REBUTTING THE FIT-PARENT PRESUMPTION: DECIDING WHO DECIDES WHAT IS IN THE BEST INTEREST OF A CHILD

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ABSTRACT

The Fourteenth Amendment's Due Process Clause protects the fundamental right of fit parents to raise their children. The Due Process Clause requires courts to apply a presumption, known as the fit-parent presumption, in cases involving interference with parents' fundamental rights. The fit-parent presumption requires courts to presume that (1) parents are fit and (2) fit parents' decisions are in the best interests of their children. Although the U.S. Supreme Court has long established that the presumption exists, the Court has never set the standard for rebutting the presumption. In the absence of a decision from the Court, many lower courts have adopted different standards for rebutting the presumption. Texas courts, in particular, have grappled with the issue for decades and are still actively developing their standards today. This Comment argues that the proper standard for rebutting the fit-parent presumption is the significant-impairment standard, which requires a showing that parental decisions significantly impair children's physical health or emotional well-being.

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1. INTRODUCTION

Abigail was three years old when her recently deceased mother's ex-boyfriend sued her father for visitation rights.[1] Abigail's parents never married but were in a long-term relationship until Abigail was two.[2] Her parents had always shared roughly equal custody until her mother died when Abigail was three.[3] The year before, Abigail's mother began dating, and subsequently moved in with, a new boyfriend.[4] Abigail lived with her mother and the boyfriend during her mother's periods of possession.[5] Eleven months after Abigail's mother moved in with the new boyfriend, Abigail's mother died

1 *In re* C.J.C., 603 S.W.3d 804, 808–09 (Tex. 2020).
2 *Id.* at 808.
3 *See id.*
4 *Id.*
5 *Id.*

unexpectedly.[6] After her mother died, Abigail lived with her father full-time.[7] However, shortly after her mother's death, the now-ex-boyfriend sued Abigail's father for visitation rights.[8] The trial court granted visitation to the ex-boyfriend over the father's objections.[9] Abigail's father appealed, and the court of appeals affirmed.[10] He then petitioned the Texas Supreme Court for a writ of mandamus, arguing that the trial court's order violated his right as a fit parent to raise Abigail.[11] Two years—and over $250,000 in legal fees—after the trial court issued the visitation order, the Texas Supreme Court granted the writ of mandamus and held that the order violated the father's constitutional fit-parent presumption.[12]

The Fourteenth Amendment's Due Process Clause protects the fundamental right of fit parents, like Abigail's father, to raise their children.[13] The Due Process Clause requires courts to apply a presumption, known as the fit-parent presumption, to governmental interference with parents' fundamental rights.[14] The fit-parent presumption requires courts to presume that (1) parents are fit and (2) fit parents' decisions are in the best interests of their children.[15] However, neither the U.S. Supreme Court nor the Texas Supreme Court have ever articulated a standard for rebutting the fit-parent presumption.[16] In her concurring opinion in *In re C.J.C.*, Texas Supreme Court Justice Lehrmann highlighted this question and expressed the need for courts to determine the standard.[17]

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6 *Id.*

7 *Id.*

8 *Id.* at 809.

9 *Id.* at 810.

10 *Id.*

11 *Id.*

12 *Id.* at 820 (granting mandamus); *Hearing on S.B. 1178 Before the S. Comm. on State Affs.*, 87th Leg., Reg. Sess. (Tex. 2021), https://perma.cc/QJ9H-7QK8 (explaining father's legal fees in case).

13 Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

14 *See Troxel*, 530 U.S. at 68 (explaining presumption that fit parents act in best interest of their children); *see also In re C.J.C.*, 603 S.W.3d at 813 (referring to presumption in *Troxel* as "fit-parent presumption").

15 *See Troxel*, 530 U.S. at 68.

16 *In re C.J.C.*, 603 S.W.3d at 821 (Lehrmann, J., concurring).

17 *See id.*

Two different parental presumptions govern Texas cases: the constitutional fit-parent presumption and the statutory parental presumption.[18] There has long been confusion in Texas cases about the requirements for interfering with parental rights because parties frequently and mistakenly conflate these two distinct presumptions.[19] Texas statute provides a statutory parental presumption that nonparents must rebut for courts to issue orders that interfere with parental rights.[20] The statutory parental presumption is similar to the fit-parent presumption but differs in its scope, standards for rebuttal, and policy basis.[21] Texas statute expressly sets the standards for rebutting the statutory parental presumptions.[22] Although the U.S. Supreme Court has not similarly set a standard for rebutting the fit-parent presumption, it has set forth general requirements that such a standard must meet.[23]

This Comment argues that the proper standard for rebutting the fit-parent presumption is the significant-impairment standard, which requires a showing that parental decisions significantly impair children's physical health or emotional well-being. Part 2 explains the statutory parental presumption's requirements and its differences from the fit-parent presumption.[24] Part 3 outlines the legal framework of the fit-parent presumption and analyzes the possible standards for rebutting that presumption.[25] Part 4 concludes that the significant-impairment standard is the proper standard for rebutting the fit-parent presumption.[26]

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18 *See id.* at 818–19; *Troxel*, 530 U.S. at 65; TEX. FAM. CODE ANN. § 151.001(a).

19 *See, e.g.*, *In re C.J.C.*, 603 S.W.3d at 813 (explaining that nonparent "argues that a fit-parent presumption does not apply in this modification proceeding" because of "the absence of a statutory presumption in the standing and modification statutes").

20 *See* FAM. § 151.001 (providing rights of parents); *e.g.*, *id.* § 153.131(a)–(b) (providing presumption that that parent should be appointed managing conservator of child).

21 *See id.* § 153.131(a)–(b).

22 *See id.* § 153.131(a)–(b) (providing for rebuttal by showing of significant impairment); *id.* § 153.004 (providing for rebuttal by showing of family violence); *id.* § 153.373 (providing for rebuttal by showing of voluntary relinquishment).

23 *See, e.g.*, *Troxel*, 530 U.S. at 68–69 (requiring standard by which the fit-parent presumption may be rebutted to prioritize the best interest of the child).

24 *See infra* Part 2.

25 *See infra* Part 3.

26 *See infra* Part 4.

2. STATUTORY PARENTAL PRESUMPTION

Texas Family Code Section 153.131 creates a statutory parental presumption.[27] The statutory parental presumption requires a court to appoint one parent as sole managing conservator or both parents as joint managing conservators of a child.[28] A party may rebut the presumption by showing, *inter alia*, that a parent's conduct "significantly impair[s] the child's physical health or emotional development."[29]

The Texas Legislature first enacted the significant-impairment standard in 1987.[30] The U.S. Supreme Court sometimes qualifies its discussion of legislative history and purpose with the phrase "for those who consider legislative history relevant."[31] Subject to this qualification, the purpose of the standard was to require a court to appoint as a managing conservator a parent who, while not being a model parent, had not done anything to "significantly impair" his or her child's welfare.[32] The legislature was particularly concerned with domestic-violence cases and sought to ensure that courts did not deny conservatorship to parents who themselves were victims of domestic violence simply because the parents did not adequately protect their children from their mutual abuser.[33] By the time the legislature recodified the Family Code in 1995, the legislature had adopted the significant-impairment standard in scattered sections of the Family Code.[34] Notably, however, the legislature had not adopted the significant-impairment standard in the grandparent-access statute.[35]

After the U.S. Supreme Court decided *Troxel v. Granville* in 2000, the Texas Attorney General's Office issued an opinion advising on *Troxel*'s

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27 *See* FAM. § 153.131(a).

28 *Id.*

29 *Id.*

30 Act of May 30, 1987, 70th Leg., R.S., ch. 720, § 1, sec. 14.01(b), 1987 Tex. Gen. Laws 2595, 2595 (amended 1995 et seq.) (current version at FAM. § 153.131(a)).

31 T-Mobile S., LLC v. City of Roswell, 574 U.S. 293, 301 (2015).

32 *Hearing on H.B. 614 Before the S. Comm. on Juris.*, 70th Leg., Reg. Sess. at 29:15–32:14 (Tex. 1987), https://perma.cc/W732-PM3T.

33 *Id.*

34 Act of Apr. 6, 1995, 74th Leg., R.S., ch. 20, § 1, sec. 153.131, 156.006(b), .102(b), 1995 Tex. Gen. Laws 113, 149, 173 (codified at FAM. § 153.131, 156.006(b), .102(b)).

35 *Id.* at 157–58 (codified at FAM. § 153.433).

application to the grandparent-access statute.[36] The opinion advised that courts must read into the grandparent-access statute a requirement that the grandparent rebut the fit-parent presumption by proving that the parent is unfit or that the denial of access to the grandparent would "significantly impair the child's physical health or emotional well-being."[37] In response to the opinion, the legislature amended the grandparent-access statute to require a finding of significant impairment to grant a grandparent access to a child.[38] Although the legislature amended the statute to comport with the *Troxel* decision, the statutory requirement itself is not the fit-parent presumption (a distinction that litigants and courts frequently confused until the Texas Supreme Court decided *In re C.J.C.*).[39] Rather, the statutory and constitutional presumptions are distinct legal presumptions that overlap in their rebuttal requirements.

2.1. Substance of Statutory Parental Presumption

Texas statute limits the statutory parental presumption's application in two relevant ways. First, the statutory parental presumption applies only to the merits of a case but not to standing.[40] As long as a nonparent establishes standing, "the final decision about the child's future will be made by a judge or jury, not the child's parents."[41] This type of court action "raises serious constitutional questions."[42]

Second, the statutory parental presumption applies only to original custody suits—not to modification suits or to child welfare cases.[43] The

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36 *See* Tex. Att'y Gen. Op. No. GA-0260 (2004) [hereinafter Att'y Gen. Op. GA-0260].

37 *Id.* at 12 (quoting *In re* Pensom, 126 S.W.3d 251, 256 (Tex. App.—San Antonio 2003, no pet.)).

38 Act of May 26, 2005, 79th Leg., R.S., ch. 484, § 3, sec. 153.433, 2005 Tex. Gen. Laws 1345, 1345–46 (codified at FAM. § 153.433).

39 *See, e.g.*, *In re* C.J.C., 603 S.W.3d 804, 813 (Tex. 2020) (explaining that nonparent "argues that a fit-parent presumption does not apply in this modification proceeding" because of "the absence of a statutory presumption in the standing and modification statutes").

40 *See* FAM. § 153.131; *cf. id.* § 102.003 (standing requirements).

41 *In re* H.S., 550 S.W.3d 151, 177 (Tex. 2018) (Blacklock, J., dissenting).

42 *Id.*

43 *In re* V.L.K., 24 S.W.3d 338, 339–40 (Tex. 2000); *see also* Taylor v. Meek, 276 S.W.2d 787, 790 (Tex. 1955).

legislature enacted the statutory parental presumption in Chapter 153 of the Family Code.[44] Chapter 153 governs original suits.[45] However, Chapter 156 governs modification suits,[46] and Chapters 261–266 govern child welfare cases.[47] In *In re V.L.K.*, the Texas Supreme Court held that, because the legislature only enacted it in Chapter 153, the statutory parental presumption applies only to suits governed by Chapter 153—that is, original suits.[48] The Court emphasized that "Chapter 153 and Chapter 156 are distinct statutory schemes that involve different issues" and raise different "policy concerns such as stability for the child and the need to prevent constant litigation in child custody cases."[49] In *In re C.J.C.*, the Court clarified that its holding in *In re V.L.K.* applied only to the statutory parental presumption—not to the constitutional fit-parent presumption.[50]

Because of these two limits, the statutory parental presumption is far narrower than the constitutional fit-parent presumption is.[51] While the statutory parental presumption applies only to decisions on the merits in original custody cases, the fit-parent presumption applies to all cases between parents and nonparents. Because the two presumptions are similar, litigants and courts often improperly imported the statutory parental presumption's limitations onto the constitutional fit-parent presumption.[52]

2.2. Standard for Rebutting Statutory Parental Presumption

In contrast to the U.S. Supreme Court's jurisprudence on the fit-parent presumption, the Texas statute provides three clear standards by which

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44 *In re V.L.K.*, 24 S.W.3d at 343.

45 *Id.*

46 *Id.*

47 *See generally* TEX. FAM. CODE ANN. Chs. 261–266.

48 24 S.W.3d at 343.

49 *Id.*

50 *In re* C.J.C., 603 S.W.3d 804, 810–11 (Tex. 2020) (explaining that the *In re V.L.K.* court "did not refer to *Troxel* or to the constitutional presumption *Troxel* applied").

51 *See generally id.* at 818–19.

52 *See, e.g.*, *id.* at 813 (Tex. 2020) (explaining that the nonparent "argues that a fit-parent presumption does not apply in this modification proceeding" because of "the absence of a statutory presumption in the standing and modification statutes").

a nonparent may rebut the statutory parental presumption:[53] a nonparent may show (1) significant impairment, (2) family violence, or (3) voluntary relinquishment.[54]

First, a nonparent may rebut the statutory parental presumption by showing that "the appointment would significantly impair the child's physical health or emotional development."[55] Thirteen of the fourteen relevant intermediate appellate courts in Texas have concluded that conduct constituting significant impairment may include "physical abuse, severe neglect, abandonment, drug or alcohol abuse, or immoral behavior by the parent."[56] Texas courts have also concluded that other conduct may contribute to significant impairment, such as "parental irresponsibility, a history of mental disorders and suicidal thoughts, frequent moves, bad judgment, child abandonment, and an unstable, disorganized, and chaotic lifestyle that has put

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53 *See* TEX. FAM. CODE ANN. § 153.131(a) (significant impairment); *id.* §§ 153.004, 153.131(b) (family violence); *id.* § 153.373 (voluntary relinquishment); *see also In re* A.V., No. 05-20-00966-CV, 2022 WL 2763355, at *4 (Tex. App.—Dallas July 15, 2022, no pet.).

54 FAM. § 153.131(a) (significant impairment); *id.* §§ 153.004, 153.131(b) (family violence); *id.* § 153.373 (voluntary relinquishment). The statute places the burden of proof on the nonparent to show that one of the standards has been met. *See, e.g.*, *In re* F.E.N., 579 S.W.3d 74, 77 (Tex. 2019).

55 FAM. § 153.131(a).

56 *In re* A.V., 2022 WL 2763355, at *6 (defining significant impairment); *see* Rolle v. Hardy, 527 S.W.3d 405, 420 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *In re* T.H., 650 S.W.3d 224, 238 (Tex. App.—Fort Worth 2021, no pet.); A. S. v. Tex. Dep't of Fam. & Protective Servs., 665 S.W.3d 786, 796 (Tex. App.—Austin 2023, no pet. h.); *In re* J.O.L., 668 S.W.3d 160, 166 (Tex. App.—San Antonio 2023, no pet. h.); *In re* B.B.M., 291 S.W.3d 463, 469 (Tex. App.—Dallas 2009, pet. denied); *In re* J.Y., 528 S.W.3d 679, 687 (Tex. App.—Texarkana 2017, no pet.); *In re* A.J.H., No. 07-19-00327-CV, 2020 WL 1174574, at *2 (Tex. App.—Amarillo Mar. 11, 2020, no pet.); *In re* L.D.F., 445 S.W.3d 823, 830 (Tex. App.—El Paso 2014, no pet.); *In re* I.K.G., No. 10-22-00043-CV, 2023 WL 2601333, at *3 (Tex. App.—Waco Mar. 22, 2023, no pet. h.); *In re* A.D.A., No. 11-12-00002-CV, 2012 WL 4955270, at *3 (Tex. App.—Eastland Oct. 18, 2012, no pet.); *In re* M.M., No. 12-18-00243-CV, 2019 WL 1032736, at *3 (Tex. App.—Tyler Mar. 5, 2019, pet. denied); *In re* D.D.L., No. 13-22-00062-CV, 2022 WL 3652496, at *4 (Tex. App.—Corpus Christi–Edinburg Aug. 25, 2022, no pet.); White v. Shannon, No. 14-09-00826-CV, 2010 WL 4216539, at *3 (Tex. App.—Houston [14th Dist.] Oct. 26, 2010, no pet.). Note that the Fifteenth Court of Appeals is a court of limited appellate jurisdiction and does not have jurisdiction over family-law matters. TEX. GOV'T CODE ANN. § 22.220(d)(1)(A).

and will continue to put the child at risk."[57] Evidence of significant impairment must raise more than mere "suspicion or speculation of possible harm" and must "support the logical inference that some specific, identifiable behavior or conduct of the parent will probably harm the child."[58] Furthermore, evidence of past misconduct, by itself, is insufficient to show significant impairment.[59]

Second, a nonparent may rebut the statutory parental presumption by showing that the parent has a history of family violence.[60] A showing of family violence is generally governed by the statutory definition of family violence.[61]

Third, a nonparent may rebut the statutory parental presumption by showing that (1) the parent "voluntarily relinquished actual care, control, and possession of the child" and (2) "appointment of the nonparent . . . as managing conservator is in the best interest of the child."[62] A voluntary relinquishment must be free from force, coercion, threats, or other compulsion and must involve relinquishment of decision-making authority rather than mere physical possession.[63]

Because the statutory parental presumption is, by definition, *statutory*, the Texas Legislature is free to set almost any standard for rebutting it. However, the same is not true for the fit-parent presumption. In fact, quite the opposite is true. The Texas Legislature has no authority to set U.S. constitutional standards.[64] When it comes to the significant-impairment

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57 *In re* S.T., 508 S.W.3d 482, 492 (Tex. App.—Fort Worth 2015, no pet.).

58 *In re B.B.M.*, 291 S.W.3d at 467.

59 *Id.* at 469.

60 FAM. §§ 153.004, 153.131(b).

61 *See generally id.* § 71.004 (defining family violence).

62 *Id.* § 153.373.

63 *See, e.g.*, *In re* S.W.H., 72 S.W.3d 772, 777 (Tex. App.—Fort Worth 2002, no pet.) (explaining that relinquishment was not voluntary because court order prohibited parent from contacting child); Critz v. Critz, 297 S.W.3d 464, 474 (Tex. App.—Fort Worth 2009, no pet.) (explaining that mother did not relinquish control of child by leaving child with grandparents for several months because mother made decisions for child).

64 *Cf.* City of Boerne v. Flores, 521 U.S. 507, 511–20 (1997) (explaining that Congress did not have constitutional authority to change interpretation of Free Exercise Clause by passing Religious Freedom Restoration Act to overrule *Employment Division v. Smith* and reinstate holding of *Sherbert v. Verner*). *See generally* U.S. CONST. (separating powers among branches and among levels of government).

standard though, it just so happens that the statutory standard that the Texas Legislature chose to adopt for rebutting the statutory parental presumption also satisfies the constitutional requirements for rebutting the fit-parent presumption.[65]

3. CONSTITUTIONAL FIT-PARENT PRESUMPTION

The fit-parent presumption is a due process requirement that the government must presume "that fit parents act in the best interests of their children."[66] The presumption is a direct component of the substantive-due-process right of parents to raise their children,[67] rather than a procedural-due-process requirement implicit within the substantive right.[68]

Importantly, the fit-parent presumption applies only in cases between parents and nonparents.[69] In cases between parents and nonparents, only

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65 *See infra* Section 3.6.1.

66 Troxel v. Granville, 530 U.S. 57, 68 (2000) (plurality opinion).

67 *See id.* at 68–73.

68 *See id.* at 92 n.1 (Scalia, J., dissenting) (explaining that case did not implicate procedural due process, which would be "a somewhat different" analysis). *But cf.* Parham v. J. R., 442 U.S. 584, 602–04 (1979) (analyzing fit-parent presumption in case alleging violations of children's procedural due process rights); Stanley v. Illinois, 405 U.S. 645, 649–51 (1972) (analyzing fit-parent presumption in case alleging violations of father's procedural due process right to hearing on fitness before termination of parental rights).

The Sixth Circuit is the only federal appellate court to analyze the fit-parent presumption in a parental rights case involving both procedural and substantive due process challenges post-*Troxel*. The Sixth Circuit analyzed the fit-parent presumption as a component of its substantive due process, but not procedural due process, analysis. *See* Schulkers v. Kammer, 955 F.3d 520, 543–49 (6th Cir. 2020); *see also* Eknes-Tucker v. Governor of Alabama, 80 F.4th 1205, 1222 n.14 (11th Cir. 2023) (referencing fit-parent presumption in substantive due process analysis). Furthermore, procedural due process rights in parental rights cases generally involve rights to hearings or counsel rather than a presumption of fitness. *See* Stanley v. Illinois, 405 U.S. 645, 647–48 (1972) (hearings); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32 (1981) (counsel).

69 *See* Reno v. Flores, 507 U.S. 292, 303–04 (1993); Tex. Att'y Gen. Op. No. KP–0241, at 7 (2019) [hereinafter Att'y Gen. Op. KP–0241] (explaining that standard for determining custody in cases between parents is governed by other statutory requirements). *Compare* Holley v. Adams, 544 S.W.2d 367, 372 (Tex. 1976) (listing factors

the parents have constitutional rights to the children. However, cases between two parents present a different issue. In divorce cases, for example, two fit parents "may have differing opinions regarding what is best for the children."[70] In these cases, the two fit parents share equal constitutional rights to their children. Yet, where the parents disagree, the constitutional rights of each parent necessarily conflict with one another. To evaluate conflicting, equal fundamental rights, courts apply a balancing test rather than the traditional strict-scrutiny analysis used for interference with fundamental rights.[71] Because of the conflicting nature of equal constitutional rights, the best-interest-of-the-child standard "is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody."[72]

3.1. Scope of Constitutional Parental Rights

The U.S. Supreme Court has held that the Fourteenth Amendment's Due Process Clause protects fit parents' fundamental right to raise their children.[73] The Court has defined this right to include the right to direct children's care, custody, control, upbringing, education, moral and religious training, and medical care.[74] The Court has upheld this right against government actions that require parents to make certain parenting decisions that

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court should consider in determining custody disputes between parents), *with Troxel*, 530 U.S. at 65 (explaining requirements for determining custody disputes between parents and nonparents).

70 Att'y Gen. Op. KP–0241, *supra* note 69, at 4.

71 Linder v. Linder, 72 S.W.3d 841, 855 (Ark. 2002); Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 279–80 (1990) (balancing patient's right to refuse medical treatment against state's equal interest in protecting lives of incapacitated persons).

72 *Reno*, 507 U.S. at 303–04.

73 *See generally Troxel*, 530 U.S. at 65.

74 *See id.* at 66 (care, custody, and control); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (care, custody, and management); Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 27 (1981) (companionship, care, custody, and management); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925) (education); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (moral and religious training); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (upbringing); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (education); Parham v. J. R., 442 U.S. 584, 602–04 (1979) (medical care).

they would *not* have made otherwise[75] and against government actions that prohibit parents from making decisions that they *would* have made otherwise.[76]

The Court has never expressly adopted a test for determining whether particular parental conduct falls within the scope of constitutional protection.[77] However, the Court has consistently looked to history and tradition when recognizing constitutional protections for parental rights.[78] This analysis is consistent with the history-and-tradition test that the Court prominently articulated in *Washington v. Glucksberg*.[79] However, at times, the Court has simply cited its prior parental-rights decisions without analyzing the constitutional basis for protection of the specific conduct at issue.[80] The precise framework for determining the scope of the parental right is beyond the

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75 *See, e.g.*, *Yoder*, 406 U.S. at 207–09, 234 (holding that compulsory attendance law requiring Amish parents to send their children to school beyond eighth grade violated Constitution).

76 *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 400–01, 403 (1923) (holding that law prohibiting parent's decision to teach his child in German until eighth grade violated Constitution)

77 *See In re* H.S., 550 S.W.3d 151, 175 (Tex. 2018) (Blacklock, J., dissenting).

78 *E.g., id.* at 602–03 (1979) (reviewing history of parental rights protections in U.S. jurisprudence); *Yoder*, 406 U.S. at 226–29, 232 (reviewing history of compulsory attendance and child labor laws and summarizing that "history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children"); *Troxel*, 530 U.S. at 65–66 (reviewing history of constitutional protection for parental rights in U.S. jurisprudence).

79 521 U.S. 702, 720–21 (1997) (first quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); then citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964); and then quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937), *overruled b*y Benton v. Maryland, 395 U.S. 784 (1969)).

The Court temporarily departed from its history-and-tradition test and instead employed a broad construction of "individual autonomy" as a fundamental right. *See* Obergefell v. Hodges, 576 U.S. 644, 663–65 (2015). However, the Court has recently returned to its traditional history-and-tradition test. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022).

80 *See, e.g.*, Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534–35 (1925) (citing *Meyer*, 262 U.S. at 399) (citing prior ruling that parents have right to teach their children German language in holding that parents have right to send their children to private, rather than public, schools).

scope of this Comment.[81] For purposes of this Comment, it is sufficient to simply note that the Court has held that parental rights are fundamental in nature and that they are deeply rooted in the nation's history and tradition.[82]

There is some disagreement amongst the justices of the U.S. Supreme Court about whether the Due Process Clause includes a substantive element.[83] The Court has historically held that parental rights are rooted in substantive due process,[84] but parental rights could also be rooted in the Ninth Amendment[85] or the Privileges and Immunities Clause.[86] Notably, no justice in *Troxel* suggested that the U.S. Constitution does *not* protect parental rights.[87] Although this Comment expresses no opinion about the appropriate

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81 As of January 2025, the precise scope of this right is still being litigated. *See, e.g.*, Grizzell v. San Elijo Elementary Sch., No. 24-0812, 2025 WL 371420 (U.S. cert. pet. filed Jan. 29, 2025) (litigating issue of whether parent's decision to sue pro se on behalf of child is fundamental right); Montana v. Planned Parenthood of Mont., No. 24-0745, 2025 WL 218678 (U.S. cert. pet. filed Jan. 10, 2025) (litigating issue of whether parent's right to consent to child's medical treatment includes consent for abortion).

82 *See Troxel*, 530 U.S. at 65–66.

83 *See id.* at 80 (Thomas, J., concurring).

84 *Id.* at 65 (plurality opinion).

85 *Id.* at 91 (Scalia, J., dissenting); *see also* U.S. CONST. amend. IX.

86 *See Troxel*, 530 U.S. at 80 n.* (Thomas, J., concurring) (citing Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting) (explaining that "privileges and immunities" originally meant "fundamental rights")); *see also* U.S. CONST. amend. XIV, § 1.

87 *See Troxel*, 530 U.S. at 65 (O'Connor, J., joined by Rehnquist, C.J., Ginsburg, J., and Breyer, J.) (plurality opinion) (explaining that Due Process Clause contains substantive elements that protects "interest of parents in the care, custody, and control of their children"); *id.* at 77 (Souter, J., concurring) ("We have long recognized that a parent's interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment."); *id.* at 80 (Thomas, J., concurring) (explaining that substantive due process is inconsistent with original meaning of Due Process Clause and consequently expressing "no view on the merits of this matter" but (1) suggesting that Privileges and Immunities Clause might protect parental rights and (2) arguing that strict scrutiny applies); *id.* at 86–87 (Stevens, J., dissenting) ("My colleagues are of course correct to recognize that the right of a parent to maintain a relationship with his or her child is among the interests included most often in the constellation of liberties protected through the Fourteenth Amendment."); *id.* at 91–92 (Scalia, J., dissenting) (rejecting plurality's substantive due process argument but explaining that "in my view that right is also among the

constitutional source for protection of parental rights, for consistency, it uses the majority's view that parental rights are rooted in due process.

Both the Due Process Clause of the U.S. Constitution[88] and the Due Course Clause of the Texas Constitution[89] protect parental rights.[90] The Texas Supreme Court has explained that "there is no 'meaningful distinction' between due process of the law under the United States Constitution and due course of law under the Texas Constitution."[91] Consequently, Texas courts "traditionally follow[] federal due process precedent" in analyzing the Due Course Clause.[92] However, the Due Process and Due Course Clauses have different histories and traditions,[93] and the Texas Supreme Court has recognized some distinctions between the clauses. For example, the Texas Supreme Court has held that the Due Course Clause protects some "economic liberties that the United States Supreme Court has long since abandoned."[94] Just as the Due Course Clause protects economic liberties that the Due Process Clause does not protect, it is possible that the Due Course Clause protects more parental rights than the Due Process Clause does.[95] Regardless of whatever additional protections that the Due Course Clause might provide, the Due Process Clause sets a minimum threshold that must be satisfied to interfere with parental rights.

'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage'") (alteration in original); *id.* at 95 (Kennedy, J., dissenting) ("The parental right stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment.").

88 See U.S. CONST. amend. XIV, § 1.

89 TEX. CONST. art. I, § 19.

90 *In re* N.G., 577 S.W.3d 230, 234 (Tex. 2019).

91 *Id.* (citing Univ. of Tex. Med. Sch. v. Than, 901 S.W.2d 926, 929 (Tex. 1995)).

92 *Id.* (citing Spring Branch Indep. Sch. Dist. v. Stamos, 695 S.W.2d 556, 560–61 (Tex. 1985)).

93 *Cf.* Douglass v. Nippon Yusen Kabushiki Kaisha, 46 F.4th 226, 263 (5th Cir. 2022) (Elrod, J., dissenting) (explaining that histories and traditions of Fifth and Fourteenth Amendments' Due Process Clauses are different), *cert. denied*, 143 S. Ct. 1021 (2023).

94 Holden T. Tanner, *Lone Star Originalism*, 27 TEX. REV. L. & POL. 25, 78 (2022).

95 *See also* Oral Argument at 2:29, State v. Loe, No. 23-0697, 692 S.W.3d 215 (Tex. Jan. 30, 2024) (No. 23-0697), https://perma.cc/W5Q5-KYH6 (indicating, in answer by State, that it is possible that Due Course Clause provides more protection of parental rights than Due Process Clause provides).

3.2. Standard of Review for Interferences with Parental Rights

Government actions, such as court orders, that interfere with the right of fit parents to raise their children are properly subject to strict scrutiny.[96] The U.S. Supreme Court has long held that the Due Process Clause prohibits infringement on the exercise of a fundamental right "unless the infringement is narrowly tailored to serve a compelling state interest."[97] The Court has also long held that the parental right is a fundamental right protected by the Due Process Clause.[98] Although the Court has explained that the Due Process Clause "provides *heightened protection* against government interference with certain fundamental rights and liberty interests" such as parental rights[99] and that a court must afford "special weight" to a fit parent's decisions,[100] the Court "has not articulated a standard of review by which to judge the constitutionality of infringements upon parents' rights."[101] In the absence of specific instruction from the Court, most state courts have held that strict scrutiny applies to interference with parental rights. The supreme courts of 27 states—Texas,[102] Alabama,[103] Arkansas,[104] Connecticut,[105] Florida,[106]

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96 *See* Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976).

97 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

98 Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality opinion).

99 *Id.* (emphasis added) (first quoting *Glucksberg*, 521 U.S. at 720; and then citing Reno, 507 U.S. at 301–02); *see also* Ryan Bangert, *Parental Rights in the Age of Gender Ideology*, 27 TEX. REV. L. & POL. 715, 720 (2023) ("The Court's parental rights jurisprudence does not hold those rights as absolute, but it does require that the state satisfy a heavy burden to proffer highly persuasive reasons for abrogating parental rights, and even then only do so in a targeted way.").

100 *Troxel*, 530 U.S. at 70.

101 *In re* H.S., 550 S.W.3d 151, 175 (Tex. 2018) (Blacklock, J., dissenting).

102 Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976); *see also* Att'y Gen. Op. KP–0241, *supra* note 69, at 4 (citing Att'y Gen. Op. GA-0260, *supra* note 36, at 5) (explaining that Texas courts and Texas Attorney General's Office recognize strict scrutiny as proper standard of review for interference with parental rights).

103 *Ex parte* E.R.G., 73 So. 3d 634, 645–46 (Ala. 2011).

104 Linder v. Linder, 72 S.W.3d 841, 855 (Ark. 2002).

105 Roth v. Weston, 789 A.2d 431, 441 (Conn. 2002).

106 Fla. Dep't of Child. & Fams. v. F.L., 880 So. 2d 602, 607 (Fla. 2004).

Hawaii,[107] Idaho,[108] Illinois,[109] Iowa,[110] Maine,[111] Maryland,[112] Massachusetts,[113] Michigan,[114] Minnesota,[115] Mississippi,[116] Montana,[117] Nebraska,[118] Nevada,[119] New Hampshire,[120] New Jersey,[121] North Dakota,[122] Ohio,[123] Pennsylvania,[124] Utah,[125] Washington,[126] Wisconsin,[127] and Wyoming[128]—have held that interference with parental rights is subject to strict scrutiny.

However, a limited number of state supreme courts have held that interference with parental rights is subject to rational-basis review or to a balancing test that lies outside the normal standards of review.[129] These minority views improperly approach the constitutional analysis necessary for a fundamental right because they depart from the traditional rule that fundamental rights are subject to strict scrutiny.[130] A balancing test, for example, applies where there are two conflicting fundamental rights (such as in divorce cases)—but not where there is only one fundamental right (such as in

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107 Doe v. Doe, 172 P.3d 1067, 1078–79 (Haw. 2007).
108 Nelson v. Evans, 517 P.3d 816, 828 (Idaho 2022).
109 *In re* R.C., 745 N.E.2d 1233, 1241 (Ill. 2001).
110 Santi v. Santi, 633 N.W.2d 312, 317–18 (Iowa 2001).
111 Rideout v. Riendeau, 761 A.2d 291, 299–300 (Me. 2000).
112 Koshko v. Haining, 921 A.2d 171, 187 (Md. 2007).
113 Blixt v. Blixt, 774 N.E.2d 1052, 1059 (Mass. 2002).
114 DeRose v. DeRose, 666 N.W.2d 636, 653 (Mich. 2003).
115 SooHoo v. Johnson, 731 N.W.2d 815, 821 (Minn. 2007).
116 Chism v. Bright, 152 So. 3d 318, 322 (Miss. 2014).
117 *In re* Adoption of A.W.S., 339 P.3d 414, 417 (Mont. 2014).
118 Hamit v. Hamit, 715 N.W.2d 512, 527 (Neb. 2006).
119 *In re* Parental Rts. of J.L.N., 55 P.3d 955, 958 (Nev. 2002).
120 *In re* R.A., 891 A.2d 564, 576 (N.H. 2005).
121 Moriarty v. Bradt, 827 A.2d 203, 214–15 (N.J. 2003).
122 Kulbacki v. Michael, 845 N.W.2d 625, 628–29 (N.D. 2014).
123 Harrold v. Collier, 836 N.E.2d 1165, 1171 (Ohio 2005).
124 Hiller v. Fausey, 904 A.2d 875, 885 (Pa. 2006).
125 Jones v. Jones, 359 P.3d 603, 609 (Utah 2015).
126 Appel v. Appel (*In re* Parentage of C.A.M.A.), 109 P.3d 405, 408 (Wash. 2005).
127 Michels v. Lyons *(In re* Visitation of A.A.L.*),* 927 N.W.2d 486, 494 (Wis. 2019).
128 Ailport v. Ailport, 507 P.3d 427, 438 (Wyo. 2022).
129 *See, e.g.*, Blakely v. Blakely, 83 S.W.3d 537, 545–46 (Mo. 2002) (rational basis review); *In re* K.H., 773 S.E.2d 20, 30–31 (W. Va. 2015) (balancing test).
130 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (citing Reno v. Flores, 507 U.S. 292, 301–05 (1993)).

cases between a parent and the state).[131] As Justice Murphy explained in his dissent in *Prince v. Massachusetts*, "statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief" are not subject to the rational-basis-review standard described by footnote four of *United States v. Carolene Products*.[132]

These minority views generally rest upon misapplications of the Court's jurisprudence. For example, one rationale suggests that rational basis applies because parental-rights cases (particularly child-welfare cases) necessarily involve conflicts between parents' fundamental rights to raise their children on the one hand and children's fundamental rights to physical well-being on the other.[133] However, the Due Process Clause prohibits courts from "presuming that children and their parents are adversaries" unless the court has already found the parents unfit.[134] Even at the fact-finding stage of parental-rights-termination proceedings, courts may not presume that parents' interests diverge from their children's interests.[135]

Not only is it impermissible for courts to presume that parents' interests conflict with their children's interests, but courts must affirmatively presume that "parents act in the best interests of their child[ren]."[136] In *Reno v.*

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131 *See Reno*, 507 U.S. at 303–04; *see also* Linder v. Linder, 72 S.W.3d 841, 855 (Ark. 2002)).

132 Prince v. Massachusetts, 321 U.S. 158, 173 (1944) (Murphy, J., dissenting) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)); *see also* Montgomery v. Carr, 101 F.3d 1117, 1124 (6th Cir. 1996) ("[T]he same level of scrutiny applies in both the First Amendment and substantive due process contexts.") (citing Lyng v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers, 485 U.S. 360, 366 (1988); Parks v. City of Warner Robins, 43 F.3d 609, 616 (11th Cir. 1995)). *See generally* Joshua D. Hawley, *The Intellectual Origins of (Modern) Substantive Due Process*, 93 TEX. L. REV. 275, 300 (2014) (explaining that standard-of-review analysis under *Carolene Products* turns on implication of fundamental rights).

133 *In re* Lester, 417 A.2d 877, 879–81 (R.I. 1980).

134 Santosky v. Kramer, 455 U.S. 745, 760 (1982) (cleaned up).

135 *Id.*

136 Parham v. J. R., 442 U.S. 584, 604 (1979); *see also id.* at 602–03 ("That some parents 'may at times be acting against the interests of their children' . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion

Flores, the Court explained that "'the best interests of the child' is not the legal standard that governs parents' or guardians' exercise of their custody" and that "[s]o long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves."[137] Additionally, in *Quilloin v. Walcott*, the Court explained that there is "little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'"[138]

Another rationale suggests that rational basis applies unless a state action "significantly interferes" with parents' rights.[139] However, as the Court explained in *Reno*, its due-process jurisprudence "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[140] Parents' decision-making authority "lies at the core of parents' liberty interest in the care, custody, and control of their children."[141] Completely prohibiting parents from making certain decisions for their children, therefore, significantly interferes with those decisions.[142] Additionally "the burden of litigating a domestic relations proceeding can itself be 'so disruptive of the parent-child relationship'" that the state may interfere with

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that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition." (internal citations omitted) (quoting Bartley v. Kremens, 402 F. Supp. 1039, 1047–48 (E.D. Pa. 1975)).

137 507 U.S. 292, 304 (1993).

138 434 U.S. 246, 255 (1978) (quoting Smith v. Org. of Foster Fams., 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

139 *See* People v. R.G., 546 N.E.2d 533, 541 (Ill. 1989) ("Only statutes which significantly interfere with fundamental rights are subject to strict scrutiny." (citing Zablocki v. Redhail, 434 U.S. 374, 386–88 (1978)).

140 507 U.S. at 302.

141 Lulay v. Lulay, 739 N.E.2d 521, 531 (Ill. 2000).

142 *See id.*

parents' rights merely by permitting nonparents to file suits challenging the parents' decisions.[143]

Thus, there is no compelling reason to think that the standard of review for interference with parental rights departs from the normal strict-scrutiny standard.

3.3. Procedural Process for Applying the Fit-Parent Presumption

From an evidentiary perspective, the Court's description of the fit-parent presumption has been imprecise. The fit-parent presumption is one of many examples of the imprecise use of the term "presumption" in law.[144] A true "presumption" is the assumption of one fact based on the existence of another fact.[145] The party seeking the benefit of a *true* presumption must affirmatively prove the existence of the other fact to establish the presumption.[146] Once that party establishes the presumption, the burden shifts to the opposing party to rebut the presumption, generally by either disproving the existence of the other fact or disproving the one fact despite the existence of the other fact.[147] In contrast to a true presumption, an "assumption" is a rule "allocating the burden of proof" that is often referred to as a "presumption."[148] The classic example of an assumption is the "presumption of innocence."[149] The presumption of innocence is not technically a presumption because a criminal defendant need not prove the existence of any fact to establish the presumption.[150] Instead, the presumption of innocence applies

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143 Troxel v. Granville, 530 U.S. 57, 75 (2000)) (plurality opinion) (quoting *id.* at 101 (Kennedy, J. dissenting)); *see also Lulay*, 739 N.E.2d at 531–32.

144 21B CHARLES ALEN WRIGHT & KENNETH W. GRAHAM JR., FED. PRAC. & PROC. EVID. § 5124 & n.68 (2d ed. 2005) (citing Fish v. Fish, 939 A.2d 1040, 1047 n.13, 1054 (Conn. 2008) (treating statutory assumption that it is in the child's best interest to be in parental custody as a "presumption" even though it has no basic facts required for invocation)).

145 *Id.* § 5124

146 *Id.* § 5125.1.

147 *Id.* § 5126.

148 *Id.* § 5124.

149 *Id.*

150 *Id.*

regardless of whether a defendant puts on a defense at all; so it is essentially an imprecise way of saying that the prosecution bears the burden of proof.[151]

This raises the question of whether the fit-parent presumption is a *presumption* or an *assumption*.[152] Like the presumption of innocence, the fit-parent presumption is, in fact, an *assumption*. In *Santosky v. Kramer*, the U.S. Supreme Court explained that the state bears the burden to rebut the fit-parent presumption in parental-rights-termination cases and that the state must do so by clear-and-convincing evidence before courts may terminate parental rights.[153] The Court articulated this requirement in categorical terms and made no distinction about the presumption's application based on whether the parent established the existence of the presumption.[154] In *Lassiter v. Department of Social Services*, the Court reviewed a parental-rights-termination case in which the mother expressly declined to attend the termination hearing and during which she made no effort to contest the termination.[155] Nevertheless, the Court emphasized that due process applied to the termination proceeding and implicitly acknowledged that the state had a burden to prove its termination case.[156]

The fact that the fit-parent presumption is technically an assumption is important for the procedural posture of parental-rights cases. Nonparents always bear the burden of proof to rebut the fit-parent presumption.[157] Because the burden lies with nonparents, parents need not establish that the presumption applies to enjoy its protection.[158] For example, in grandparent-visitation suits against parents, the parents need not raise the fit-parent presumption as a defense or affirmatively prove that they adequately care for

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151 *Id.*

152 Federal Practice and Procedure does not take a definitive position on this question but does provide an extensive list of presumptions, including the fit-parent presumption. *Id.* § 5124. However, the list also includes the presumptions of sanity and intent, which the treatise explains elsewhere are actually assumptions. *Id.* §§ 5124–5125.

153 Santosky v. Kramer, 455 U.S. 745, 760 (1982).

154 *See id.*

155 Lassiter v. Dep't of Soc. Services, 452 U.S. 18, 33 (1981).

156 *Id.* at 27–28.

157 *See* Troxel v. Granville, 530 U.S. 57, 69 (2000) (plurality opinion) ("In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters.").

158 *See* 21B WRIGHT & GRAHAM, *supra* note 144, § 5124.

their children.[159] Similarly, in declaratory-judgment suits brought by parents, the parents need not affirmatively prove that they adequately care for their children.

The fact that the fit-parent presumption is technically an assumption is also important because it impacts the effect of rebuttal. Because the way that nonparents rebut the presumption is by carrying their burdens of proof (in other words, by proving their cases), the effect of a rebuttal of the presumption is that the nonparents win.[160]

In short, although the fit-parent presumption is an assumption, it is known as the "fit-parent *presumption*," just as the assumption of innocence is known as the "presumption of innocence."[161] Accordingly, this Comment refers to it as a "presumption" subject to the clarification that it is technically an assumption.

3.4. Substantive Requirements for Rebutting the Fit-Parent Presumption

In *Troxel*, the U.S. Supreme Court explained that (1) "there is a presumption that fit parents act in the best interests of their children" and (2) if a parent is fit then "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[162] In other words, the fit-parent presumption requires courts to presume that (1) parents are fit and (2) fit parents' decisions are in the best interests of their children.[163] The Court defines fit parents as parents who

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159 *Troxel*, 530 U.S. at 69 ("In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters. . . . The decisional framework employed by the Superior Court directly contravened the traditional presumption that a fit parent will act in the best interest of his or her child." (citation omitted)).

160 *See id. But see In re* Marriage of O'Donnell-Lamont, 91 P.3d 721, 733 (Or. 2004) (explaining that rebutting fit-parent presumption puts parent and nonparent on equal ground, at which point court conducts best interest analysis based on preponderance of evidence).

161 *See supra* notes 144, 150–51 and accompanying text.

162 530 U.S. at 68–69.

163 *See id.*

"adequately care[]for [their] children."[164] The presumption therefore prohibits courts from interfering with fit parents' decisions simply because better decisions could be made.[165]

The way that nonparents may rebut this presumption may be framed in two ways. First, it may be framed as requiring either (1) a showing of unfitness or (2) a showing that, despite general fitness, the parent's particular decision at issue does not provide adequate care for the child.[166] Second, it may be framed as requiring either (1) a showing of categorical unfitness—unfitness that is complete and permanent that would justify termination of parental rights—or (2) a showing of limited unfitness—unfitness that is limited to a particular decision or circumstance that would justify interference only with *that* decision.[167] Because being "fit" simply means that the parent adequately cares for his or her child,[168] both framings of the presumption require the same showings: (1) the parent *generally* does not adequately care for his or her child or (2) the parent's *particular decision* does not provide adequate care for his or her child.

3.4.1. Requirement of Unfitness Generally

A party may rebut the fit-parent presumption by showing unfitness—that is, inadequate care.[169] The U.S. Supreme Court held in *Troxel* that a fit parent is a parent who "adequately cares for his or her children."[170] *Troxel* failed to define "adequate care" and specifically declined to specify whether "inadequate care" required harm to the child.[171]

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164 *Id.* at 68.

165 *Id.* at 72–73; *see also* Parham v. J. R., 442 U.S. 584, 602–04 (1979) (explaining that a court may not automatically interfere with a parent's decision simply because that decision involved some risk).

166 *See* H.B. 2756, 86th Leg., Reg. Sess. (Tex. 2019).

167 *See Ex parte* E.R.G., 73 So. 3d 634, 644–45 (Ala. 2011).

168 *Troxel*, 530 U.S. at 68.

169 *See* text accompanying *supra* notes 166–67.

170 530 U.S. at 68.

171 *In re* Marriage of O'Donnell-Lamont, 91 P.3d 721, 740 (2004); *see Troxel*, 530 U.S. at 68, 73.

However, the Court has implicitly defined "inadequate care" as child abuse or neglect.[172] In *Parham v. J.R.*, the Court held that the fit-parent presumption applies "absent a finding of neglect or abuse"[173] and that, with respect to the fit-parent presumption, child abuse or neglect "may rebut what the law accepts as a starting point."[174] The Court explained that the fact

> [t]hat some parents "may at times be acting against the interests of their children" . . . creates a basis for caution[] but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests. The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.[175]

However, simply defining "inadequate care" as abuse or neglect raises the question of what conduct constitutes abuse or neglect for constitutional, as opposed to statutory, purposes. Section 3.6.1 argues that, for constitutional purposes, "inadequate care" means conduct that causes a significant impairment to the child's physical health or emotional well-being.

3.4.2. Unfitness Necessarily Involves Harm to Child

The standard for rebutting the fit-parent presumption must include a requirement of harm because it is necessary to meet two constitutional requirements.[176] First, courts must *presume* that fit parents' decisions are in their children's best interest.[177] In *Troxel*, the Court explained that this presumption prohibits the state from interfering with a parent's child-rearing decision "simply because a state judge believes a 'better' decision could be

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172 *See* Parham v. J. R., 442 U.S. 584, 604 (1979).

173 *Id.*

174 *Id.* at 602.

175 *Id.* at 602–03 (citations omitted).

176 *See also* Brooks v. Parkerson, 454 S.E.2d 769, 772–73 (Ga. 1995) ("The Supreme Court has made clear that state interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child.").

177 Troxel v. Granville, 530 U.S. 57, 69–70 (2000) (plurality opinion).

made."[178] A court therefore may not "substitute its judgment for the judgment of a fit parent even if [the court] disagrees with the parent's decision."[179]

A court cannot find that the fit-parent presumption has been rebutted without an objective, specific standard by which to determine that the parent's decision is not in the child's best interest. Without an objective standard, any judicial determination that the parent's decision is not in the child's best interest is necessarily a judgment that the court substitutes for the judgement of the parent because the court believes that a better decision could be made.[180]

Second, courts must find more than a mere risk of harm to interfere with parents' decisions.[181] Parents may make many permissible decisions for their children about any given issue.[182] However, those permissible decisions are just that—*permissible*. For example, a parent could decide to enroll his or her child in baseball, soccer, band, dancing, robotics, math club, painting, 4-H, orchestra, volleyball, debate, or any other of the dozens of extracurricular activities offered at most schools. Some of those decisions would necessarily be better for the particular child than others. For example, a child might have a gift for music and might consequently be "better off" in orchestra than in robotics. However, the parent's decision to enroll the child in robotics instead of orchestra is a decision both allowed and protected by the Due Process Clause. The presence of a better decision does not permit the state to interfere with the parent's decision.[183]

In *Parham v. J.R.*, the U.S. Supreme Court reviewed parents' decisions to commit their children to mental institutions.[184] The Court explained that "[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make

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178 *Id.* at 72–73.

179 *In re* A.A.L., 927 N.W.2d 486, 500 (Wis. 2019) (footnote omitted); *see also Troxel*, 530 U.S. at 72–73.

180 *See Troxel*, 530 U.S. at 72–73.

181 *See* Parham v. J. R., 442 U.S. 584, 603–04 (1979) (explaining that parent's decision about medical treatment is constitutionally protected even if treatment involves risk).

182 *See, e.g.*, *id.*

183 *See id.*

184 *Id.* at 587.

that decision from the parents to some agency or officer of the state."[185] The Court analogized the parents' decisions about mental commitment to decisions about tonsillectomies, appendectomies, and other medical procedures that, despite involving risks of harm to the children, are within the parents' rights to make.[186] The Court emphasized that "courts are [not] equipped to review such parental decisions."[187]

Thus, a constitutionally proper standard must require a showing of objective, actual harm to the child. In other words, the parent's decision must actually be harmful rather than merely neutral or potentially harmful.

3.5. Analytical Framework for the Fit-Parent Presumption

Because the fit-parent presumption is a component of parents' rights to raise their children,[188] courts should analyze the fit-parent presumption within the traditional substantive-due-process framework. In analyzing substantive-due-process claims, courts first analyze whether asserted rights are "fundamental" to ordered liberty and deeply rooted in the nation's history and tradition.[189] Courts then analyze the government action at issue under the appropriate standard of review. Courts analyze fundamental rights under strict scrutiny[190] and non-fundamental rights under rational-basis review.[191] Where conduct appears to implicate a fundamental right, rational-basis review only applies where the conduct falls outside the scope of that right.[192]

Even at the fact-finding stage of parental-rights-termination proceedings, courts must presume that parents act in their children's best interest.[193] Courts may not dispense with the fit-parent presumption until "[a]fter the

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185 *Id.* at 603.

186 *Id.*

187 *Id.* at 604.

188 *See supra* note 68 and accompanying text.

189 *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993); *see also* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (citations omitted).

190 *See Reno*, 507 U.S. at 301–02.

191 *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 237–38, 300 (2022).

192 *See, e.g.*, Combs v. Homer-Ctr. Sch. Dist., 540 F.3d 231, 247–48 (3d Cir. 2008) (holding that "the right to be free from all [educational] reporting requirements and 'discretionary' state oversight" was outside scope of constitutional parental right to direct child's education and therefore applying rational basis).

193 Santosky v. Kramer, 455 U.S. 745, 760 (1982).

State has established parental unfitness . . . ."[194] Absent a finding of "parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[195] Courts must find parents unfit not only before presuming that the parents do not act in their children's best interest but also before removing the children from their parents[196] or otherwise interfering with the parents' rights to raise their children.

Because the exercise of a fundamental right receives full constitutional protection,[197] the proper stage of a strict-scrutiny analysis at which to analyze the fit-parent presumption is after the determination of fundamentality—that is, the application stage.

3.5.1. Determine if the State Has a Compelling Interest

As the U.S. Supreme Court implicitly held in *Parham*, abuse and neglect can constitute unfitness for purposes of rebutting the fit-parent presumption.[198] Because protecting children from abuse and neglect is a compelling government interest,[199] the fit-parent presumption fits quite cleanly into a constitutional strict-scrutiny analysis. The court simply determines whether interference with the parent's right is necessary to protect the child from abuse or neglect. If so, then the government has a compelling interest in interfering with the parent's right, and the fit-parent presumption is rebutted. The court would then determine whether that interference is narrowly tailored to protect the child from that abuse or neglect.

Importantly, promoting the best interest of a child is not a compelling government interest.[200] In *Reno*, the Court explicitly rejected "the best

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194 *Id.*

195 *Id.*

196 *See* Stanley v. Illinois, 405 U.S. 645, 649 (1972).

197 *See* Reno v. Flores, 507 U.S. 292, 301–02 (1993).

198 *See supra* notes 172–75 and accompanying text.

199 *See* Packingham v. North Carolina, 582 U.S. 98, 111 (2017). The state also has a compelling interest in establishing stable, permanent homes for children. *In re* A.M., 385 S.W.3d 74, 80 (Tex. App.—Waco 2012, pet. denied) (citing Dupree v. Tex. Dep't Protective & Regul. Servs., 907 S.W.2d 81, 87 (Tex. App.—Dallas 1995, no writ)). However, the state does not have a compelling interest in "bettering" a child's upbringing. *See* Troxel v. Granville, 530 U.S. 57, 72–73 (2000) (plurality opinion).

200 *See* Reno v. Flores, 507 U.S. 292, 303–04 (1993).

interests of the child" as the standard for reviewing parents' decisions in contexts other than disputes between two fit parents such as divorce suits.[201] The Court went as far as to explain that "[e]ven if . . . a particular couple desirous of adopting a child would *best* provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child *adequately*."[202] Because the Court differentiates "the best interest of a child" from "adequate care for a child," failing to promote the best interest of a child *cannot* equate to failing to adequately care for a child—that is, being unfit.

Furthermore, promoting the best interest of a child is arguably not a legitimate government interest either. A legitimate interest, necessary for a state action to survive rational-basis review, is an interest that is within the scope of an enumerated constitutional power.[203] In *Troxel*, the U.S. Supreme Court explained that the state may not interfere with a parent's right to raise his or her child even if "a 'better' decision could be made."[204] The Court then

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201 *Id.* ("'The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. . . . [But it] is not the legal standard that governs parents' or guardians' exercise of their custody: So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.").

202 *Id.* at 304.

203 United States v. Comstock, 560 U.S. 126, 160 (2010) (Thomas, J., dissenting) ("[F]ederal legislation is a valid exercise of Congress' authority under the Clause if it satisfies a two-part test: First, the law must be directed toward a 'legitimate' end, which *McCulloch* defines as one 'within the scope of the [C]onstitution'—that is, the powers expressly delegated to the Federal Government by some provision in the Constitution. Second, there must be a necessary and proper fit between the 'means' (the federal law) and the 'end' (the enumerated power or powers) it is designed to serve." (alteration in original) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)); *see id.* at 134, 148 (majority opinion) ("[W]e look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power. . . . But every such statute must itself be legitimately predicated on an enumerated power."); *see also* Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny's Compelling- and Important-Interest Inquiries*, 129 HARV. L. REV. 1406, 1412 (2016); Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 376 (2016) (describing rational basis test).

204 *Troxel*, 530 U.S. at 72–73 (2000).

declared a statute unconstitutional precisely because the statute allowed a court to interfere with a parent's decision if the court believed that a better decision could be made.[205] Because the Court, under the best interest standard, found an interference with a parental decision unconstitutional, there is a serious open question about whether promoting the best interest of a child is within the scope of an enumerated constitutional power. If the interference is not within the scope of an enumerated constitutional power, then it is not a legitimate interest—let alone a compelling one.

In sum, the U.S. Supreme Court has indicated that a party may rebut the fit-parent presumption by showing that the government's compelling interest in protecting a child from abuse or neglect justifies interference with the parent's right to raise that child.[206] If the party successfully shows that the interference is necessary to protect that child from abuse or neglect, then the party must show that the interference is narrowly tailored to address the abuse or neglect.

3.5.2. Determine if the Interference Is Narrowly Tailored

For state interference to be narrowly tailored, the state must have no less restrictive means of accomplishing its compelling interest.[207] Although the U.S. Supreme Court has never analyzed whether a state action is narrowly tailored in the context of parental rights, a few state supreme courts have addressed the issue. These state supreme courts generally have found interferences with parental rights to be narrowly tailored where the interferences were predicated upon compliance with significant procedural protections.[208]

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205 *Id.* at 73.

206 *See supra* notes 199–202 and accompanying text.

207 *Ex parte* Ellis, 609 S.W.3d 332, 337 (Tex. App.—Waco 2020, pet. ref'd).

208 For cases that have held statutes to be narrowly tailored to protecting children from abuse or neglect, see, for example, Sparks v. Sparks, 65 A.3d 1223, 1232–34 (Me. 2013) (holding that Maine's abuse statute was narrowly tailored because it included four specific procedural protections); Blixt v. Blixt, 774 N.E.2d 1052, 1060–62 (Mass. 2002) (holding that Massachusetts's grandparent visitation statute was narrowly tailored because doctrine of constitutional avoidance required courts to read "significant harm" finding into statute); *In re* Termination of Parental Rts. to Diana P., 694 N.W.2d

For example, the Wisconsin Supreme Court held that Wisconsin's child-welfare-proceeding process was narrowly tailored to protect a child from abuse and neglect because it used a step-by-step approach that permitted an increased level of interference only after a court had determined that lesser levels of interference would not effectively protect the child from abuse or neglect.[209]

Like Wisconsin, Texas permits interferences with parental rights of varying degrees in child-welfare proceedings.[210] However, unlike Wisconsin, Texas does not directly predicate imposition of greater interferences upon findings that lesser interferences would not accomplish the compelling

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344, 352–53 (Wis. 2005) (holding that Wisconsin's child welfare proceeding process was narrowly tailored because it required step-by-step process of increasing interference based on effectiveness of protecting children from abuse or neglect). For cases that have held statutes to not be narrowly tailored to protecting children from abuse or neglect, see, for example, *In re* Zachary B., 678 N.W.2d 831, 836–37 (Wis. 2004) (holding that statute permitting termination of parental rights for incestuous relationship with child's other parent was not narrowly tailored because it allowed termination of rights of mother who was victim of sexual abuse by her father).

209 *In re Zachary B.*, 678 N.W.2d at 836–37. Wisconsin's child welfare system uses the following process: (1) if a court finds that a child's welfare demands immediate removal from his or her parent, then the state may remove the child from the parent's custody, WIS. STAT. ANN. § 48.19(1)(c) (West); (2) after the state removes the child, if the court finds one of the grounds (e.g. the parent has abandoned the child) for the child being in need of protection or services by clear and convincing evidence, then the court may declare the child to be in need of protection or services, *id.* § 48.31(1)–(2) (providing requirements for court findings); *id.* § 48.13 (stating grounds for child being in need of protection or services); (3) after the court declares a child to be in need of protection or services, if the court finds that placing the child in his or her home would be contrary to the child's welfare, then the court may order the state to place the child outside the home, *id.* § 48.355(2)(b)(6); *see also id.* § 48.345(a); (4) after the court orders the state to place the child outside the home, if the court finds that it is in the best interest of the child, then the court may grant the parent visitation with the child, *id.* § 48.355(3); and (5) after a court has denied visitation, the court must inform the parent of the conditions necessary for the child to be returned home or for the parent to be granted visitation, *id.* § 48.356(1); *see also In re Zachary B.*, 678 N.W.2d at 836–37 (describing step-by-step process). *Compare, e.g.*, TEX. FAM. CODE ANN. § 262.201 (permitting removal of child from home), *with id.* § 264.203 (permitting imposition of court-ordered services).

210 *Compare, e.g.*, TEX. FAM. CODE ANN. § 262.201 (permitting removal of child from home), *with id.* § 264.203 (permitting imposition of court-ordered services).

interest of protecting a child from abuse or neglect.[211] Many of Texas's statutes impose a requirement that the ordered relief be "necessary" to protect the child.[212] "Necessary" does not necessarily mean the "least restrictive means." If comparison with the U.S. Constitution offers any indication, "necessary" can mean nothing more than "convenient" or "useful."[213] At the other end of the definitional spectrum, "necessary" can mean "necessary *because no less restrictive means would be effective*." The doctrine of constitutional avoidance[214] favors the latter interpretation because it reads the constitutional requirement of narrow tailoring into the statute.[215]

Notwithstanding whether Texas predicates imposition of greater interferences upon findings that lesser interferences would not accomplish a compelling interest, Texas allows several options from which a court could select, on a case-by-case basis, the least-restrictive option that would effectively protect a child from abuse and neglect. These options include the following in order of the least to the greatest degree of interference.[216]

First, the state can provide voluntary family support services to the parent.[217] The state can provide these services even absent a child welfare investigation.[218] Because these services are voluntary, whether to participate is necessarily the *parent's* decision. Thus, there is no interference with the parent's right to make child-rearing decisions.

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211 *See, e.g.*, *id.* § 264.203(m) (failing to require finding that lesser interventions would not adequately protect child).

212 *See, e.g.*, *id.*

213 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413 (1819). *But see* Steven Gow Calabresi et al., *What* McCulloch v. Maryland *Got Wrong: The Original Meaning of "Necessary" Is Not "Useful," "Convenient," or "Rational,"* 75 BAYLOR L. REV. 1, 4–5 (2023) (arguing that *McCulloch* incorrectly defined "necessary").

214 *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 251 (2012).

215 *Cf.* Blixt v. Blixt, 774 N.E.2d 1052, 1060–62 (Mass. 2002) (holding that Massachusetts's grandparent visitation statute was narrowly tailored because doctrine of constitutional avoidance required courts to read "significant harm" finding into statute).

216 The following list is non-exhaustive and represents only the major options commonly used in child welfare cases. The list does not include rarely used procedures such as joint managing conservatorship with the state for children with severe emotional disturbances. *See* TEX. FAM. CODE ANN. § 262.352.

217 *See* TEX. HUM. RES. CODE ANN. §§ 137.001–.258 (providing for family support services).

218 *See id.*

Second, the state can provide family-based safety services (FBSS) to the parent.[219] FBSS are voluntary services provided to families who are the subjects of child-welfare investigations.[220] However, the policy of Child Protective Services (CPS) is to "file[] for a motion to participate or court-ordered services if . . . [t]he family does not agree to participate in FBSS services . . . [or] does not allow DFPS to access the home or child . . . ."[221] CPS's policy of seeking a court order whenever a family refuses to "voluntarily" participate in FBSS raises serious concerns about whether participation in FBSS is truly voluntary. Nevertheless, because of the purportedly voluntary nature of FBSS, these services are the second-least restrictive method of protecting children.

Third, the state could enter into a parental child safety placement (PCSP) with the parent.[222] A PCSP is a voluntary agreement between the parent and CPS to temporarily place the child outside the home during a CPS investigation or while the parent receives services.[223] A PCSP is facially voluntary and therefore technically involves no government interference with a parent's decision.[224] In 2023, the Texas Legislature responded to widespread concerns about the coercive nature of PCSPs[225] by creating due-process protections such as timelines, court oversight, and notifications of rights

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219 SUP. CT. OF TEX. PERMANENT JUD. COMM'N FOR CHILD., YOUTH & FAMS., TEXAS CHILD WELFARE LAW BENCH BOOK 367 (2023) [hereinafter BENCH BOOK].

220 *Id.*; *see* TEX. DEP'T OF FAM. & PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 2400 (2023) [hereinafter CPS HANDBOOK], https://perma.cc/SG34-6GTZ. DFPS maintains that FBSS can also be court ordered. CPS HANDBOOK § 2400. However, Texas statute provides for court-ordered services under a different provision. *See* FAM. § 264.203. When DFPS uses the term "FBSS" in context of being court-ordered, it is referring to the content, not the enforceability, of court-ordered services as that which is offered through FBSS.

221 *See* CPS HANDBOOK § 2414.

222 *See* FAM. §§ 264.901–.905. PCSPs are commonly used during CPS investigations, and evidence suggests that just as many (if not more) children are removed from their homes through PCSPs as through the traditional, statutory removal process. ANDREW C. BROWN & ANNA CLAIRE LONG, REFORMING THE HIDDEN FOSTER CARE SYSTEM 3, 8 (2022), https://perma.cc/V98F-M2NR.

223 FAM. § 264.901(2).

224 *See id.* § 264.902(j).

225 *See* BROWN & LONG, *supra* note 222, at 4–6.

for PCSPs.[226] Based on the facially voluntary nature of the agreement and the out-of-home placement, PCSPs are the third-least restrictive means of protecting children.

Fourth, a court can issue an order in aid of investigation.[227] An order in aid of investigation is the child welfare analogue to a search warrant in a criminal case.[228] It authorizes CPS to enter a parent's home, interview a child, obtain medical records, and access other information that the parent has declined to release in the course of CPS's investigation.[229] Because an order in aid of investigation can authorize CPS to interfere with a parent's decision, such as a decision to not allow CPS to interview a child, an order in aid of investigation directly interferes with a parent's right to make decisions for a child. An important distinction between an order in aid of investigation and the other seven means of interference is the indirect nature of their protection. Unlike services and removal, an order in aid of investigation assists CPS in determining whether a child needs protection, and if so how to protect the child, rather than in directly protecting a child.[230] This distinction could be a factor in determining whether an order in aid of investigation would *effectively* protect a child but would not impact whether the conduct at issue interferes with a parental decision. Because it *does* directly interfere with a parental decision, an order in aid of investigation is the fourth-least restrictive means of protecting a child.

Fifth, a court can issue an order to participate in services.[231] Court-ordered services are services that the Family Code specifically authorizes for alleviating the effects of past abuse or neglect or preventing future abuse or neglect.[232] Court-ordered services are subject to several procedural

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226 Act of May 20, 2023, 88th Leg., R.S., H.B. 730, § 9 (codified at FAM. § 264.902).

227 FAM. § 261.303.

228 *See, e.g.*, Gates v. Tex. Dep't of Protective & Regul. Servs., 537 F.3d 404, 420 n.10 (5th Cir. 2008). This is a limited analogue, though, because orders in aid of investigation do not necessarily satisfy the Fourth Amendment's requirements for search warrants. *See* Reynolds v. State, 507 S.W.3d 805, 817 n.19 (Tex. App.—Texarkana 2016), *rev'd on other grounds*, 543 S.W.3d 235 (Tex. Crim. App. 2018).

229 *See* FAM. § 261.303.

230 *See id.*; *cf.* Wernecke v. Garcia, 591 F.3d 386, 396 (5th Cir. 2009) (explaining that an order in aid of investigation "is purely an investigative tool").

231 FAM. § 264.203(a)(1).

232 *Id.* § 264.203(m).

requirements such as notice and hearing.[233] Importantly, statute requires the services to be narrowly tailored to the court's findings of abuse or neglect.[234] Additionally, the statute prohibits the court from ordering the removal of the child as part of the court-ordered services suit.[235] Because court-ordered services are more intrusive than court-ordered access to information, court-ordered services are the fifth-least restrictive means of protecting children.

Sixth, a court can order the child to be removed from his or her home.[236] The removal order is a temporary order that lasts during the pendency of the underlying suit,[237] which may last for up to two years (a timeline that is made up of a one-year initial deadline and two consecutive six-month extensions).[238] The underlying suit is a suit for parental-rights termination, so the state requests a temporary order to remove the child until the trial on the issue of termination. The removal order thus represents the sixth-least restrictive means of protecting children.

Seventh, a court can render conservatorship orders without terminating parental rights.[239] At the termination trial, the court can appoint the state as the child's managing conservator without terminating parental rights.[240] Although this option is strongly disfavored because it prohibits the child both from returning home and being adopted, it interferes with a parent's rights less than termination does. Thus, appointing the state as the conservator without terminating parental rights is the seventh-least restrictive means of protecting children.

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233 *See id.* § 264.203(l).

234 *Id.* § 264.203(n)(3).

235 *Id.* § 264.203(e).

236 *Id.* § 262.201.

237 *See id.* § 262.201(h).

238 *See id.* § 263.401 (trial commencement deadline); *id.* § 263.401(b) (providing for extraordinary circumstances extension); *id.* § 263.403 (providing for monitored return extension). A court may not grant an extraordinary circumstances extension then subsequently grant a monitored return extension. *Id.* § 263.403(a-1) (providing that monitored return is unavailable if court has already granted extraordinary circumstances extension). However, Texas law does not prohibit a court from granting a monitored return extension then subsequently granting an extraordinary circumstances extension. *See generally id.* §§ 263.401, .403.

239 *Id.* § 263.404.

240 *Id.*

Eighth, a court can involuntarily terminate parental rights.[241] Termination of parental rights is the Family Code's "death penalty"[242] and the most severe interference with parental rights because it permanently severs those rights. Termination of parental rights is thus the *most* restrictive means of protecting children.

These means of protecting children illustrate that courts have a variety of options to consider when determining the least-restrictive means of protecting a child from abuse or neglect for any given case. Section 3.6.1 revisits these means in arguing that the significant-impairment standard comports with a narrow-tailoring analysis.

3.5.3. Distinctions from Other Analytical Frameworks

Another possible analytical framework merits discussion but ultimately does not conform to the U.S. Supreme Court's analytical approach. This approach is to use the fit-parent presumption as the test for determining whether conduct falls within the scope of constitutional protection. Under this approach, if the conduct provides adequate care for a child, then the conduct would be protected; but if the conduct does not provide adequate care for a child, then the conduct would not be protected. This approach is inconsistent with the Court's jurisprudence for two reasons.

First, the Court applies the fit-parent presumption after determining that a parental right falls within the scope of constitutional protection.[243] In fact, the Court has never used the fit-parent presumption to determine whether a parental right is constitutionally protected in the first place. In *Santosky v. Kramer*, the Court held that even parental decisions that might constitute abuse or neglect are within the scope of a parent's constitutional right to raise his or her children.[244] The Court explained that "[t]he fundamental liberty interest of natural parents . . . does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[245] Based on this rationale, the Court concluded that

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241 *Id.* § 161.001–.003, .006–.007.

242 *In re* D.T., 625 S.W.3d 62, 69 (Tex. 2021).

243 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65–66, 68–69 (2000) (plurality opinion).

244 *Cf.* 455 U.S. 745, 753–54 (1982).

245 *Id.* at 753.

the Due Process Clause allows states to terminate parental rights only by the heightened standard of proof of clear-and-convincing evidence.[246]

Notably, the Court's analytical approach to parental-rights cases differs significantly from its approach in free-speech cases. In its parental-rights cases, the Court does not examine the substance of a parent's decision (or the decision's effect on the child) to determine whether that decision is constitutionally protected.[247] However, in its free-speech cases, the Court does analyze the substance of the speech (e.g. whether it incites imminent lawless action,[248] constitutes defamation,[249] etc.) in determining whether the speech is constitutionally protected.[250] Applying a free-speech-type analysis to parental-rights cases would not only conflate two distinct areas of constitutional jurisprudence but also, as discussed below, permit courts to inconsistently apply strict scrutiny in parental-rights cases.

Second, simply using the fit-parent presumption to determine whether conduct is constitutionally protected circumvents strict scrutiny. Under this approach, if the court determines that the conduct is not constitutionally protected, then the court would apply rational basis. This approach would not subject the state interference with the parent's decision to a narrow-tailoring requirement. In other words, any interference, no matter how disproportionate or unnecessary, would be constitutional as long as it was rationally related to some conceivable legitimate state interest.[251] For example, it would authorize states to remove children from their homes or even terminate parental rights in cases in which services would adequately protect the children. For these reasons, using the fit-parent presumption as the test for determining whether conduct falls within the scope of constitutional protection does not comport with the U.S. Supreme Court's jurisprudence.

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246 *Id.* at 747.

247 *See, e.g.*, *id.* at 753–54.

248 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

249 Beauharnais v. Illinois, 343 U.S. 250, 261 (1952).

250 *See, e.g.*, *id.*

251 *See* U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

3.6. Possible Standards for Rebutting the Fit-Parent Presumption

The U.S. Supreme Court has made clear that a party may rebut the fit-parent presumption by showing unfitness—that is, inadequate care[252]—but has not defined "inadequate care."[253] However, the Court has implicitly found that abuse and neglect constitute "inadequate care."[254] This section surveys the possible standards for determining "inadequate care" and argues that the significant-impairment standard is the constitutionally correct standard by which a nonparent may rebut the fit-parent presumption.

3.6.1. Significant Impairment—Satisfies Strict Scrutiny

The first possible standard is the significant-impairment standard specified in Texas statute as one of the ways that a nonparent may rebut the statutory parental presumption. The significant-impairment standard meets the requirements of strict scrutiny.

As discussed in Section 3.4.2, due process necessitates a showing of harm to a child before the state may interfere with the parent's right to raise the child. This harm must be significant to justify interference with a fundamental right. A standard requiring *any* harm, no matter how insignificant, to the child is functionally comparable to the best-interest-of-the-child standard that the U.S. Supreme Court rejected in *Reno*.[255] A decision that is not in the best interest of a child necessarily withholds a benefit from the child. Because the Court has held that the denial of a benefit can constitute a harm for constitutional purposes,[256] an any-harm-at-all standard is incompatible with due process.

In the wake of the Texas Supreme Court's decision in *In re C.J.C.*,[257] Texas's intermediate courts of appeals have grappled with the proper standard by which a nonparent may rebut the fit-parent presumption. Six of the

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252 See *supra* text accompanying note 243.

253 *In re* Marriage of O'Donnell-Lamont, 91 P.3d 721, 740 (Or. 2004); *see* Troxel v. Granville, 530 U.S. 57, 68, 73 (2000) (plurality opinion).

254 *See supra* notes 198, 173–75 and accompanying text.

255 *See supra* notes 201–02 and accompanying text.

256 Sherbert v. Verner, 374 U.S. 398, 403 (1963), *abrogated on other grounds*, Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

257 603 S.W.3d 804 (Tex. 2020).

eight courts of appeals that have decided the issue have held that the significant-impairment standard satisfies the constitutional requirements of due process.[258] Furthermore, the supreme courts of Connecticut, Hawaii, Massachusetts, and Vermont have held that a party must show "significant harm" to a child to rebut the fit-parent presumption.[259] As the Vermont Supreme Court explained, a significant harm standard is necessary to "minimize[] the risk that a court will substitute its judgment for that of the parent simply because the court disagrees with the parent's decision."[260] The Massachusetts Supreme Court added that a significant-harm standard is necessary to "ensure[] a careful balance between the possibly conflicting rights of parents in securing their parental autonomy, and the best interests of children in avoiding actual harm to their well-being."[261]

As a practical matter, state interference cannot be narrowly tailored to achieve the compelling interest of preventing abuse and neglect absent a significant impairment to the child's physical health or emotional well-being. If due process merely required a showing of some harm, the state would always have some less-restrictive way of preventing that harm. Take, for example, a case in which a nonparent seeks visitation with a child over the parent's objections. The nonparent alleges that the nonparent has a strong

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258 *See In re* J.O.L., 668 S.W.3d 160, 166–67, 169 (Tex. App.—San Antonio 2023, pet. filed); *In re* A.V., No. 05-20-00966-CV, 2022 WL 2763355, at *4 (Tex. App.—Dallas July 15, 2022, no pet.); *In re* Huff, No. 10-23-00216-CV, 2023 WL 7039650, at *2–3 (Tex. App.—Waco Oct. 26, 2023, no pet.); *In re* E.R.D., 671 S.W.3d 682, 687–88 (Tex. App.—Eastland 2023, no pet.); *In re* A.V., No. 13-23-00433-CV, 2024 WL 973021, at *10 (Tex. App.—Corpus Christi–Edinburg Mar. 7, 2024, no pet.); *In re* N.H., 652 S.W.3d 488, 496, 498 (Tex. App.—Houston [14th Dist.] 2022, pet. denied). *But see In re* B.B., 632 S.W.3d 136, 140 (Tex. App.—El Paso 2021, no pet.) (holding that prior appointment of nonparent as managing conservator could rebut fit-parent presumption); S. C. v. Tex. Dep't of Fam. & Protective Servs., No. 03-20-00179-CV, 2020 WL 4929790, at *2–3 (Tex. App.—Austin Aug. 21, 2020, no pet.) (holding that finding that parent does not act in child's best interest, as determined by *Holley* factors, could rebut fit-parent presumption).

259 Roth v. Weston, 789 A.2d 431, 434 (Conn. 2002); Doe v. Doe, 172 P.3d 1067, 1079–80 (Haw. 2007); Blixt v. Blixt, 774 N.E.2d 1052, 1060–61 (Mass. 2002); Craven v. McCrillis, 868 A.2d 740, 742–43 (Vt. 2005). *But see In re* Adoption of C.A., 137 P.3d 318, 326 (Colo. 2006).

260 *Craven*, 868 A.2d at 743 (alteration in original) (quoting Glidden v. Conley, 820 A.2d 197, 205 (Vt. 2003)).

261 *Blixt*, 774 N.E.2d at 1061.

relationship with the child and that denying the nonparent visitation would emotionally harm the child by making the child sad. The court awards the nonparent two hours of unsupervised visitation per week. Here, the court order would fail strict scrutiny because there are many possible less-restrictive ways for the court to interfere with the parent's decision than awarding visitation. For example, the court could award less than two hours of visitation per week, award supervised visitation, allow phone calls, allow texts, allow emails to the child only if the child initiates the email, allow the nonparent to attend one of the child's extracurricular events per semester, or order any number of other conceivable methods of access that the court could imagine. If the Due Process Clause merely required a showing of some harm, then virtually every custody order entered over a fit parent's objections would be unconstitutional because it would fail strict scrutiny.

Alternatively, requiring a showing of a significant impairment would allow a court to narrowly tailor an interference to address the specific harm to the child. Take, for example, the issue of a parent's substance abuse. Texas courts recognize that a parent's substance abuse can potentially constitute a significant impairment for purposes of Texas's statutory parental presumption.[262] Substance abuse is one of the most common problems that parents who are involved in the child welfare system have.[263] When a parent is reported to CPS for issues related to substance abuse, it is possible that CPS may never interfere with the parent's rights.[264] For example, CPS may provide voluntary medical or mental health services without seeking either the removal of the child or other intervention that would interfere with the parent's decision.[265] Alternatively, if CPS determines that interference with the parent's rights is necessary to protect the child, CPS and the court have many tools to address the specific harm to the child in the least-restrictive way.[266] For example, CPS could enter into a PCSP with the parent to temporarily place the child outside of the home during the period of time that the parent

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262 *See supra* note 56 and accompanying text.

263 *See* BENCH BOOK, *supra* note 219, at 259.

264 *See generally id.* at 261–62 (explaining possible responses in substance abuse cases).

265 *See id.* In this example, there would be no government interference with a parent's decision because the parent would have *voluntarily* decided to accept services provided to the *parent* to address the parent's substance abuse issues.

266 *See, e.g.*, TEX. FAM. CODE ANN. § 264.203.

is receiving services.[267] CPS could also petition a court for an order requiring the parent to participate in services.[268] To grant the order, the court would have to make findings that substantively amount to a significant impairment of the child's physical health or emotional well-being.[269] Additionally, the court would have to narrowly tailor the required services to address the significant impairment.[270] In the case of substance abuse, the court could order the parent to complete an in-patient substance abuse treatment program and render any custody orders necessary to ensure that the child is cared for while the parent is receiving in-patient care.[271]

The court could order these same types of narrowly-tailored-interventions in suits not involving CPS. Texas statute allows a court to issue any order necessary for the "safety and welfare of the child" in any suit affecting the parent-child relationship.[272] These suits affecting the parent-child relationship include traditional suits between a parent and a nonparent. Because

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267 *See id.* §§ 264.901–.905. A parental child safety placement (PCSP) is a voluntary agreement between the parent and CPS to temporarily place the child outside the home during a CPS investigation or while the parent receives services. *Id.* § 264.901(2). PCSPs are commonly used during CPS investigations, and evidence suggests that just as many (if not more) children are removed from their homes through PCSPs as through the traditional, statutory removal process. BROWN & LONG, *supra* note 222, at 3. As with the previous example, a PCSP would technically involve no government interference with a parent's decision because the parent would have voluntarily decided to accept services.

268 FAM. § 264.203(a).

269 *See id.* § 264.203(m). To order a parent to participate in services, a court must find, inter alia, that "abuse or neglect has occurred or there is a substantial risk of abuse or neglect or continuing danger to the physical health or safety of the child caused by an act or failure to act of the parent, managing conservator, guardian, or other member of the child's household." *Id.* These findings are distinct from the significant impairment standard (that is, abuse or neglect compared to significant impairment) but are also a more substantively stringent standard than significant impairment. Thus, an abuse or neglect finding described by the court ordered services statute would implicitly encompass the significant impairment standard. *See generally id.*

270 *See id.* § 264.203(n) (requiring that services be narrowly tailored to address abuse or neglect). *Compare In re* A.V., No. 05-20-00966-CV, 2022 WL 2763355, at *6 (Tex. App.—Dallas July 15, 2022, no pet.) (explaining that significant impairment includes abuse and neglect), *with* FAM. § 264.203(m) (requiring a finding of abuse or neglect).

271 *See* FAM. § 264.203(n)(3) (allowing court to order services); *id.* § 264.203(n)(2) (allowing court to make custody orders necessary to protect child).

272 *Id.* § 105.001(a).

a court would have wide discretion to issue orders in a traditional suit between a parent and a nonparent, the court could narrowly tailor its intervention to any number of different fact-specific circumstances. In this way, the significant-impairment standard allows courts to satisfy strict scrutiny by narrowly tailoring orders to address a specific impairment in order to accomplish the compelling state interest of protecting children from abuse and neglect.

3.6.2. Clear and Present Danger—Satisfies Strict Scrutiny but Jurisprudentially Complicated

The second possible standard for rebutting the fit-parent presumption is the clear-and-present-danger test from *Schenck v. United States*.[273] In *Prince v. Massachusetts*, the U.S. Supreme Court overturned a mother's criminal conviction because it violated her right to direct her child's religious training.[274] The Court explained that the state could not interfere with the mother's right unless the interference was "necessary for or conducive to the child's protection against some clear and present danger . . . ."[275] In doing so, the Court borrowed the clear-and-present-danger test for free-speech restrictions from *Schenck* and applied the test to the parental-rights context.[276] Although the clear-and-present-danger test probably satisfies strict scrutiny for substantially the same reasons that the significant-impairment standard does, the clear-and-present-danger test has been effectively abrogated in the free-speech context.[277] Additionally, importing tests from free-speech jurisprudence into parental-rights jurisprudence creates blurry interpretive lines because the analytical frameworks for free-speech issues and parental-rights issues are quite different.[278] On balance, significant impairment is a

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273 *See* 249 U.S. 47, 52 (1919).

274 321 U.S. 158, 159, 165–67 (1944).

275 *Id.* at 167 (citing *Schenck*, 249 U.S. at 52).

276 *Schenck*, 249 U.S. at 52.

277 *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (establishing incitement-to-imminent-lawless-action standard as test for free speech restrictions, effectively overruling *Schenck*'s clear-and-present-danger test); *see also* Frank R. Strong, *Fifty Years of "Clear and Present Danger": From* Schenck *to* Brandenburg*—and Beyond*, 1969 SUP. CT. REV. 41, 41–43 (explaining that *Brandenburg* all but overruled *Schenck*).

278 *See supra* Section 3.5.3.

cleaner—and therefore better—standard for rebutting the fit-parent presumption.

3.6.3. Parent-Like Relationship—Fails Strict Scrutiny

The third possible standard is a parent-like relationship with the child. In her concurrence in *In re C.J.C.*, Justice Lehrmann cited five cases from other states as examples of possible standards by which a nonparent may rebut the fit-parent presumption.[279] The facts of these five cases share two common nuclei: (1) the child lived with a nonparent for several years and (2) the child was raised jointly or primarily by a nonparent.[280] Neither of these standards, jointly or individually, meet the constitutional requirements for rebutting the fit-parent presumption. That is two reasons.

First, neither standard requires a showing of harm. As discussed in Section 3.4.2, a showing of harm is necessary to meet the constitutional requirements that: (1) a judge may not interfere with a fit parent's decision because a better decision could be made and (2) a mere risk of harm is insufficient to interfere with a fit parent's decision.[281] However, the courts in these five cases either (1) explicitly found that a showing of harm was unnecessary or (2) implicitly found that a showing of harm was unnecessary by failing to require a showing of harm.[282]

Only requiring that a child has lived with a nonparent for a set period of time does not include a showing of harm. Similarly, only requiring that the child was raised by a nonparent does not include a showing of harm. To be clear, either of these circumstances could be a sufficient factual basis to rebut the fit-parent presumption if the parent's decision to deny access to the nonparent (who would presumably enjoy a close relationship with the child) would significantly impair the child's physical health or emotional well-being. However, neither circumstance could be a sufficient standard by which

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279 *In re* C.J.C., 603 S.W.3d 804, 823 n.3 (Tex. 2020) (Lehrmann, J., concurring).

280 *See* Hernandez v. Hernandez, 265 P.3d 495, 496, 500–01 (Idaho 2011); SooHoo v. Johnson, 731 N.W.2d 815, 818–19, 822–25 (Minn. 2007); E.S. v. P.D., 863 N.E.2d 100, 101–04, 106 (N.Y. 2007); McAllister v. McAllister, 779 N.W.2d 652, 655–61 (N.D. 2010); Harrold v. Collier, 836 N.E.2d 1165, 1166–67, 1172–73 (Ohio 2005).

281 *See supra* Section 3.4.2.

282 *See, e.g.*, *McAllister*, 779 N.W.2d at 660–61 (explaining that statutory showing of harm was constitutionally unnecessary to grant stepfather reasonable visitation).

to rebut the fit-parent presumption. It would also be insufficient to require a two-prong standard including both a showing of harm and either that the child lived with the nonparent or was raised by the nonparent. This is because, as discussed in Section 3.6.1, a mere showing of *any* harm does not meet the constitutional requirement of strict scrutiny.[283] Instead, the harm must meet the standard of significant impairment.

Second, neither standard satisfies strict scrutiny. Strict scrutiny requires that the government interference serves a compelling state interest.[284] Here, the government's compelling state interest in protecting children from abuse or neglect is not implicated by a standard that the child has lived with a nonparent for a set period of time or a standard that the child has been raised by a nonparent. Neither standard involves any showing of harm, much less an allegation of abuse or neglect. As the Vermont Supreme Court explained, that fact that "a grandparent may have a close relationship with the child such that the child might benefit from contact with the grandparent" and the fact that "the parent may deny such contact for no good reason" do not create compelling interests sufficient to interfere with the parent's decision.[285] Without a compelling state interest, any government interference with a fit parent's decision would be unconstitutional. Even if a requirement that the child has lived with a nonparent for a set period of time or that the child has been raised by a nonparent were accompanied by a requirement of harm, the government interference would have to be narrowly tailored to address that specific harm. As discussed in Section 3.4.2, government interference cannot be narrowly tailored to address a general showing of *some* harm.[286] Government interference can only be narrowly tailored to address a specific harm that significantly impairs a child's physical health or emotional well-being.[287] Therefore, the other possible standards articulated by other states' supreme courts by which a nonparent could rebut the fit-parent presumption are constitutionally inadequate.

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283 *See supra* Section 3.6.1.

284 *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

285 Craven v. McCrillis, 868 A.2d 740, 743 (Vt. 2005).

286 *See supra* Section 3.4.2.

287 *See id.*

3.6.4. Statutory Abuse or Neglect—Fails Strict Scrutiny

The fourth possible standard is child abuse or neglect as defined by state statute. This standard is constitutionally inadequate because state legislatures have no authority to set U.S. constitutional standards.[288] If a state statute's definition of abuse or neglect comports with the Constitution's due-process requirements, then it is because the statute's definition *aligns with* the Constitution's definition—not because the statute's definition *determines* the Constitution's definition.[289]

For example, until 2021, Texas statute defined "neglect" as a series of acts or omissions that could put a child at a "substantial risk" of harm at an undefined point in the future.[290] This definition "allow[ed] for issues rooted in poverty, such as the inability to access adequate housing, affordable child care, or food insecurity, to lead to child welfare involvement."[291] Such a definition is constitutionally offensive. As the U.S. Supreme Court explained in *Parham v. J.R.*, "[s]imply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state."[292] Defining "neglect" as precisely that—a decision that involves a risk of harm at some undefined point in the future—directly contradicts clear constitutional mandates.

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288 *Cf.* City of Boerne v. Flores, 521 U.S. 507, 512–20 (1997) (explaining that Congress did not have constitutional authority to change interpretation of Free Exercise Clause by passing Religious Freedom Restoration Act to overrule *Employment Division v. Smith* and reinstate holding of *Sherbert v. Verner*). *See generally* U.S. CONST. (separating powers among branches and among levels of government).

289 *See* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (explaining that state statute establishing preponderance of evidence as standard of proof for termination of parental rights did not comport with constitution's requirement that termination be ordered only by clear and convincing evidence).

290 *See* TEX. FAM. CODE ANN. § 261.001(4) (2021).

291 Andrew C. Brown, *HB 567 – Preserving and Strengthening Families: Testimony Submitted to the Texas House Committee on Juvenile Justice & Family Issues*, TEX. PUB. POL'Y FOUND. (Mar. 8, 2021), https://perma.cc/V7LK-67Z3.

292 Parham v. J. R., 442 U.S. 584, 603 (1979) (footnote omitted).

3.6.5. Prior Nonappointment as Managing Conservator—Fails Strict Scrutiny

Eight intermediate courts of appeals in Texas have ruled on the standard for rebutting the fit-parent presumption post-*In re C.J.C.* Six of those eight courts of appeals have adopted the significant-impairment standard,[293] but the El Paso Court of Appeals has adopted a different standard. The El Paso Court of Appeals has held that the existence of a prior custody order that fails to appoint a parent as the child's managing conservator rebuts the fit-parent presumption.[294] In *In re C.J.C.*, the Texas Supreme Court explained that a parent does not retain the fit-parent presumption in modification suits in which the original order failed to appoint that parent as the child's managing conservator.[295] This is because the court in the original suit would have had to find that the fit-parent presumption was rebutted in order to have not appointed the parent as managing conservator.[296] In the original suit, the parent would have enjoyed both the statutory parental presumption and the fit-parent presumption.[297] In the modification suit, however, the statutory parental presumption would not apply[298] and the fit-parent presumption would have been previously rebutted.[299] A parent cannot resurrect a previously defeated presumption simply by filing a modification suit.

Thus, in cases in which the original courts did indeed find that a nonparent had rebutted the fit-parent presumption, the prior-nonappointment standard can satisfy due process. However, and very importantly, the standard can satisfy due process only because it *incorporates* a separate requirement of significant impairment—not because it, in and of itself, requires the findings necessary to survive strict scrutiny.

A mere prior nonappointment is not necessarily based on any harm—much less a significant harm—to the child.[300] A study of every Texas appellate case decided between 2000 and 2019 that involved the fit-parent

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293 *See* cases cited *supra* note 258.

294 *In re* B.B., 632 S.W.3d 136, 140 (Tex. App.—El Paso 2021, no pet.).

295 603 S.W.3d 804, 819 (Tex. 2020).

296 *See id.*

297 *See id.*; TEX. FAM. CODE ANN. § 153.131.

298 *See In re* J.O.L., 668 S.W.3d 160, 164 (Tex. App.—San Antonio 2023, pet. filed).

299 *See In re B.B.*, 632 S.W.3d at 140.

300 *See supra* Sections 3.4.2, 3.6.1.

presumption found that "in 43.48% of appellate cases, the lower court did not make the constitutionally required findings before overruling the child-drearing decisions of fit parents."[301] Out of that same set of cases, the courts of appeals granted 78.8% of the petitions for writs of mandamus based on trial courts' misapplications of the fit-parent presumption.[302] These numbers are based on cases in Texas—a state that has codified the fit-parent presumption into state statute in very express terms for every judge, attorney, and law student in the state to see.[303] Many other states have not codified the fit-parent presumption. Nevertheless, the Full Faith and Credit Clause[304] requires Texas courts to give full effect to prior-nonappointment judgments issued by the courts of states that have not codified the fit-parent presumption and would seem likely to have even higher error rates than Texas has.

Additionally, the standard provides no mechanism by which a court could narrowly tailor its orders in the modification case. To the extent that a court chooses to construe the state's interests in judicial efficiency and the application of res judicata to prior-nonappointment orders as *compelling* interests, it would be difficult if not impossible to narrowly tailor an interference with a parent's decision to the interests of judicial efficiency or res judicata. Ordering a parent to participate in services or to give a nonparent access to a child, for example, has no effect on the judicial process and therefore cannot be narrowly tailored to accomplishing procedural interests. Therefore, a prior-nonappointment standard fails strict scrutiny.

3.6.6. *Holley* Factors—Fail Strict Scrutiny

Besides the significant-impairment standard and the prior-nonappointment standard, Texas's intermediate courts of appeals have proposed a third standard for rebutting the fit-parent presumption following *In re C.J.C.*

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301 *Report: Texas Courts Are Systematically Ignoring Parental Rights*, TEX. HOME SCH. COAL. (Apr. 14, 2020), https://perma.cc/V5Z4-PAR6 (summarizing results of study); TEX. HOME SCH. COAL., PARENTAL PRESUMPTION RESEARCH REPORT 3, 10 (2020), https://perma.cc/7WAF-6TQ2.

302 TEX. HOME SCH. COAL., *supra* note 301, at 3, 16.

303 TEX. FAM. CODE ANN. § 153.131; *In re* S.K., No. 13-19-00213-CV, 2020 WL 4812633, at *3 (Tex. App.—Corpus Christi–Edinburg Aug. 13, 2020, pet. denied), *order withdrawn* (Apr. 29, 2022) (discussing codification).

304 U.S. CONST. art. IV, § 1.

The Austin Court of Appeals has adopted the *Holley* factors as the proper standard for rebutting the fit-parent presumption.[305] The *Holley* factors are a set of nine factors that Texas courts use in determining the best interests of children.[306] This approach would seem easy to apply the extant best-interest factors to rebut the presumption that a fit parent acts in the best interests of his or her child. However, this approach fails for three reasons. First, the Court has expressly rejected the best interest of the child as the standard for interfering with parental rights.[307] Second, the *Holley* factors are largely irrelevant to constitutional analysis. For example, the *Holley* factors include the desires of the child, the plans of the parent and nonparent for the child now and in the future, the stability of the parent and nonparent's homes, and the availability of parenting programs for the parent and nonparent.[308] The U.S. Supreme Court has never considered such factors in deciding parental-rights issues[309] and, indeed, has directly disapproved of certain *Holley* factors such as the desires of the child.[310] Third, the *Holley* factors constitute a multifactor balancing test. Although multifactor balancing tests may be appropriate for reviewing government power,[311] they are inappropriate for reviewing individual rights.[312] Therefore, the *Holley* factors are a constitutionally improper standard for rebutting the fit-parent presumption.

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305 S.C. v. Tex. Dep't of Fam. & Protective Servs., No. 03-20-00179-CV, 2020 WL 4929790, at *2–3 (Tex. App.—Austin Aug. 21, 2020, no pet.).

306 Holley v. Adams, 544 S.W.2d 367, 371–72 (Tex. 1976).

307 Reno v. Flores, 507 U.S. 292, 303–04 (1993) ("'The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. . . . [But it] is not the legal standard that governs parents' or guardians' exercise of their custody . . . .").

308 *Holley*, 544 S.W.2d at 371–72.

309 *See supra* Sections 3.1–3.4.

310 *See, e.g.*, *Reno*, 507 U.S. at 304 ("So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.").

311 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978) (reviewing government taking).

312 *See* Dunaway v. New York, 442 U.S. 200, 213 (1979) (reviewing Fourth Amendment right against unreasonable searches and seizures) ("But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases . . . .").

For the foregoing reasons, the significant-impairment standard satisfies strict scrutiny and the other requirements of due process. Significant impairment is the best standard for rebutting the fit-parent presumption because it satisfies these requirements without intermingling current parental-rights doctrine with widely discredited free-speech doctrine.

4. CONCLUSION

The Due Process Clause protects the fundamental rights of fit parents to raise their children by requiring courts to presume that the decisions of fit parents are in the best interests of their children.[313] Courts may not order interference with parents' rights without rebutting this fit-parent presumption and must strictly scrutinize state actions that interfere with fit parents' rights.[314] Unfortunately, there is an open question of what the constitutionally proper standard for rebutting the fit-parent presumption is.[315] Consequently, courts in different states have articulated differing standards for rebutting the presumption.[316]

The best current standard that satisfies the requirements of the Due Process Clause is the significant-impairment standard.[317] A court may not substitute its judgment for that of a fit parent simply because a better decision could be made, nor may a court substitute its judgment for that of a fit parent simply because the parent's decision involves *some* risk of harm to the child.[318] Consequently, any constitutionally proper standard must require a showing of actual harm for a nonparent to rebut the fit-parent presumption.[319] The constitutionally proper standard must, therefore, require a showing of specific, significant harm to a child for a court to be able to narrowly

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313 Troxel v. Granville, 530 U.S. 57, 65, 68 (2000) (plurality opinion).

314 *See id.* at 68; Wiley v. Spratlan, 543 S.W.2d 349, 352 (Tex. 1976).

315 *In re* C.J.C., 603 S.W.3d 804, 821 (Tex. 2020) (Lehrmann, J., concurring).

316 *See generally, e.g.*, *supra* Section 3.6.3.

317 *See supra* Section 3.6.1.

318 *Troxel*, 530 U.S. at 72–73; *In re* A.A.L., 927 N.W.2d 486, 500 (Wis. 2019) (footnote omitted); *see* Parham v. J. R., 442 U.S. 584, 603–04 (1979) (explaining that parent's decision about medical treatment is constitutionally protected even if treatment involves risk).

319 *See supra* Section 3.4.2.

tailor its interference to protect the child from that harm.[320] Significant impairment meets these requirements, and courts should therefore adopt significant impairment as the standard for rebutting the fit-parent presumption. Adopting this standard would ensure that fit parents' fundamental rights are properly protected and would effectively resolve the open question about the proper standard that the Texas Supreme Court identified in *In re C.J.C.*

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320 *See id.* The child welfare system is designed to protect children from abuse and neglect. (Note, however, that the child welfare system is not designed to protect children from any less-than-ideal parenting decision or from any parenting decision that presents *any* risk of harm.) Because abuse or neglect is a more substantively stringent standard than significant impairment, a court could (and should) constitutionally interfere a parent's decision in a situation in which a child is at risk of abuse or neglect.