* note 9.

88 *Id.*

89 *Id.*

90 *Id.*

91 Tapie, *supra* note 80, at 309.

92 *Id.* at 309–10.

the parents in the natural law, and a theology of baptism that stresses the importance of human consent.”⁹³

Aquinas’s view, according to Tapie, is that baptism of a child before the use of reason without parental consent is *always* invalid, because baptism requires the intent of the recipient to be baptized, and in the case of infants or young children, that intent is provided vicariously “when parents make the profession of faith on behalf of the child.”⁹⁴ As Aquinas makes clear in his account of the family as a “spiritual womb” in which children are under the care and authority of their parents, no one other than the parents has the authority to consent to baptism on the child’s behalf.⁹⁵ The fact that a child is in danger of death does not change this. Indeed, in responding to the objection that children of Jews and unbelievers should be baptized because they “are in danger of everlasting death,” Aquinas argues that one may not violate natural law even for this purpose.⁹⁶ Tapie concludes that Cessario’s position—and, by extension, Asinus’s and others’ defense of it—is inconsistent with Aquinas’s teaching, as well as with natural law and Church custom: “In so far as Aquinas’s teaching is concerned, the baptism of Edgardo Mortara, or any child against the will of the parents, is not valid, lawful, or praiseworthy, but a dangerous innovation contrary to the custom of the church and the natural law.”⁹⁷

It should also be emphasized that, *even if* Edgardo’s baptism had been valid, the natural law arguments made in the previous sections regarding the limits of political authority would still imply that Pius IX’s removal of Edgardo from his parents’ care was unjust. For although baptized children have a right to receive a Catholic education, according to natural law (and Catholic teaching) the duty to provide for this aspect (and every other aspect) of children’s education falls primarily on the children’s *parents*.⁹⁸ And while the Church also has a duty in this regard, that duty must be carried out in a way that respects the primacy of parental educational authority. *Civil* authorities have no direct duties or rights with regard to the religious education of children, except insofar as they have a duty to assist parents in

93 *Id.* at 310.

94 *Id.* at 314.

95 AQUINAS, *supra* note 34, at II-II Q. 10 art. 12.

96 *Id.*

97 Tapie, *supra* note 80, at 327. Tapie also argues that Benedict XIV’s arguments, which are the basis for canon law’s exception allowing baptism of infants in danger of death without parental consent, are likewise based on the flawed rationale that Aquinas rejects as contrary to natural law and to the custom of the Church. *See id.* at 329.

98 1983 CODE c.793, § 1 (“Parents and those who take their place are bound by the obligation and possess the right of educating their offspring.”).

fulfilling *their* educational obligations. For the purpose and justification of political authority is the resolution of the sorts of coordination problems mentioned above—with a view toward securing the temporal goods of peace and justice. The exercise of that authority for purely spiritual purposes—such as the salvation of Edgardo’s soul and the securing of his baptismal inheritance—are outside those bounds and therefore unjust. Further, the exercise of authority even for legitimate civil purposes is limited by the principle of subsidiarity and the natural authority of parents over the family community, which the government is obligated to respect unless parents prove themselves unfit. Given that the Mortaras were clearly fit parents at least by temporal standards, the natural law account sketched above implies that Pius IX’s actions went beyond the legitimate exercise of civil authority, and the positive laws that authorized such an exercise of authority were fundamentally unjust.

IV. CONTEMPORARY PARALLELS TO THE MORTARA CASE: “PROGRESSIVE INTEGRALISM” AND THE VIOLATION OF PARENTAL RIGHTS

Consider the story of “Sinead,” based on her mother’s testimony⁹⁹: Sinead, an autistic thirteen-year-old, announced to her parents that she was nonbinary (and later that she identified as a boy) at the end of seventh grade. Sinead’s parents, who knew that Sinead had never before expressed any discomfort with her gender, believed that this was a phase due to school and social media influence, so they decided that they would not use Sinead’s preferred name and pronoun, or acknowledge her transgender identification (Sinead’s mom describes the school as filled with “sex and gender propaganda” and “pushing through a transgender student policy whose underlying message communicated the school’s opinion that parents are dangerous and need to be excised from the decision-making process regarding their children’s sexuality and gender identity.”)¹⁰⁰ Contrary to her parents’ wishes, however, the school affirmed Sinead’s transgender identification and, during the following school year, allowed her to use the boys’ restroom, even though Sinead’s mother protested that this might be unsafe. Sinead’s parents decided to homeschool her the following year. Although Sinead resisted at first—even running away at one point—the following summer Sinead announced that she no longer considered herself transgender. Sinead now blames the public school

99 I have summarized the story for the sake of brevity. The full account can be found in *Our Desistance Story*, PARTNERS FOR ETHICAL CARE (Jan. 27, 2022), <https://www.partnersforethicalcare.com/post/our-desistance-story/> [<https://perma.cc/U89V-2X2M>].

100 *Id.*

for what she went through, recently telling her homeschool class: “You guys have no idea what public school is like They knew exactly where I was vulnerable and insecure, and they targeted me right there to convince me I was transgender. It’s all a lie. They’re lying to kids.”¹⁰¹ Sinead’s mother says: “I’m so grateful I got my child back. I’m grateful we were able to stop her before she became medicalized.”¹⁰²

Sinead’s story might have ended very differently if someone had called child protection services to accuse her parents of abuse or neglect for failing to affirm her perceived gender identity and not allowing her to access puberty-blocking hormones. In another case, an Ohio couple lost permanent custody of their seventeen-year-old teenage daughter, who suffered from gender dysphoria, depression, and anxiety disorder, because they believed that counseling, rather than hormone treatment, would be in their child’s best interests.¹⁰³ A couple of years earlier, after the girl reported on a crisis chat service that she was having suicidal thoughts due to her parents’ opposition to gender transition, county officials removed her temporarily from her parents’ custody and placed her with her grandparents. The juvenile court judge granted permanent custody to the grandparents in 2018.¹⁰⁴

No further information is known about this case, but a similar case in California—in which a teenager suffering from depression who began to identify as transgender under the influence of her school was removed from her mother’s custody and placed in foster care because the mother did not believe gender transition was in the child’s best interests—ended tragically with the teenager’s suicide several years later.¹⁰⁵ Abigail Martinez, the teen’s mother, blames the Department of Children and Family Services for this tragic outcome, arguing that breaking up their family and setting her daughter down the path of hormonal gender transition—rather than attending to the underlying depression as Abigail had wanted to do—exacerbated the teen’s mental health problems and led to her suicide.¹⁰⁶

Regardless of whether the outcome of state intervention in these cases was, on balance, positive or negative, what I want to consider in this Part are the parallels between recent scholarly arguments that would seem to justify these sorts of interventions, and the sorts of arguments put forth by Catholic integralists regarding the Mortara case.

101 *Id.*

102 *Id.*

103 Kiley Crossland, *Parents Lose Custody of Transgender Teen*, BAPTIST PRESS (Feb. 20, 2018), <https://www.baptistpress.com/resource-library/news/parents-lose-custody-of-transgender-teen/> [https://perma.cc/4DJ4-5X84].

104 *See id.*

105 *See* Boswell, *supra* note 23.

106 *Id.*

A number of recent articles by legal scholars and medical ethicists have made the case that children with gender dysphoria have a right to “gender-affirming” interventions, including social transition, puberty blockers and, in some cases, cross-sex hormones. According to these arguments, discussed below, a child like Sinead should have been able to access puberty-blocking hormones without her parents’ knowledge or consent, and if her parents persisted in their refusal to support social transition and puberty blockers, removing her from their custody might be warranted. The logic of these articles would also likely support the government officials’ actions in the Ohio and California cases mentioned above. It would also likely support California’s new act for “gender-affirming health care,” which authorizes courts to take emergency jurisdiction over minors who travel to California seeking gender-affirming care that they were unable to obtain in their home state, even if this is against the wishes of one or both of their parents.¹⁰⁷

Samuel Dubin and coauthors, for instance, argue that parents who do not support “gender-affirming interventions” (e.g., social transition, puberty-blocking hormones, and eventually cross-sex hormones and surgeries) because they believe such interventions are not in their child’s best interests may be guilty of neglect: “research supports invoking parental neglect when youth who experience extreme gender dysphoria are prevented from accessing medically recommended gender-affirming interventions.”¹⁰⁸ While the argument largely focuses on justifying the provision of “gender-affirming interventions” without parental consent, the authors state that “in the most severe instances,” healthcare professionals can charge parents with neglect “to initiate an evaluation by Child Protective Services and remove a parent as a child’s legal guardian.”¹⁰⁹

Similarly, Maura Priest argues that “transgender adolescents have a fundamental right to puberty-blocking treatment (PBT) even if their parents disapprove,” and that the state has a duty to intervene in order to ensure access to PBT and to prevent “harm to transgender youth who have nonsupportive parents.”¹¹⁰ She clarifies: “by ‘nonsupportive’ I do not mean parents who do not love or care for their children; I rather mean parents who do not support, aid, and/or approve of the

107 See CAL. FAM. CODE §§ 3421, 3424, 3427–3428, 3453.5 (West 2023); CAL. PENAL CODE §§ 819, 1326(c) (West 2023); CAL. CIV. CODE § 56.109 (West 2023). For an extended critique of the bill as a violation of parents’ constitutional rights, see Melissa Moschella, *California “Transgender Refuge” Bill Usurps Parental Rights and Endangers Children*, PUB. DISCOURSE (Sept. 20, 2022), <https://www.thepublicdiscourse.com/2022/09/84645/> [https://perma.cc/A3FX-QRLC].

108 Dubin et al., *supra* note 24, at 298.

109 *Id.*

110 Priest, *supra* note 24, at 46.

transition process.”¹¹¹ To defend her argument, Priest compares “non-supportive parents” to Jehovah’s Witness parents who do not want their child to receive a lifesaving blood transfusion, or naturalist parents who reject standard medical treatment: “Just as it is the state’s duty to step in when naturalist parents are refusing insulin to their diabetic son or antibiotics to their daughter sick with meningitis, so is it the state’s duty to step in when the parents of gender-dysphoric children are avoiding medically recommended treatment.”¹¹² While Priest does not directly advocate removing children from their parents’ custody, the logic of her argument—grounded on the claim that the state has a duty to protect children from serious “psychological harm inflicted via their caretakers”—would seem to imply that removal would be warranted if parents persist in being “non-supportive,” particularly if, as in the Ohio case, the child claims that the home environment is contributing to suicidal thoughts.¹¹³

Law professors Anne Dailey and Laura Rosenbury argue in a recent article that “[b]y requiring parental consent for almost every type of medical care provided to children, the current regime of expansive parental rights harms transgender children lacking parental support.”¹¹⁴ They argue for the creation of a system to bypass the parental consent requirement by allowing “transgender children to seek medical consent from a court or other neutral decisionmaker,” similar to the current judicial bypass option for minors seeking abortion without parental consent.¹¹⁵ They note that the case of gender transition is different from the case of abortion, because gender transition “is difficult to conceal from parents,” and because the treatment is ongoing.¹¹⁶ As a result, they recognize that “complications might arise if parents resist the treatment,” but make no concrete recommendations for how to deal with persistent parental resistance, apart from “mechanisms for encouraging parents to better understand their children’s interests

111 *Id.*

112 *Id.* at 53, 52–53.

113 *Id.* at 46.

114 Dailey & Rosenbury, *supra* note 24, at 137 (footnote omitted).

115 *Id.* at 139.

116 *Id.* at 141.

and needs,”¹¹⁷ including coercive state intervention when necessary.¹¹⁸ Similar arguments are made by a number of other legal scholars.¹¹⁹

While most of these articles do not directly support removal of children from parents’ custody, or support it only as a last resort, they all advocate significant intrusions into the sphere of parental decision-making authority by empowering judges, healthcare professionals, social workers, and/or teachers and school officials to facilitate children’s gender transition and access to puberty-blocking hormone treatments without parents’ knowledge or consent. Further, as California’s new “gender-affirming health care” act and the Ohio and California cases discussed above demonstrate,¹²⁰ in practice the sorts of arguments employed in these articles are sometimes used by state officials to temporarily or permanently remove gender dysphoric children from the custody of parents who are loving but “nonsupportive” according to Priest’s definition.¹²¹ It is thus interesting to note the parallels between the scholarly arguments summarized above and the integralist defenses of Pius IX’s actions in the Mortara case.

117 *Id.*

118 Dailey and Rosenbury approvingly cite Rachmilovitz’s proposal for a “Family in Need of Services” framework that would allow courts to mandate certain “services” for families in cases where parental actions “do not rise to the level of abuse or neglect.” Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1428, 1442, 1428–46 (2014), *cited with approval* in Dailey & Rosenbury, *supra* note 24, at 142 n.279.

119 *See, e.g.*, Abernathy, *supra* note 24, at 631 (“[I]n the absence of direct legislation, substantive due process claims, partial emancipation statutes, or mature minor exemptions that provide a judicial bypass procedure should be guaranteed for LGBTQ minors when life-altering or life-endangering choices are made by any parental figure or guardian.”); Murphree, *supra* note 24, at 434 (“[B]ecause a child has a right to gender affirmation services and because this right is independent of a parent’s, parents cannot unilaterally deny gender affirmation services to their children without at least some form of review in cases of disagreement.”); Federica Vergani, Comment, *Why Transgender Children Should Have the Right to Block Their Own Puberty with Court Authorization*, 13 FIU L. REV. 903, 905 (2019) (“This Comment proposes that States should provide a judicial bypass procedure for transgender children who want to begin hormone suppression therapy without their parents’ consent.”).

120 In justifying her decision, Judge Sylvia Hendon argued that the child “has a legitimate right to pursue life with a different gender identity than the one assigned at birth.” *In re* JNS, No. F17-334 X, slip op. at 3 (Ohio Juv. Ct. Feb. 16, 2018); *see also* Bradford Richardson, *Religious Parents Lose Custody of Transgender Teen for Refusing Hormone Treatment*, WASH. TIMES (Feb. 20, 2018), <https://www.washingtontimes.com/news/2018/feb/20/religious-parents-lose-custody-transgender-teen/> [<https://perma.cc/Y8P9-GBKT>].

121 For additional examples, see Abigail Shrier, *When the State Comes for Your Kids: Social Workers, Youth Shelters, and the Threat to Parents’ Rights*, CITYJ. (June 8, 2021), <https://www.city-journal.org/transgender-identifying-adolescents-threats-to-parental-rights/> [<https://perma.cc/TK9M-8BU7>] (“For child services in states that regard ‘gender affirming care’ as the only humane way to treat a troubled teen who’s suddenly decided she’s transgender, the power the state grants them to undermine and even remove parents who object to these

Just like Cessario and Asinus’s defense of the Mortara case, Dubin, Priest, Dailey and Rosenbury, and others defend state intrusions into parents’ sphere of authority on the grounds that this is necessary to protect the rights of the child, respect the child’s identity, and preserve the child from harm. As we have seen, Cessario and Asinus believe that Edgardo Mortara, by virtue of the indelible Catholic identity acquired through baptism, had a right to a Catholic education. They argue that by preventing him from receiving such an education, Edgardo’s parents were causing him serious—perhaps eternal—harm. Asinus makes the point that parental rights are not absolute, and that when parents’ actions (or inactions) threaten severe harm to a child—as he believed was the case with Edgardo—“the state must intervene.”¹²² Similarly, as noted above, Dubin, Priest, Dailey and Rosenbury, and others all believe that children with gender dysphoria have a right to “gender-affirming interventions” such as puberty-blocking hormones, and that parents’ refusal to consent to such interventions fails to respect their children’s gender identity and is seriously harmful to their children. They thus believe that such refusal is outside the bounds of parental rights, and that state intervention to override parents’ judgments is justified.¹²³

In both sets of cases, there is disagreement between parents and civil authorities about what is in the child’s best interests. Like any loving parents, the Mortaras believed that taking Edgardo away from them would be harmful to him, but Pius IX believed that leaving Edgardo in his parents’ care was dangerous to his eternal salvation, and that—while the separation from his family would initially be difficult—Edgardo would ultimately be better off if raised as a Catholic and thus allowed to flourish in his Catholic identity. Likewise, Abigail Martinez and the Ohio parents mentioned above, as well as many other parents of children with gender dysphoria, believe that their children would be better off in their care, are not convinced that their children’s transgender identification will endure, and judge that “gender-affirming interventions” (as opposed to psychological care for underlying mental health problems) would be more likely to harm their children

treatments is alarming. . . . [I spoke] with Vernadette Broyles, president and founder of Child and Parental Rights Campaign. A Harvard-educated lawyer, Broyles represents parents in child custody, child protective services, and school cases. I asked Broyles point-blank: Was she seeing the same the pattern I had noticed—namely, loving parents bringing a suicidal, trans-identified teen to the E.R., which ensnares her in a child services network that will not relinquish her? ‘Yes, that is one of the patterns,’ she said. ‘We’re seeing national patterns. . . . One is the very deliberate and systemic erosion of parental rights.’ Broyles believes that this erosion leaves girls, especially, ‘disproportionately vulnerable.’” (second omission in original)).

122 Asinus, *supra* note 9.

123 See *supra* notes 107–19 and corresponding text.

than to help them.¹²⁴ But the authors cited above, as well as the state officials in the above-mentioned cases, believe that “gender-affirming interventions” are necessary to respect the children’s gender identity, improve their mental health, and prevent them from committing suicide.¹²⁵

It might be argued that one important difference between the two sets of cases is that in the Mortara case, the civil authorities were outside their sphere of competence because, as I argued above, that sphere of competence is limited to the *temporal* realm, while their intervention was for the sake of Edgardo’s *spiritual* good. By contrast, protecting children from medical neglect *is* within the state’s sphere of competence, even on the account that I have defended here. However, according to the argument made in the previous section, the primary reason why Pius IX’s actions in the Mortara case were unjust is that civil authorities violated parental rights, intruding into the spiritual womb of the family without just cause (i.e., without proving the parents to be guilty of genuine abuse or neglect, or of threatening the public order). And these critiques of the Mortara case on parental rights’ grounds *do* apply equally to the cases of gender-dysphoric children being discussed here. For all of these cases involve the government trespassing upon the natural authority of fit parents. Indeed, Dailey and Rosenbury, along with the other legal scholars cited above, do not even suggest that parental refusal to consent to puberty blockers or cross-sex hormones constitutes neglect, and thus do not even question the fitness of such parents. It is therefore clear that their proposal to override parental authority in these cases exceeds the natural law limits on government defended above. While Dubin (who is not a legal scholar) argues that parental denial of “gender-affirming interventions” constitutes medical neglect, and Priest makes similar arguments, their attempt to argue that such parenting decisions amount to neglect is overly broad and ideological—i.e., it rests on controversial ideological assumptions about gender identity and the best way to treat gender dysphoria—and is also clearly out of line with current legal definitions of abuse and neglect.¹²⁶ For, as I argued above, state intervention should be limited to cases in which harm to children is intended,

124 See *supra* notes 99–106 and corresponding text.

125 See *supra* notes 107–19 and corresponding text.

126 See *supra* note 67 and corresponding text.

reflects callous disregard for the child’s well-being, or directly and seriously threatens physical life or health.¹²⁷ This applies to medical neglect as well.¹²⁸

Considerable controversy exists in the medical community about the benefits and risks of hormonal treatments¹²⁹ (and even social transition)¹³⁰ for the alleviation of gender dysphoria, particularly

127 See *supra* notes 66–71 and corresponding text.

128 The most prominent ethical frameworks for determining when state intervention overriding parents’ medical decisions is justified offer similar criteria to the ones that I propose here. See Douglas S. Diekema, *Parental Refusals of Medical Treatment: The Harm Principle as Threshold for State Intervention*, 25 THEORETICAL MED. & BIOETHICS 243, 249–54 (2004); Rosalind J. McDougall & Lauren Notini, *Overriding Parents’ Medical Decisions for Their Children: A Systematic Review of Normative Literature*, 40 J. MED. ETHICS 448, 450–51 (2014).

129 See, e.g., James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, 46 J. SEX & MARITAL THERAPY 307 (2020) (arguing that the American Academy of Pediatrics policy statement on the care of transgender youth, which endorses only “gender affirmation” rather than watchful waiting, grossly misrepresents the evidence it cites and omits important evidence contrary to its recommendations); Rebecca M. Harris, Amy C. Tishelman, Gwendolyn P. Quinn & Leena Nahata, *Decision Making and the Long-Term Impact of Puberty Blockade in Transgender Children*, AM. J. BIOETHICS, no. 2, 2019, at 67; Paul W. Hruz, *Deficiencies in Scientific Evidence for Medical Management of Gender Dysphoria*, 87 LINACRE Q. 34 (2020); Michael Laidlaw, Michelle Cretella & G. Kevin Donovan, *The Right to Best Care for Children Does Not Include the Right to Medical Transition*, AM. J. BIOETHICS, no. 2, 2019, at 75, 77 (“To argue that all children who are self-declared as transgendered will be harmed psychologically and physically without puberty blocking treatments is false; the greatest number will be seen to not require this at all. To further argue that these adolescents should receive hormonal therapy without parental approval betrays a poor understanding of adolescent psychology and the role of parents in the family dynamic. Evidence of severe and permanent harm from an appropriate delay for the psychological evaluation and treatment of such children, prior to permanently altering them, does not exist. To argue that such supposed harm rises to the level of denying parental involvement in the care of their gender-dysphoric child is grossly overreaching, and should not be suggested as the standard of care. Rather, it would constitute an unmonitored, experimental intervention in children without sufficient evidence of efficacy or safety, for which informed consent therefore would not be possible.”); Antony Latham, *Puberty Blockers for Children: Can They Consent?*, 28 NEW BIOETHICS 268, 287–90 (2022) (“[A] blanket policy of merely affirming the GD as a primary condition, is unhelpful, untherapeutic and may prevent such children from naturally, over time, becoming comfortable with their natal sex. Seeking consent to treat the GD with PBs is strongly linked to this trend to affirm rather than further examine. It is a trend that is more socio-political than based on science.”); William Malone, Roberto D’Angelo, Stephen Beck, Julia Mason & Marcus Evans, Correspondence, *Puberty Blockers for Gender Dysphoria: The Science Is Far from Settled*, 5 LANCET CHILD & ADOLESCENT HEALTH e33 (2021); Lieke Josephina Jeanne Johanna Vrouwenraets, A. Miranda Fredriks, Sabine E. Hannema, Peggy T. Cohen-Kettenis & Martine C. de Vries, *Early Medical Treatment of Children and Adolescents with Gender Dysphoria: An Empirical Ethical Study*, 57 J. ADOLESCENT HEALTH 367, 367 (2015) (“[I]n actual practice, no consensus exists whether to use these early medical interventions [i.e., puberty-blocking hormones].”).

130 See, e.g., Elisabeth DC Sievert, Katinka Schweizer, Claus Barkmann, Saskia Fahrenkrug & Inga Becker-Hebly, *Not Social Transition Status, but Peer Relations and Family Functioning Predict Psychological Functioning in a German Clinical Sample of Children with Gender*

for minors. Countries such as Finland,¹³¹ France,¹³² and the United Kingdom¹³³ are now recommending much greater caution in the use of puberty-blocking hormones, and Sweden has prohibited them outside of clinical trials,¹³⁴ due to increased awareness of their risks, doubts

Dysphoria, 26 CLINICAL CHILD PSYCH. & PSYCHIATRY 79, 79 (2021) (“Research provides inconclusive results on whether a social gender transition (e.g. name, pronoun, and clothing changes) benefits transgender children or children with a Gender Dysphoria (GD) diagnosis.”); Thomas D. Steensma, Roeline Biemond, Fijgje de Boer & Peggy T. Cohen-Kettenis, *Desisting and Persisting Gender Dysphoria After Childhood: A Qualitative Follow-Up Study*, 16 CLINICAL CHILD PSYCH. & PSYCHIATRY 499, 514 (2010) (“As for the clinical management in children before the age of 10, we suggest a cautious attitude towards the moment of transitioning. Given our findings that some girls, who were almost (but not even entirely) living as boys in their childhood years, experienced great trouble when they wanted to return to the female gender role, we believe that parents and caregivers should fully realize the unpredictability of their child’s psychosexual outcome. They may help the child to handle their gender variance in a supportive way, but without taking social steps long before puberty, which are hard to reverse.”); Wang Ivy Wong, Anna I.R. van der Miesen, Tjonnie G.F. Li, Laura N. MacMullin & Doug P. VanderLaan, *Childhood Social Gender Transition and Psychosocial Well-Being: A Comparison to Cisgender Gender-Variant Children*, 7 CLINICAL PRAC. PEDIATRIC PSYCH. 241 (2019) (finding that social transition did not seem to increase children’s psychosocial well-being); Kenneth J. Zucker, *Debate: Different Strokes for Different Folks*, 25 CHILD & ADOLESCENT MENTAL HEALTH 36, 36 (2020) (“Gender social transition of prepubertal children will increase dramatically the rate of gender dysphoria persistence when compared to follow-up studies of children with gender dysphoria who did not receive this type of psychosocial intervention and, oddly enough, might be characterized as iatrogenic.”).

131 *One Year Since Finland Broke with WPATH “Standards of Care,”* SOC’Y FOR EVIDENCE-BASED GENDER MED. (July 2, 2021), https://segm.org/Finland_deviates_from_WPATH_prioritizing_psychotherapy_no_surgery_for_minors [<https://perma.cc/CS5J-B6G3>].

132 See Press Release, French Nat’l Acad. of Med., *Medicine and Gender Transidentity in Children and Adolescents* (Feb. 25, 2022), <https://www.academie-medecine.fr/la-medecine-face-a-la-transidentite-de-genre-chez-les-enfants-et-les-adolescents/?lang=en> [<https://perma.cc/K2AV-FY6F>] (“Although, in France, the use of hormone blockers or hormones of the opposite sex is possible with parental authorization at any age, the greatest reserve is required in their use, given the side effects such as impact on growth, bone fragility, risk of sterility, emotional and intellectual consequences and, for girls, symptoms reminiscent of menopause.”).

133 See Deborah Cohen & Hannah Barnes, *Evidence for Puberty Blockers Use Very Low*, Says NICE, BBC NEWS (Apr. 1, 2021), <https://www.bbc.com/news/health-56601386> [<https://perma.cc/SRK7-KV8S>]; Andrew Gregory, *NHS to Close Tavistock Gender Identity Clinic for Children*, GUARDIAN (July 28, 2022, 11:32 AM), <https://www.theguardian.com/society/2022/jul/28/nhs-closing-down-london-gender-identity-clinic-for-children/> [<https://perma.cc/DE5T-4EJG>]. But see *Bell v. Tavistock & Portman NHS Found. Tr.* [2021] EWCA (Civ) 1363 (Eng. & Wales).

134 See *Summary of Key Recommendations from the Swedish National Board of Health and Welfare (Socialstyrelsen/NBHW)*, SOC’Y FOR EVIDENCE-BASED GENDER MED. (Feb. 27, 2022), <https://segm.org/segm-summary-sweden-prioritizes-therapy-curbs-hormones-for-gender-dysphoric-youth/> [<https://perma.cc/D9ZG-JSZH>]; *Sweden’s Karolinska Ends All Use of Puberty Blockers and Cross-Sex Hormones for Minors Outside of Clinical Studies*, SOC’Y FOR EVIDENCE-

about their efficacy, and skepticism about the ability of minors to meaningfully consent. It is therefore clearly untenable to claim, as Priest does, that refusal of these controversial and unproven interventions is comparable to the refusal of noncontroversial medically necessary treatments like insulin for a diabetic or antibiotics for meningitis. According to the natural law view I have outlined above, where reasonable people can disagree about whether or not a medical treatment is necessary (or even beneficial) for the child’s health, the state must respect parents’ sphere of authority and defer to their judgment.¹³⁵

One might object that an important difference between the Mortara case and the case of gender-dysphoric children seeking medical interventions that their parents do not support is that in the latter case the children themselves are, at least in some instances, asking for the state to intervene on their behalf. In response to this, it is crucial to remember that those who favor such state intervention against parents’ wishes are not proposing that children simply be empowered to make these medical decisions without *any* adult oversight. Rather, their proposals always involve approval of the child’s decision (and/or decision-making competence) by some adult(s) other than the child’s parents—be it a clinician, social worker, school official, judge, or some combination of these. Thus, they are simply replacing the authority of parents to decide what is in the child’s best interests with the authority of other adults who do not know the child as intimately as the parents, and who are less invested in the child’s long-term well-being than the parents.¹³⁶

A full critique of the arguments presented by Dubin, Priest, Dailey and Rosenbury, and others is beyond the scope of this Article. My aim

BASED GENDER MED. (May 8, 2021), https://segm.org/Sweden_ends_use_of_Dutch_protocol/ [<https://perma.cc/5R7P-F2SK>].

135 Courts have generally been deferential to parental medical decisionmaking, except when there is clear medical consensus to the contrary and the threat to the child’s health is serious. Maxine Eichner, *Bad Medicine: Parents, the State, and the Charge of “Medical Child Abuse,”* 50 U.C. DAVIS L. REV. 205, 242 (2016).

136 The law “historically . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children.” *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (first citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447; and then citing 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *190); *see also, e.g.*, *State ex rel. Sheibley v. Sch.-Dist. No. 1*, 48 N.W. 393, 395 (Neb. 1891) (“[W]ho is to determine what studies she shall pursue in school,—a teacher who has a mere temporary interest in her welfare, or her father, who may reasonably be supposed to be desirous of pursuing such course as will best promote the happiness of his child?”); Martin Guggenheim, *The (Not So) New Law of the Child*, 127 YALE L.J.F. 942, 947 (2018) (criticizing Dailey and Rosenbury for their proposal to “shift ultimate decision-making authority from parents to judges,” and noting that “there is insufficient correspondence between giving judges authority over children’s lives and making good decisions for the individual children affected by the court order”).

in this Part has been much more limited: to show that their arguments—which we might call a form of “progressive integralism”—are strikingly similar to the sorts of arguments used by Catholic integralists to defend Pius IX’s actions in the Mortara case. For they all rest on the premise that the state has expansive authority to override the childcare decisions of fit parents in order to promote the child’s best interests or defend the child’s rights as they understand them.¹³⁷ While they have widely divergent views of what the child’s interests or rights actually are, the Catholic integralists and their progressive counterparts are alike in denying that respect for the self-governance of subpolitical communities, especially the family, is a fundamental limit on the legitimate exercise of state power.¹³⁸

CONCLUSION

This Article has argued that the Thomistic natural law tradition can offer a robust defense of the principles and institutions of limited government that are frequently associated with liberalism. While Catholic integralists want to jettison limited government along with the liberal philosophy they criticize, I believe that this is a grave mistake, and is inconsistent with the Thomistic natural law tradition these integralist thinkers claim to embrace. The integralists’ defense of the Mortara case provides a powerful example of how their abandonment of principles of limited government leads them to take positions that are in fact incompatible with the views of Aquinas and the tradition of the Catholic Church, including the tradition’s teachings regarding parental rights, religious freedom, the distinction between temporal and spiritual authority, and the principle of subsidiarity. The integralists would also do well to recognize that, once one jettisons limited government and respect for parental rights, the door is open for government to use that expansive power to aggressively promote a vision of the good that the integralists believe is false, such as the vision currently being promoted by progressives regarding gender and sexuality. On

137 Dailey and Rosenbury are explicit about this, seeking to justify overriding parental authority in “the many situations where perfectly fit, and sometimes exemplary, parents might fail to recognize and further their children’s interests.” Dailey & Rosenbury, *supra* note 24, at 99.

138 Denial that the family is a pre-political community with pre-political authority is, in fact, explicitly at the foundation of Dailey and Rosenbury’s argument:

The law’s allocation of control to parents is a choice, not a natural state of affairs. Because the state grants control to parents in most instances, parents are thought to be free of state control until they engage in gross misconduct. Expansive parental rights therefore rest on the false notion of a natural divide and opposition between parents and the state.

Id. at 106–07.

the other hand, the Mortara case should be a cautionary tale for progressives, for if they create precedents for the government to intrude into the family sphere and override the decisions of loving and responsible parents in the name of a highly controversial account of children’s rights, what is there to prevent conservatives from doing the same thing when they have the power?¹³⁹ Ultimately, the very real harms to parents, children, and society as a whole that result from overzealous state intrusion into the family sphere underscore the wisdom of limited government, and its crucial importance for the promotion of integral human flourishing.

139 This concern is not purely hypothetical. Unfortunately, the child protection system has also been weaponized by those who believe that childhood gender transition is harmful in order to separate children from loving parents doing what they think best to support gender-nonconforming children. See Roxanna Asgarian, *She Supported Her Child Being Trans. So the State Separated Them. Is the Case of Katee Churchill Just the Beginning?*, N.Y. MAG.: INTELLIGENCER (Dec. 15, 2021), <https://nymag.com/intelligencer/2021/12/she-supported-her-child-being-trans-so-they-were-separated.html> [<https://perma.cc/DV7L-LCNP>].

