
UNCONSTITUTIONAL OR JUST BAD
POLICY?: TITLE IV-E’S AFDC
“LOOKBACK” AND THE
CONSTITUTIONAL GUARANTEE OF
EQUAL PROTECTION

BY ROSIE FRIHART-LUSBY*

TABLE OF CONTENTS

INTRODUCTION.....	1070
I. THE STRUCTURE OF FOSTER CARE FUNDING.....	1077
II. A BRIEF HISTORY OF FOSTER CARE FUNDING AND THE LOOKBACK	1085
III. WHY IS THE AFDC LOOKBACK A PROBLEM?.....	1090
A. THE LOOKBACK FAILS TO CONSIDER THE NEEDS OF CAREGIVERS.....	1090
B. THE LOOKBACK DOES NOT KEEP PACE WITH INFLATION.....	1092
C. THE LOOKBACK ENCOURAGES CHILD WELFARE AGENCIES TO MAKE DECISIONS THAT MAY NOT BE IN THE BEST INTEREST OF CHILDREN.....	1093
D. THE LOOKBACK IS ADMINISTRATIVELY DIFFICULT AND EXPENSIVE.....	1094
IV. AN OVERVIEW OF EQUAL PROTECTION ANALYSIS	1095
A. TRADITIONAL TIERS OF SCRUTINY ANALYSIS.....	1095
B. JUSTICE MARSHALL’S SLIDING-SCALE APPROACH	1099

*. Executive Senior Editor, *Southern California Law Review*, Volume 93; J.D. 2020, University of Southern California Gould School of Law; B.A., History and Film Studies 2011, University of Tulsa. Thank you, first and foremost, to Professor Clare Pastore, whose guidance and feedback throughout this process was as useful as it was thoughtfully given. Thank you to the experts and practitioners who graciously shared their time and knowledge as this Note evolved, including Professor Dara Barker, Adam Cherenky, Judge Amy Pellman, Rachel Stein, Tyler Sutherland, Professor Karen Ullman, and Professor Kimberly West-Faulcon. Thank you to the editors of the *Southern California Law Review* for their excellent work. Finally, thank you to my family and friends who not only offered support during this process but also served as volunteer editors.

V. THE AFDC LOOKBACK AND EQUAL PROTECTION	1104
A. THE LEVEL OF SCRUTINY APPLIED TO THE AFDC LOOKBACK UNDER TRADITIONAL EQUAL PROTECTION	1104
1. The AFDC Lookback Classifies Based on Wealth	1104
2. The AFDC Lookback Prevents Families from Living Together	1105
3. The AFDC Lookback Limits the Application of Other Title IV-E Protections.....	1106
B. THE LEVEL OF SCRUTINY APPLIED TO THE AFDC LOOKBACK UNDER JUSTICE MARSHALL’S SLIDING SCALE APPROACH	1109
VI. TESTING “EVERY CONCEIVABLE RATIONALE” OF THE AFDC LOOKBACK	1110
A. “THE AFDC LOOKBACK PREVENTS STATES FROM USING ‘SUITABLE HOME’ REQUIREMENTS”	1110
B. “THE AFDC LOOKBACK ENCOURAGES STATES TO MAKE DECISIONS IN THE BEST INTERESTS OF CHILDREN”	1111
C. “THE AFDC LOOKBACK ENCOURAGES STATES TO IMPROVE THE ADMINISTRATION OF FOSTER CARE BENEFITS”	1112
D. “THE AFDC LOOKBACK PROTECTS THE FEDERAL GOVERNMENT’S LIMITED RESOURCES”	1113
1. “The Federal Government Has Limited Resources—the AFDC Lookback Ensures Those Resources Go to the Children Most in Need”	1114
2. “The Federal Government Has Limited Resources—the AFDC Lookback Uses Those Resources to Encourage States to Provide Payments to Children They Might Otherwise Decline to Fund”.....	1116
3. “The Federal Government Has Limited Resources—the AFDC Lookback Ensures That There is Adequate Funding for the Children Requiring the Most Expensive Care”	1117
CONCLUSION	1120

INTRODUCTION

In 1960, Louisiana mandated that, to receive welfare benefits, a child must live in a “suitable home”—a home without unmarried adult partners or children born out of wedlock.¹ On this basis the state then expelled some twenty-three thousand children from its welfare rolls.²

1. Bess Furman, *U.S. Seeks to Bar Aid for Louisiana*, N.Y. TIMES, Nov. 15, 1960, at 42; *Welfare Boards Act in Louisiana*, N.Y. TIMES, Sept. 18, 1960, at 70.

2. This was 28 percent of Louisiana’s public welfare caseload at the time. Taryn Lindhorst & Leslie Leighninger, *Ending Welfare as We Know It” in 1960: Louisiana’s Suitable Home Law*, 77 SOC.

The Department of Health, Education and Welfare (“DHEW”) responded, calling the policy “wholly unreasonable and capricious.”³ Believing that a state should not “[turn] its back on the needs of a child because of the sins of the parents,”⁴ DHEW, then led by Arthur Flemming, forbade states from ending a child’s receipt of aid (then through Aid to Dependent Children, later renamed Aid to Families with Dependent Children, or AFDC)⁵ simply because it believed the child’s home was “unsuitable.”⁶ DHEW gave states two alternatives: either provide services to make the home suitable or place the child in a suitable home (through foster care) while continuing to provide welfare payments for the child’s care.⁷

A 1961 Amendment to the Social Security Act codified this “Flemming Rule”: to discourage states from simply denying children AFDC benefits based on the “unsuitability” of their homes, the federal government would now reimburse states for the maintenance of those welfare-receiving children removed from their homes and placed in foster care—but only if the children continued to receive welfare.⁸

With this amendment, the federal government officially coupled AFDC eligibility with federal funding for foster care.⁹ This coupling continues today.

Foster care is an arrangement in which a state removes abused,

SERV. REV. 564, 564 (2003); see also Susan Vivian Mangold, *Poor Enough to Be Eligible? Child Abuse, Neglect, and the Poverty Requirement*, 81 ST. JOHN’S L. REV. 575, 585 (2007); Furman, *supra* note 1; *Welfare Boards Act in Louisiana*, *supra* note 1.

3. Furman, *supra* note 1 (quoting Edwin H. Yourman).

4. Mangold, *supra* note 2, at 584 (quoting a statement made by Secretary Flemming before the National Biennial Round Table Conference of the American Public Welfare Association).

5. Aid to Dependent Children, or ADC, was renamed Aid to Families with Dependent Children, or AFDC, in 1962, “reflecting concern that the program’s benefits and eligibility rules discouraged marriage.” Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 FUTURE OF CHILDREN 28, 31 (1997). To prevent confusion, I will refer to the program exclusively as AFDC.

6. L. ANNE BABB, *ETHICS IN AMERICAN ADOPTION* 52 (1999); Lindhorst & Leighninger, *supra* note 2; Mangold, *supra* note 2, at 586.

7. Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76 CHILD WELFARE 9, 12 (1997) (“The Flemming Rule declared that if a state believed a particular home was ‘unsuitable,’ that state had to (1) provide due process protections for the family, and (2) provide service interventions to families that were deemed to be ‘unsuitable.’ States could no longer simply apply a label of ‘unsuitable,’ expel the family from the AFDC rolls, and ignore the family. The rule was the first action taken against the arbitrary state home suitability policies.”).

8. See Flemming Rule, Pub. L. No. 87-31, 75 Stat. 75 (1961); see also Lawrence-Webb, *supra* note 7, at 17 (“The new law incorporated aspects of the Flemming Rule with emphasis on service provision and the provision of federal financial help to states in the removal of children from unsuitable home conditions . . .”).

9. See Lawrence-Webb, *supra* note 7, at 17–18 (“P.L. 87–31 connected aspects of protection, neglect, and relative foster care to the case support aspects of AFDC by promoting the concept of joint social service delivery and monetary payments to relatives designated as foster care placements for children removed from their ‘neglectful’ or ‘abusive’ parents.”).

neglected, or abandoned children—or children the state suspects are likely to be abused, neglected, or abandoned—from the home of their parents or guardians and arranges for alternative care.¹⁰ The arrangement is intended to be temporary until either the children are returned to their parents, or parental rights are terminated and the child is adopted.¹¹

According to the U.S. Department of Health and Human Services, nearly half a million children were in foster care in the United States in 2017.¹² The state, obligated by federal law to place each child in a setting “consistent with the best interest and special needs of the child,”¹³ placed about 77 percent of those children in what is called “family foster care.”¹⁴

In family foster care, children live in the homes of adults approved by a state or its agent.¹⁵ These adults may be relatives or they may be unrelated or even unknown to the foster child.¹⁶ This arrangement is intended to resemble a traditional family living arrangement.¹⁷ By contrast, non-family foster care—group homes where multiple children are housed together, institutions, or supervised independent living arrangements—are less reminiscent of a traditional family home.¹⁸ While the most common placement is in non-relative family foster homes,¹⁹ almost all states have a

10. *What is Foster Care*, ADOPTION CTR., <http://www.adopt.org/what-foster-care> [<https://perma.cc/WK82-KWSB>].

11. *Id.*

12. U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 1 (2018), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport25.pdf> [<https://perma.cc/858K-BAQN>] [hereinafter AFCARS REPORT 2018].

13. 42 U.S.C. § 675(5) (2018) (defining the “case review system” states must implement to receive federal funding as a procedure “designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents’ home, consistent with the best interest and special needs of the child.”).

14. In 2017, 336,035 children were placed in some form of family foster home. This is about 77 percent of placements. AFCARS REPORT 2018, *supra* note 12.

15. *Family Foster Care*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/outofhome/foster-care/fam-foster> [<https://perma.cc/3JKP-7SMQ>].

16. *Id.*; see also AFCARS REPORT 2018, *supra* note 12; *The Child Welfare Placement Continuum: What’s Best for Children?*, NAT’L CONF. ST. LEGISLATURES (Nov. 3, 2019), <https://www.ncsl.org/research/ch/human-services/the-child-welfare-placement-continuum-what-s-best-for-children.aspx#FosterCare> [<https://perma.cc/EE3B-ENEB>].

17. See *Family Foster Care*, *supra* note 15; see also *The Child Welfare Placement Continuum*, *supra* note 16.

18. See *The Child Welfare Placement Continuum*, *supra* note 16.

19. In 2017, 45 percent of placements were in non-relative foster family homes, while 32 percent of placements were in kinship foster homes. AFCARS REPORT 2018, *supra* note 12. It is important to note that these statistics do not include *informal* foster placements. In other words, children who are cared for by relatives are not included in these statistics if the children are not dependents of the state, even if the unfitness of a parent is the reason the child lives with a relative. Informal kinship caregivers face many of the same economic hardships as formal kinship caregivers but are not entitled to the same benefits. See also James P. Gleeson, *Kinship Care as a Child Welfare Service: Emerging Policy Issues and Trends*, in KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH 28, 28 (Rebecca L. Hegar & Maria Scannapieco eds., 1999); Sonia Gipson Rankin, Note, *Why They Won’t Take the Money: Black*

statutory preference for placing children in the home of a relative.²⁰ This practice, known as “kinship foster care,”²¹ has increased dramatically since 2006.²²

Caregivers, including relative caregivers, may be entitled to foster care maintenance payments from the child welfare agency of the state in which they live.²³ Maintenance payments are not compensation to foster parents for their efforts; rather, they are payments intended to cover the expenses made in caring for foster children.²⁴ Both state and federal governments provide funding for maintenance payments, but, despite both a state and federal funding source, caregivers—especially kin caregivers—often do not receive adequate funding to care for the children in their charge.²⁵ When this occurs, a caregiver may decline to accept a foster child despite both a desire to accept the child and the state’s belief that this placement is in the child’s best interest.²⁶ Other times, caregivers may accept children and in doing so sink themselves and their new charges further into poverty. This second scenario is particularly common among relative caregivers.²⁷

The obstacles to adequate funding are myriad, but ironically, one obstacle comes from a source intended to ensure children receive adequate benefits: the Flemming Rule.²⁸ When Congress amended the Social Security

Grandparents and the Success of Informal Kinship Care, 10 ELDER L.J. 153 (2002); Maria Scannapieco & Rebecca L. Hegar, *Kinship Foster Care in Context*, in KINSHIP FOSTER CARE: POLICY, PRACTICE, AND RESEARCH, *supra*, at 1, 2.

20. 42 U.S.C. § 675(5) (2018) (defining the “case review system” states are required to implement as a procedure to ensure each child has a case plan that is the “most family like.”).

21. Eileen Mayers Pasztor, *Kinship Care: The History of a Name*, FOSTERING FAMILIES TODAY, Mar./Apr. 2010, at 20 (stating that the term “kinship care” was derived from language used in CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (1974)); *see also* Scannapieco & Hegar, *supra* note 19.

22. *Compare* U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 1 (2008), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport14.pdf> [<https://perma.cc/TR56-5YDV>], *with* AFCARS REPORT 2018, *supra* note 12 (showing an increase in kinship foster care placements from 24 percent of placements in 2006 to 32 percent of placements in 2017).

23. 42 U.S.C. § 672(a)(1) (“Each state with a plan approved under this part shall make foster care maintenance payments on behalf of each [eligible] child . . .”).

24. *Id.* § 675(4)(A) (defining “foster care maintenance payments”).

25. *See, e.g.*, Cal. Dep’t of Soc. Servs. v. Thompson (*Rosales*), 321 F.3d 835, 842 (9th Cir. 2003); *Lipscomb v. Simmons*, 962 F.2d 1374, 1377 (9th Cir. 1992) (en banc); Meredith L. Alexander, Note, *Harming Vulnerable Children: The Injustice of California’s Kinship Foster Care Policy*, 7 HASTINGS RACE & POVERTY L.J. 381, 382 (2010).

26. The majority opinion in *Lipscomb v. Simmons* described this dilemma: a policy that denies kin caregivers adequate funding denies “some children the opportunity to be placed in the homes of relatives who are financially able but unwilling to care for the children without state assistance or [with relatives] who are willing but financially unable to provide care without state assistance.” *Lipscomb*, 962 F.2d at 1377 (holding that an Oregon program which granted assistance to foster caregivers only if they were unrelated to the foster child was not in violation of the Equal Protection Clause).

27. *See id.*

28. *See* Lawrence-Webb, *supra* note 7; Shardé Armstrong, Note, *The Foster Care System Looking*

Act in 1961, it made qualifying for AFDC by the child's parents a prerequisite for federal participation in foster care funding.²⁹ In other words, the federal government was committed to funding a portion of maintenance payments but only payments to children who qualified for AFDC.

This requirement, sometimes called the "AFDC-Linkage" requirement³⁰ or, as I will call it here, the "AFDC Lookback,"³¹ presents a barrier to adequate funding in two distinct ways.

First, eligibility for federal funding is based on the income of a child's home of removal rather than the child's home of placement.³² In other words, federal eligibility is based not on the income of those currently charged with the care of the child (the foster caregiver) but on the income of those a court has explicitly denied custody (the parent or guardian).³³ If the child is placed with a grandparent who is poor enough to qualify for AFDC, but the child's parent is not, the grandparent is not eligible for federal maintenance payments.

Second, federal funding is based on whether a parent would be eligible for AFDC—a welfare program that was repealed in 1996.³⁴ Now, nearly a quarter of a century after AFDC's repeal, states must still analyze whether the income of a child's home of removal meets the states' AFDC income threshold as it was on July 16, 1996.³⁵ For states, this retroactive accounting

Forward: The Growing Fiscal and Policy Rationale for the Elimination of the "AFDC Look-Back", 17 N.Y.U. J. LEGIS. & PUB. POL'Y 193, 224 (2014); Mangold, *supra* note 2, at 586.

29. See Flemming Rule, Pub. L. No. 87-31, 75 Stat. 75 (1961).

30. The Ninth Circuit referred to the requirement as "AFDC-linkage" in a 2003 opinion. *Rosales*, 321 F.3d at 839.

31. Representative John Lewis used the term "Look-Back" in legislation that he sponsored to eliminate the requirement. *E.g.*, Look-Back Elimination Act of 2017, H.R. 269, 115th Cong. (2017).

32. 42 U.S.C. § 672(a)(1),(3) (2018) ("Each State . . . shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative . . . into foster care if . . . the child, *while in the home*, would have met the AFDC eligibility requirement . . . (as in effect on July 16, 1996)" (emphasis added)).

33. *E.g.*, *Rosales*, 321 F.3d at 839 (noting that the "so-called AFDC-linkage, on which eligibility for AFDC-FC benefits depend[ed], could be based either on the home of removal, Anthony's mother's home, or on his interim home with his related caregiver, his grandmother. Here, the distinction [was] crucial, because Anthony was not AFDC-eligible in his mother's home, but was eligible in his grandmother's home . . ."). While the court in *Rosales* held that AFDC Lookback could be based either on the home of removal or the home a child is living in at the time of removal, the Deficit Reduction Act of 2005 undid the ruling and specified that the Lookback requirement could only be based on the home of removal. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.

34. 42 U.S.C. § 672; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (repealing AFDC).

35. 42 U.S.C. § 672(a)(1),(3) ("Each State . . . shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative . . . into foster care if . . . the child, *while in the home*, would have met the AFDC eligibility requirement . . . (as in effect on July 16, 1996)" (emphasis added)).

is time-consuming and expensive;³⁶ for both states and caregivers, this means that federal funding is based on a standard that is much lower than current welfare standards³⁷ and non-responsive to inflation.³⁸ Given that income standards are frozen in time at the July 16, 1996 date, it is perhaps unsurprising that states have noted a steady decline in the federal commitment to foster care funding.³⁹

In February 2018, President Trump signed a spending bill that included the Family First Prevention Services Act (“FFPSA”).⁴⁰ The FFPSA drastically restructures the way states may use federal funds in their foster care systems.⁴¹ Despite the fact that it “effectively blows up” the nation’s foster care system,⁴² the AFDC Lookback survives.⁴³ And because the FFPSA places a cap on the use of federal funds for “congregate care” like group homes and institutions,⁴⁴ it may increase the need for the alternative to congregate care, family foster care, and therefore family foster care maintenance payments.⁴⁵

36. Armstrong, *supra* note 28 (“Stakeholders argue that this eligibility determination results in the loss of billions of dollars that could otherwise be used for direct services to children in foster care . . .”).

37. For example, today, a Georgia family of three must have a gross income below \$784 a month to qualify for Temporary Assistance for Needy Families, or TANF, the modern equivalent of AFDC. *TANF Eligibility Requirements*, GA. DEP’T HUM. SERVS., <https://dfcs.georgia.gov/tanf-eligibility-requirements> [<https://perma.cc/TR56-5YDV>]. By contrast, a Georgia family must have a gross income below \$424 dollars a month to meet the July 16, 1996 income requirement. CONG. RESEARCH SERV., R42792, CHILD WELFARE: A DETAILED OVERVIEW OF PROGRAM ELIGIBILITY AND FUNDING FOR FOSTER CARE, ADOPTION ASSISTANCE AND KINSHIP GUARDIANSHIP ASSISTANCE UNDER TITLE IV-E OF THE SOCIAL SECURITY ACT app. B, tbl. B-1 (2012) [hereinafter CONG. RES. SERV., CHILD WELFARE 2012].

38. PEW CHARITABLE TRS., TIME FOR REFORM: FIX THE FOSTER CARE LOOKBACK 1 (2007), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/fixthefostercarelookbackpdf.pdf [<https://perma.cc/6VDE-Y2N2>] (“[T]he 1996 AFDC income standard has not been adjusted for inflation, resulting in fewer children eligible for federal foster care support each year.”).

39. For example, in 2005, Title IV-E covered about thirty-five thousand fewer children than it had just seven years before. *Id.*

40. Family First Prevention Services Act, Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 170 (2018).

41. *Id.* For a summary of changes the FFPSA makes, see FIRST FOCUS, FAMILY FIRST PREVENTION SERVICES ACT BILL SUMMARY (2018), <https://campaignforchildren.org/wp-content/uploads/sites/2/2016/06/FFCC-Short-Summary-FFPSA.pdf> [<https://perma.cc/U4JZ-9VPP>].

42. Teresa Wiltz, *When Trump Signed Spending Bill, He Signed into Law a Huge Overhaul of Foster Care*, USA TODAY (May 5, 2018, 7:04 AM), <https://www.usatoday.com/story/news/nation/2018/05/05/foster-care-family-first-prevention-services-act-trump/573560002> [<https://perma.cc/VUZ9-NMPW>].

43. The FFPSA does not mention the AFDC income eligibility for foster care maintenance payments. Family First Prevention Services Act, Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 170 (2018).

44. *Id.*

45. Teresa Wiltz, *Finding Foster Families for Teens Is a Challenge in Many States*, PEW TR. (June 20, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/06/20/finding-foster-families-for-teens-is-a-challenge-in-many-states> [<https://perma.cc/B6XS-98KU>]; Bill Prummell,

Since AFDC's repeal, legislation that would eliminate the AFDC Lookback has been proposed at least nineteen times without success.⁴⁶ With

Florida Already Has Shortage of Homes for Foster Children. This Could Make it Worse., TAMPA BAY TIMES (Sept. 13, 2019), <https://www.tampabay.com/opinion/2019/09/14/florida-already-has-shortage-of-homes-for-foster-children-this-could-make-it-worse-column> [https://perma.cc/3XCD-L88C]; Laurel Morales, *On the Navajo Nation, Foster Care Families Are in Short Supply*, NPR (Feb. 26, 2018, 4:02 PM), <https://www.npr.org/2018/02/26/588927177/on-the-navajo-nation-foster-care-families-are-in-short-supply> [https://perma.cc/T8UY-RDKT]; Teresa Wiltz, *The Feds Are Cutting Back on Group Homes. Some Say That's a Big Mistake*, HUFFPOST (July 9, 2019, 3:09 PM), https://www.huffpost.com/entry/feds-funding-cuts-group-homes-children_b_5d23820e4b06dc407fc6907 [https://perma.cc/EGE9-XBRP].

46. The Senate has considered repealing the AFDC Lookback at least five times. Family First Transition and Support Act of 2019, S. 1376, 116th Cong. (2019); All Kids Matter Act, S. 1932, 114th Cong. (2015); Partnership for Children and Families Act, S. 2900, 110th Cong. (2008); Personal Responsibility and Work Opportunity Reconciliation Act Amendments of 2002, S. 2052, 107th Cong. (2002); Leave No Child Behind Act of 2001, S. 940, 107th Cong. (2001).

The House of Representatives, on the other hand, has considered repealing the AFDC Lookback at least fourteen times. Look-back Elimination Act of 2019, H.R. 4472, 116th Cong. (2019); Family First Transition and Support Act of 2019, H.R. 2702, 116th Cong. (2019); Look-Back Elimination Act of 2017, H.R. 269, 115th Cong. (2017); Look-Back Elimination Act of 2016, H.R. 5477, 114th Cong. (2016); All Kids Matter Act, H.R. 5364, 114th Cong. (2016); Permanent Families for All Children Act, H.R. 4909, 113th Cong. (2014); Look-back Elimination Act of 2013, H.R. 2111, 113th Cong. (2013); Look-Back Elimination Act of 2011, H.R. 2063, 112th Cong. (2011); Look-Back Elimination Act of 2009, H.R. 3329, 111th Cong. (2009); Partnership for Children and Families Act, H.R. 4207, 110th Cong. (2007); Leave No Abused or Neglected Child Behind Act, H.R. 3576, 109th Cong. (2005); Child Protective Services Improvement Act, H.R. 1534, 108th Cong. (2003); Child Safety, Adoption, and Family Enhancement (Child SAFE) Act of 2004, H.R. 4856, 108th Cong. (2004); Leave No Child Behind Act of 2001, H.R. 1990, 107th Cong. (2001).

Not one of these nineteen bills made it out of committee. *S.1376 – Family First Transition and Support Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/senate-bill/1376/all-actions-without-amendments> [https://perma.cc/KKM5-Q4RE]; *S.1932 – All Kids Matter Act*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/senate-bill/1932/all-actions-without-amendments> [https://perma.cc/6JYA-KVGD]; *S.2900 – Partnership for Children and Families Act*, CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/senate-bill/2900/all-actions-without-amendments> [https://perma.cc/AQ9A-SCGN]; *S.2052 – Personal Responsibility and Work Opportunity Reconciliation Act Amendments of 2002*, CONGRESS.GOV, <https://www.congress.gov/bill/107th-congress/senate-bill/2052/all-actions-without-amendments> [https://perma.cc/385C-892L]; *S.940 – Leave No Child Behind Act of 2001*, CONGRESS.GOV, <https://www.congress.gov/bill/107th-congress/senate-bill/940/all-actions-without-amendments> [https://perma.cc/XF73-64VJ]; *H.R.4472 – Look-Back Elimination Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/4472/all-actions-without-amendments> [https://perma.cc/3DKG-R25N]; *H.R.2702 – Family First Transition and Support Act of 2019*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/2702/all-actions-without-amendments> [https://perma.cc/ME7B-MFQL]; *H.R.269 – Look-Back Elimination Act of 2017*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/269/all-actions-without-amendments> [https://perma.cc/49DE-J5YA]; *H.R.5477 – Look-Back Elimination Act of 2016*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/5477/all-actions-without-amendments> [https://perma.cc/C9MV-ZFU5]; *H.R.5364 – All Kids Matter Act*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/5364/all-actions-without-amendments> [https://perma.cc/9KPN-UFZJ]; *H.R.4909 – Permanent Families for All Children Act*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/4909/all-actions-without-amendments> [https://perma.cc/GF9X-JDK9]; *H.R.2111 – Look-Back Elimination Act of 2013*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/2111/all-actions-without-amendments> [https://perma.cc/T8EA-U2NY]; *H.R.2063 – Look-Back Elimination Act of 2011*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/2063/all-actions-without-amendments> [https://perma.cc/BVW8-VFL4]; *H.R.3329 – Look-Back Elimination Act of 2009*, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/house-bill/3329?s=1&r=27>

the passage of the FFPSA, Congress has failed yet again to repeal this troublesome legislation.⁴⁷ The mantle, then, may fall to courts.

This Note will consider one possible means for judicially striking down the AFDC Lookback: that it is a classification so arbitrary it violates the Equal Protection clause implicit in the Fifth Amendment. In Section I, I describe in greater depth the structure of foster care funding and the distinct roles played by the federal and state governments in the provision of funds. Next, in Section II, I elaborate on the history of the AFDC Lookback and attempt to pinpoint a rationale for its continued inclusion in the Social Security Act. In Section III, I enumerate and briefly explain common arguments as to why the AFDC Lookback is bad policy. Section IV includes a brief overview of Equal Protection doctrine—both the traditional approach utilizing tiered scrutiny and Justice Thurgood Marshall’s alternative sliding-scale approach. Then in Section V, I consider the level of scrutiny a court might apply to the Lookback. Finally, in Section VI, I analyze the AFDC Lookback under both the traditional approach and Justice Marshall’s sliding-scale approach, concluding in both cases that the AFDC Lookback is likely a Fifth Amendment Equal Protection violation.

I. THE STRUCTURE OF FOSTER CARE FUNDING

Parens patriae, or “parent of the country,” is a long-standing doctrine that grants a state the “power and responsibility . . . to protect, care for, and control citizens who cannot take care of themselves.”⁴⁸ Traditionally applied to “infants, idiots, and lunatics,”⁴⁹ the doctrine gives states the authority to become surrogate parents to children when necessary to ensure their welfare.⁵⁰ *Parens patriae* is the foundation of the modern child welfare

[<https://perma.cc/GXW9-LHHL>]; *H.R.4207 – Partnership for Children and Families Act*, CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/house-bill/4207/all-actions-without-amendments> [<https://perma.cc/A4B4-4W2U>]; *H.R.3576 – Leave No Abused or Neglected Child Behind Act*, CONGRESS.GOV, <https://www.congress.gov/bill/109th-congress/house-bill/3576/all-actions-without-amendments> [<https://perma.cc/6G2U-LE5X>]; *H.R.1534 – Child Protective Services Improvement Act*, CONGRESS.GOV, <https://www.congress.gov/bill/108th-congress/house-bill/1534/all-actions-without-amendments> [<https://perma.cc/ZHX7-AQ53>]; *H.R.4856 – Child Safety, Adoption and Family Enhancement (Child SAFE) Act of 2004*, CONGRESS.GOV, <https://www.congress.gov/bill/108th-congress/house-bill/4856/all-actions-without-amendments> [<https://perma.cc/Q6F7-7SB6>]; *H.R.1990 – Leave No Child Behind Act of 2001*, CONGRESS.GOV, <https://www.congress.gov/bill/107th-congress/house-bill/1990/all-actions-without-amendments> [<https://perma.cc/94TP-49NF>].

47. Family First Prevention Services Act, Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 170 (2018).

48. Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000).

49. *Parens Patriae*, WHARTON’S LAW LEXICON 730 (12th ed. 1916).

50. *Schall v. Martin*, 467 U.S. 253, 265 (1984) (“Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.”); *Santosky v. Kramer*, 455 U.S.

system, whereby neglected or abused children, or children likely to become neglected or abused, become dependents of the state.⁵¹

A child typically becomes a dependent of the state after a juvenile court finds that the child, or one of his or her siblings, has been abandoned, neglected, or abused—either physically, emotionally, or sexually.⁵² Once the court has jurisdiction over a child, a child welfare agency must decide whether to remove the child from his or her home and, if removed, where to place the child after removal.⁵³ States generally try to place a child in the “least restrictive” and “most family like” placement appropriate for the child.⁵⁴

One way to understand potential placements is as though they exist along a continuum.⁵⁵ At one end is the least restrictive, most family-like possibility.⁵⁶ continued placement with the child’s parent while the parent receives supportive or supplementary aid.⁵⁷ An example of this aid might be

745, 766 (1982) (arguing that the state has “a *parens patriae* interest in . . . promoting the welfare of the child”); *Late Corp. of Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 57 (1890) (“This prerogative of *parens patriae* is inherent in the supreme power of every State . . . [I]t is a most beneficent function, and [is] often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.”); *In re Christopher I.*, 131 Cal. Rptr. 2d 122, 139 (Cal. Ct. App. 2003) (holding that the state has a *parens patriae* interest in promoting child welfare which granted the court the authority to remove a child from life support if it is in his or her best interest); Clark, *supra* note 48; see also Bernardine Dohrn, “*Leastwise of the Land*”: *Children and the Law*, 14 CHILD. LEGAL RTS. J. 36, 39–40 (1993) (“Under the *parens patriae* doctrine, the state assumed the legal power to substitute for the parent and act on behalf of the child as well as on behalf of society. It is an idea, of course, which is only as good as the protection and remediation actually provided to children . . .”).

51. *Lipscomb v. Simmons*, 962 F.2d 1374, 1385–86 (9th Cir. 1992) (en banc) (Kozinski, J., dissenting) (“In removing children from the custody of parents who are unable, unwilling or unfit to take care of them, the state performs a very significant—and very delicate—governmental function. Because children normally have no resources of their own, and very young children lack the wherewithal to provide for their own upkeep, they depend on adults for the necessities of life and for the other resources they need to become healthy, productive and well-adjusted adults. Normally these resources are provided by their parents; every child has a legitimate expectation, if not entitlement, to be supported by the adults who brought him into the world. But when, because of death or disability, criminality or drug abuse, the child’s parents fail to provide these resources, the state normally steps in to make sure the child receives the necessary care. Indeed, every state in the union has undertaken to care for its abandoned, neglected and mistreated children. In so doing, states take on very significant responsibilities.” (citations omitted)); Clark, *supra* note 48, at 388.

52. *E.g.*, CAL. WELF. & INST. CODE § 300 (West 2016) (listing categories of children who come within the jurisdiction of the juvenile court).

53. *E.g.*, CAL. WELF. & INST. CODE § 309 (West 2019) (describing the placement of children after the juvenile court takes jurisdiction).

54. *Infra* text accompanying notes 81–84.

55. For a literal illustration of the continuum, see *The Child Welfare Placement Continuum*, *supra* note 16.

56. The language “least restrictive” and “most family like” has been adopted from Title IV-E. *Infra* note 82.

57. *The Child Welfare Placement Continuum*, *supra* note 16. One of the main provisions of the FPPSA is that it increases the funding for in-home supportive or supplementary aid. Family First

substance abuse treatment or parenting education.⁵⁸ These services are often referred to as “pre-removal” services because they occur before the child is removed from his or her home, hopefully preventing the need for removal.⁵⁹

Next along the continuum is placement in a family foster home with a related caregiver,⁶⁰ followed by placement in a family foster home with a non-related caregiver.⁶¹ This is typically a person or persons unknown to the child.⁶² The federal government and states prefer placement with a related caregiver, known as “kinship foster care,” for a variety of reasons.⁶³ Kinship foster care “generally enables children to live with people they know and trust.”⁶⁴ Children in kinship foster care are more likely to be placed in close proximity to their homes and with their siblings and are therefore more likely to visit their parents.⁶⁵ Children in kinship foster care are also less likely to change schools frequently than children placed with non-relatives.⁶⁶ Relatives are more likely to take in children who might otherwise be difficult to place, for example, children with severe emotional, behavioral, physical, or developmental problems.⁶⁷ Children in kinship foster care graduate high school at a higher rate and enter the criminal justice system at a lower rate than children in non-relative foster care.⁶⁸ Studies show that placement with

Prevention Services Act, Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 170 (2018).

58. *E.g.*, CAL. WELF. & INST. CODE § 300.2 (West 2000) (noting that services to children and families may include a “full array of social and health services . . . to prevent reabuse of children”).

59. *E.g.*, Sean Hughes, *The Family First Prevention Services Act: A Mixed Bag of Reform*, IMPRINT (June 22, 2016), <https://chronicleofsocialchange.org/analysis/family-first-prevention-services-act-mixed-bag-reform/19073> [<https://perma.cc/MC5B-VX3C>].

60. *The Child Welfare Placement Continuum*, *supra* note 16. In some states, the definition of a related caregiver includes both adults who are related to the child and adults who are “fictive kin.” For example, in Arkansas, placement may be with “fictive kin” if the juvenile court identifies such person or persons as being ones who have “a significant positive role in his or her life.” ARK. CODE ANN. § 9-27-355 (2020). In Hawaii, placement may be with a “hanai relative,” or an adult other than a blood relative who has played a substantial role in the child’s life. HAW. REV. STAT. § 587A-4 (2016). In California, placement may be with a “non-relative extended family member.” CAL. WELF. & INST. CODE § 361.3 (West 2018). For a summary of state laws regarding placement with fictive kin, see CHILDREN’S BUREAU, PLACEMENT OF CHILDREN WITH RELATIVES 2 (2018), [hereinafter CHILDREN’S BUREAU], <https://www.childwelfare.gov/pubPDFs/placement.pdf> [<https://perma.cc/P7KV-9S79>]. Common examples of “fictive kin” include teachers, clergy, and family friends.

61. *The Child Welfare Placement Continuum*, *supra* note 16.

62. *Id.*

63. The preference for kinship foster care exists despite the fact that children residing with a relative are less likely to be reunified with their parents. Scannapieco & Hegar, *supra* note 19, at 4 (stating that the reunification rate is higher for foster children living with non-relatives than foster children living with relatives).

64. *Id.*

65. Rob Geen, *The Evolution of Kinship Care Policy and Practice*, 14 FUTURE OF CHILD. 131, 143 (2004); Alexander, *supra* note 25, at 393.

66. Aimee Corbin, Comment, *Decreasing Disproportionality Through Kinship Care*, 18 SCHOLAR 73, 86 (2016).

67. Alexander, *supra* note 25, at 395.

68. See Alexander, *supra* note 25, at 394.

a relative supports the transmission of children's family, cultural, and ethnic identities.⁶⁹ Finally, children in kinship foster care are significantly less likely to run away⁷⁰ and are more likely to describe themselves as "happy" than children in non-relative placements.⁷¹

The end of the continuum is placement in a group home or institution.⁷² Often called "congregate care," these placements are the most restrictive and least family-like.⁷³ They are also the most expensive to operate.⁷⁴ However, for many children, congregate care is the best or only option, either because the child's dangerous behaviors necessitate greater structure and supervision than family foster care can provide, or because there simply is not a willing family foster home available for the child.⁷⁵

Many—though not all—foster families may be entitled to government-funded maintenance payments.⁷⁶ Maintenance payments are payments made to foster families to cover the cost of providing "food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, [and] reasonable travel to the child's home for visitation" for any foster child in the foster home.⁷⁷

Under Title IV-E of the Social Security Act, the federal government may be responsible for a substantial portion of these maintenance payments.⁷⁸ The Title IV-E program is a federal program administered by states, as well as participating territories and Native American tribes.⁷⁹ Under the program, the federal government reimburses states, territories, and

69. Scannapieco & Hegar, *supra* note 19, at 4.

70. Corbin, *supra* note 66, at 86.

71. Alexander, *supra* note 25, at 395.

72. *The Child Welfare Placement Continuum*, *supra* note 16.

73. *Id.*

74. It is estimated that placement in congregate care costs state governments three to five times more than placement in a foster family home. *Id.*

75. *Id.*

76. 42 U.S.C. § 670 (2018) ("The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans [including foster care maintenance payment programs, per 42 U.S.C. § 672]").

77. *Id.* § 675(4)(A).

78. *Id.* § 675(4)(A). If a child is eligible for the Title IV-E program, the federal government is responsible for anywhere from 50 to 83 percent of the child's maintenance payments. The reimbursement rate is each state's unique federal medical assistance percentage, or "FMAP," which is determined by a statutory formula within the Social Security Act. The formula sets the minimum (50 percent) and maximum (83 percent) and correlates per capita income with the reimbursement rate so that states with lower per capita income receive higher federal reimbursement and vice versa. CONG. RES. SERV., CHILD WELFARE 2012, *supra* note 37, at 7.

79. *Id.* § 679(c). For clarity, I will primarily focus my discussion on the administration of Title IV-E to states. While the rules governing payments to territories and Native American tribes are slightly different, much of the analysis regarding maintenance payments to foster families through states can be applied to payments made to foster families through territories or Native American tribes.

tribes for a portion of certain foster care expenses—including maintenance payments—for eligible children.⁸⁰

To participate in the Title IV-E program, states structure their own child welfare programs to fit nearly forty criteria outlined in Title IV-E of the Social Security Act.⁸¹ For example, one of the criteria is that foster children be placed in the least restrictive or most family-like placement available that is consistent with the child's unique needs.⁸² Thus, to participate in the program, states must prioritize placements according to the continuum described above.⁸³ Forty-eight states, the District of Columbia, Guam and Puerto Rico have specific statutory language that does so, though all states do so in practice.⁸⁴

The Children's Bureau, a federal agency within the U.S. Department of Health and Human Services, administers the Title IV-E program at the federal level, while states administer the program through their own child welfare agencies.⁸⁵ Some states have one central child welfare agency that administers the Title IV-E program for the entire state,⁸⁶ while other states delegate administration to county-level agencies while supervising centrally.⁸⁷ No matter the structure of state child welfare system, it is state agencies that distribute Title IV-E maintenance payments directly to foster families.⁸⁸ However, it is the federal government, not states, that makes policy decisions as to which children are eligible for Title IV-E payments.⁸⁹

Title IV-E payments only cover children who meet certain eligibility

80. *Id.* § 670 (establishing Title IV-E which makes available payments to states which have submitted approved foster care plans).

81. *Id.* § 671 (listing the criteria a state plan must meet to be eligible for federal reimbursement).

82. *Id.* § 675(5) (defining the "case review system" mandated by 42 U.S.C. § 622 as a procedure to assure that "each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, [and is] consistent with the best interest and special needs of the child.").

83. *Id.* § 675(5) (defining the "case review system" required of states per 42 U.S.C. § 671 as one that prioritizes family-like placements).

84. California prioritizes placements with a relative over placements with a non-relative and places a duty on social workers to identify potential placements with relatives. CAL. WELF. & INST. CODE § 309 (West 2019). In addition to California, forty-seven other states, the District of Columbia, Guam, and Puerto Rico, all have specific statutory language that grants preference to placements with a relative over placements with a non-relative. New Hampshire, West Virginia, American Samoa, and the Virgin Islands do not express a preference for relative placements in their statutes, though this does not necessarily mean there is not a preference in practice. Twenty-eight states have statutes that grant preference to placement with "fictive kin," or extended family, over strangers. Eleven states consider tribal members "fictive kin," even if a stranger to the child, if the child is a member of a Native American tribe. CHILDREN'S BUREAU, *supra* note 60.

85. CONG. RES. SERV., CHILD WELFARE 2012, *supra* note 37, at 1.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

requirements.⁹⁰

First, the child's placement and care must be the responsibility of either a state, a public agency with which the state has made an agreement, or a Native American tribe.⁹¹

Second, the child must be a U.S. citizen or "qualified alien."⁹²

Third, the child must have been removed from the home of his or her parent or guardian either by a judicial determination that "continuation in the home . . . would be contrary to the welfare of the child" or by the parent or guardian voluntarily placing the child with a relative.⁹³ If removal was based on a judicial determination, the state must have made "reasonable efforts" to prevent the need for removal.⁹⁴

Fourth, the home in which the child is placed and the foster parents with whom the child is placed must meet state licensing requirements.⁹⁵

Finally, even if the above requirements are met, the child is only eligible if he or she would have been eligible to receive benefits through Aid to Families with Dependent Children (AFDC) "as in effect on July 16, 1996."⁹⁶

AFDC, now defunct, was a federal welfare program that provided cash assistance to indigent families.⁹⁷ Only families who had an income falling below a certain income standard qualified for AFDC assistance.⁹⁸ Per Title IV-E, these same income standards—frozen as they were on July 16, 1996—determine Title IV-E eligibility and therefore the receipt of Title IV-E maintenance payments.⁹⁹

Under AFDC, each state set its own income standard and could update it to keep it consistent with inflation, though there was no requirement to do so.¹⁰⁰ As a result, income standards vary widely from state to state: in New

90. 42 U.S.C. § 672 (2018) (enumerating eligibility criteria for federal reimbursement of foster care maintenance payments). Below is a simplified version of Title IV-E eligibility requirements. For a more detailed summary, see CONG. RES. SERV., CHILD WELFARE 2012, *supra* note 37, at 13 tbl. 2.

91. *Id.* § 672(a)(2)(B).

92. *Id.* § 672(a)(4).

93. *Id.* § 672(a)(2)(A).

94. *Id.* § 672(a)(2)(A)(ii). For a discussion of the parameters of the "reasonable efforts" requirement, or lack thereof, see Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259 (2003).

95. 42 U.S.C. § 672(c).

96. *Id.* § 672(a)(3)(A).

97. John Marino, *Aid to Families with Dependent Children (AFDC)*, in 1 THE AMERICAN ECONOMY: A HISTORICAL ENCYCLOPEDIA 12, 12 (Cynthia L. Clark ed., rev. ed. 2011).

98. *Id.*

99. 42 U.S.C. § 672 (noting that the income test for federal eligibility is based on AFDC income standards on July 16, 1996).

100. CYNTHIA ANDREWS SCARCELLA ET AL., THE COST OF PROTECTING VULNERABLE CHILDREN

Hampshire, any family of three whose monthly income is less than \$2,034 qualifies, but in Indiana, a family of three only qualifies if their monthly income is less than \$320.¹⁰¹ Because states were not required to update their income standard, the income standard for AFDC eligibility in some states is not from 1996 but years before.¹⁰²

Only children removed from households that have an income below their state's 1996 AFDC income threshold are eligible for Title IV-E maintenance payments.¹⁰³ Ineligible children's maintenance payments are funded entirely by states, if at all.¹⁰⁴

All states provide for maintenance payments to non-federally eligible children to some extent,¹⁰⁵ though there are gaps in this funding scheme.¹⁰⁶ One key distinction between federal and state programs is the treatment of relative caregivers. Despite the ample research affirming the value of kinship foster care, historically, some states have declined to provide maintenance payments to children placed in kinship foster care.¹⁰⁷ The rationale is that maintenance payments act as an incentive for foster parents: while non-related foster parents will likely decline to accept care of a child without maintenance payments, foster parents who already know a child are likely to accept that child's care even without maintenance payments.¹⁰⁸ Thus, cash-strapped states might see maintenance payments for related caregivers as a dispensable part of the budget.¹⁰⁹

The Supreme Court considered such a state scheme in the 1979 case

V: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING 16 (2006).

101. CONG. RES. SERV., CHILD WELFARE 2012, *supra* note 37. Indiana's income threshold represents only 18 percent of the federal poverty guideline in 2019, while New Hampshire's threshold represents 114 percent. *See id.*

102. For example, the income standard in Utah is not from 1996 but from 1992. ROSEANA BESS ET AL., THE COST OF PROTECTING VULNERABLE CHILDREN III: WHAT FACTORS AFFECT STATES' FISCAL DECISIONS? 14 (2002); *see also* SCARCELLA ET AL., *supra* note 100.

103. *See* 42 U.S.C. § 672.

104. *See id.* §§ 672, 675.

105. URBAN INST., STATE KINSHIP FOSTER CARE LICENSING AND PAYMENT POLICIES (2003) [hereinafter URBAN INST. 2003], <https://www.urban.org/sites/default/files/publication/59641/900611-State-Kinship-Foster-Care-Licensing-and-Payment-Policies.PDF> [https://perma.cc/WE5X-QKXJ].

106. *E.g., infra* text accompanying notes 119–25.

107. *E.g.,* Miller v. Youakim, 440 U.S. 125, 137–38 (1979) (overruling an Illinois law that provided maintenance payments to non-related foster parents exclusively); Lipscomb v. Simmons, 962 F.2d 1374, 1377 (9th Cir. 1992) (en banc) (upholding an Oregon law that provided maintenance payments to non-related foster parents exclusively).

108. Lipscomb, 962 F.2d at 1377 (“The social benefit of Oregon’s policy [to limit maintenance payments to non-related caregivers] is that it saves an estimated \$ 4 million biannually in money Oregon need not spend to provide foster care for those children being cared for by relatives who are both financially able and willing to provide such care without state support.”).

109. *Id.*

Miller v. Youakim.¹¹⁰ Illinois's challenged statute limited maintenance payments to non-related caregivers, even if related caregivers met the same qualifications and licensing requirements required of non-related caregivers.¹¹¹ The Supreme Court struck down the scheme, holding that, when it came to the distribution of funds through the federal Title IV-E program, states could not distinguish between related and non-related caregivers who met the state's qualifications for becoming a foster parent.¹¹²

The Supreme Court has never considered similar schemes involving maintenance payments outside of the Title IV-E program, but the Ninth Circuit has held that it is neither a violation of the Social Security Act nor the Constitution to distinguish between related and non-related foster parents in the distribution of *state* maintenance payments.¹¹³

Thus, states may not deny relative caregivers who meet licensing requirements maintenance payments if the child is *federally* eligible under Title IV-E, but there is no such protection if the child is *not* federally eligible.¹¹⁴

Children who do not qualify for federal or state maintenance payments may only receive benefits through Temporary Assistance to Needy Families ("TANF"), the federal welfare program that replaced AFDC.¹¹⁵ These TANF benefits, called "child-only" benefits, are significantly smaller than Title IV-E maintenance payments.¹¹⁶ While Title IV-E payments generally increase in steady increments as the number of foster children in a home increases, TANF child-only benefits do not.¹¹⁷ Thus, as the number of children a caretaker accepts increases, so does the difference between Title IV-E payments and TANF benefits.

Luckily, most children who are not federally eligible are eligible within their state.¹¹⁸ There are some scenarios, however, when a child may not be

110. *Miller*, 440 U.S. at 137–38.

111. *Id.*

112. *Id.*

113. *Lipscomb*, 962 F.2d at 1377.

114. While there is no such protection regarding state maintenance payments, most states provide maintenance payments to related caregivers as well as non-related caregivers. URBAN INST. 2003, *supra* note 105.

115. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-2, TANF AND CHILD WELFARE PROGRAMS: INCREASED DATA SHARING COULD IMPROVE ACCESS TO BENEFITS AND SERVICES 1 (2011) [hereinafter GAO REPORT], <https://www.gao.gov/assets/590/585649.pdf> [<https://perma.cc/S93P-4UZG>].

116. *Id.* at app. 3.

117. *Id.* For example, the minimum foster care payment is \$697 per child in Tennessee. If that child does not qualify for foster care payments, the child is entitled to \$140 per month in TANF child-only benefits. If the foster home takes in two children, the Tennessee foster care payment doubles, but the TANF child-only benefit only increases to \$192.

118. See Alexander, *supra* note 25, at 404–05.

state eligible, meaning that, if the child is also federally ineligible, he or she may receive only the paltry TANF child-only benefits.

Such a scenario is common in California. California children may be eligible for maintenance payments through three different funding sources: Title IV-E, State Aid to Families with Dependent Children Foster Care (“State AFDC-FC”),¹¹⁹ and Approved Relative Caregiver (“ARC”) funding.¹²⁰ All three sources provide approximately the same amount in maintenance payments, with varying rates depending on the age of the child and whether the child has special needs.¹²¹

If a California child is federally eligible, Title IV-E covers maintenance payments for that child no matter whether the child is placed with a related or non-related caregiver.¹²²

If a child is *not* federally eligible and the child is placed with a non-related caregiver, State AFDC-FC covers maintenance payments for that child.

If a child is *not* federally eligible, and the child is placed with a related caregiver, ARC covers maintenance payments for that child—but only if the related caregiver lives within the state of California.¹²³ Children placed with a relative who lives outside of California are not eligible to receive maintenance payments under ARC.¹²⁴

Thus, if a child is placed with a grandparent (or other relative) out of state—as happens with some frequency—the only option for maintenance payments, apart from TANF, is through Title IV-E.¹²⁵

II. A BRIEF HISTORY OF FOSTER CARE FUNDING AND THE LOOKBACK

Title IV-A of the Social Security Act of 1935 created a welfare program called Aid to Dependent Children, later renamed Aid to Families with Dependent Children (AFDC).¹²⁶ The original intent of the program was to provide federal grants to states for the maintenance of widows’ pensions—

119. CAL. WELF. & INST. CODE § 11461 (West 2020).

120. CAL. WELF. INST. CODE § 11460 (West 2019) (describing the state system for funding relative caregivers in the absence of federal eligibility).

121. *Id.* §§ 11461, 11461.3.

122. *See* Miller v. Youakim, 440 U.S. 125, 137–38 (1979).

123. CAL. WELF. & INST. CODE §§ 11461, 11461.3.

124. *Id.* § 11461.3.

125. GAO REPORT, *supra* note 115, at 24.

126. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620. The program was originally called Aid to Dependent Children, or ADC. To prevent confusion, I have referred to it by its second name, Aid to Families with Dependent Children, or AFDC.

subsidies to poor, single mothers for the care of their children in the absence of their deceased husbands.¹²⁷ It also included a small provision “for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent.”¹²⁸ Funds from the act were based on plans developed jointly by state and federal agencies.¹²⁹

States set the eligibility requirements for their programs.¹³⁰ State policies often included “home suitability clauses” and “man-in-the-house rules”¹³¹—policies that allowed states to arbitrarily deny benefits.¹³² One common reason to deny benefits was that a mother had a child out of wedlock: this was seen as evidence that the home was “unsuitable,” or that there was a “substitute father” negating the need for AFDC (in the state’s view).¹³³

Application of these suitability requirements was highly racialized.¹³⁴ In a particularly egregious example later known as the “Louisiana Incident,” Louisiana expelled approximately 23,000 children—95 percent of whom were African American¹³⁵—from its welfare rolls because their mothers had borne a child out of wedlock or were living with a man to whom they were not married.¹³⁶

In response, the Department of Health, Education and Welfare implemented the “Flemming Rule.”¹³⁷ Per Arthur Flemming, the department head, a state could not

impose an eligibility condition that would deny assistance with respect to a needy child on the basis that the home conditions in which the child live[d] [we]re unsuitable, while the child continue[d] to reside in the home. Assistance [would] therefore be continued during the time efforts [we]re being made either to improve the home conditions or to make arrangements for the child elsewhere.¹³⁸

127. Ethan G. Sribnick, *The Origins of Modern Child Welfare: Liberalism, Interest Groups, and the Transformation of Public Policy in the 1970s*, 23 J. POL’Y HIST. 150, 151 (2011); WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 290 (6th ed. 1999).

128. Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620.

129. Sribnick, *supra* note 127.

130. Mangold, *supra* note 2, at 583.

131. Lawrence-Webb, *supra* note 7, at 11.

132. *Id.*

133. Laura Briggs, *Somebody’s Children*, 11 J.L. & FAM. STUD. 373, 377–78 (2009).

134. *Id.* at 377.

135. *Louisiana Action Hit*, N.Y. TIMES, Aug. 30, 1960, at 25 (“[T]he legislation was a ‘political reprisal aimed at intimidation of colored citizens seekig [sic] constitutional rights to ballot box and education.’”); *Welfare Boards Act in Louisiana*, *supra* note 1 (“Legislators, in pushing the bill to final passage, said openly that it was aimed at Negroes.”).

136. Briggs, *supra* note 133, at 377.

137. Lawrence-Webb, *supra* note 7.

138. Bureau of Public Assistance, Social Security Administration, Department of Health,

A 1961 amendment to the Social Security Act modified Title IV's AFDC program to include the Flemming Rule.¹³⁹ To discourage states from simply removing children from the welfare rolls based on their "unsuitable" homes, the federal government would now reimburse states for the maintenance of children who continued to receive AFDC in their foster homes.¹⁴⁰ The Senate Finance Committee held no formal public hearings regarding the amendment,¹⁴¹ and the debate surrounding it was brief.¹⁴²

Following the implementation of the Flemming Rule, foster care "exploded" with predominantly African American children.¹⁴³

In 1968, Congress modified Title IV to cover not only children who received AFDC in their homes of removal but also children who *would have* received aid in their home of removal whether the child actually received the aid or not.¹⁴⁴ This marked an important shift in the function of the AFDC-eligibility requirement: previously, the requirement acted to discourage states from arbitrarily denying children AFDC benefits. A child would need to be actually receiving welfare at the time of removal to fulfill this purpose. After the 1968 amendment, Congress was no longer concerned merely with states arbitrarily removing children from welfare rolls but was instead committed to sharing the financial burden of foster care for children whose homes were poor enough to be eligible for welfare.

Federal foster care remained a part of the federal AFDC program until 1980, when Congress amended Title IV yet again, this time with the Adoption Assistance and Child Welfare Act ("AACWA").¹⁴⁵ It removed foster care funding from Title IV-A, which primarily dealt with the administration of AFDC, and placed it in a new separate section governing federal foster care, now Title IV-E.¹⁴⁶ The act also increased the federal role

Education, and Welfare, State Letter No. 452 (1961).

139. See Social Security Act Amendment, Pub. L. No. 87-31, 75 Stat. 75 (1961).

140. 107 CONG. REC. 6387 (1961); Lawrence-Webb, *supra* note 7.

141. 107 CONG. REC. 6385-88 (1961).

142. *Id.*

143. Briggs, *supra* note 133, at 405-06 (quoting and citing Sheryl Brissett-Chapman, *Child Protection Risk Assessment and African American Children: Cultural Ramifications for Families and Communities*, in *SERVING AFRICAN AMERICAN CHILDREN: CHILD WELFARE PERSPECTIVES* 45, 49 (Sondra Jackson & Sheryl Brissett-Chapman eds., 1999)) (noting that some called the period following the Flemming rule the "browning" of child welfare).

Even today, the children of color are far more likely to become involved in the child welfare system than are white children. The Title IV-E maintenance payment program is one possible reason for his disparity. Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 895-96 (2007).

144. Social Security Amendments of 1967, Pub. L. No. 90-248, 81 Stat. 821.

145. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

146. *Id.*

in the administration of child welfare services.¹⁴⁷ Among its changes, states were now required to make “reasonable efforts” to keep families together and provide a detailed plan regarding how child welfare funds would be implemented.¹⁴⁸ It also created an adoption assistance program.¹⁴⁹ Despite the move from Title IV-A to Title IV-E (from an AFDC-focused section to a foster care-focused section), the Lookback requirement remained, but now it applied not only to federal foster care maintenance payments but also to funding for adoption assistance.¹⁵⁰ This occurred despite spirited argument that “[t]he needs of the child should be the important factor [in determining receipt of federal funds,] not AFDC . . . linkage.”¹⁵¹

The next major change came in 1996 with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA”).¹⁵² PRWORA repealed AFDC and replaced it with TANF.¹⁵³ Despite the elimination of AFDC, the AFDC Lookback remained in Title IV-E, frozen at July 16, 1996.¹⁵⁴ According to the Congressional Research Service, a number of welfare reform proposals under discussion at the time would have removed income eligibility requirements.¹⁵⁵ Though the legislative record is unclear as to why the Lookback remained intact despite the elimination of the AFDC program, some have suggested that it “occurred as a matter of legislative convenience, and because the cost of changing the link was unknown.”¹⁵⁶

With the Fostering Connections to Success and Increasing Adoptions Act of 2008, Congress began phasing out the Lookback for adoption assistance.¹⁵⁷ Beginning in 2010, Congress removed the Lookback for the adoption of children ages sixteen and older, and in each year following, dropped the age by two years.¹⁵⁸ The reasoning behind this change was

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Child Welfare and Adoption Assistance: Hearing Before the Subcomm. on Pub. Assistance & Unemployment Comp. of the H. Comm. on Ways & Means*, 98th Cong. 35 (1984) (statement of Raymond Farrington, Director, Child Protective Services, Department of Children and Youth Services, State of Connecticut).

152. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

153. *Id.*

154. See 42 U.S.C. § 672 (2018) (noting that the income test for federal eligibility is based on AFDC income standards on July 16, 1996).

155. CONG. RESEARCH SERV., RL32849, CHILD WELFARE FINANCING: AN ISSUE OVERVIEW 30 n.43 (2005).

156. *Id.* at 30.

157. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949.

158. *Id.*

largely that AFDC was an “outdated” means for determining eligibility fourteen years after AFDC’s repeal.¹⁵⁹ Now, the Lookback for adoption assistance is almost completely eliminated.¹⁶⁰

The most recent major change to federal foster care funding is 2018’s Family First Prevention Services Act (FFPSA). What is the “most extensive overhaul of foster care in nearly four decades,”¹⁶¹ the FFPSA has been hailed by many as a “historic step” toward keeping children safely with their families.¹⁶² The FFPSA alters the distribution of Title IV-E funds along the child welfare continuum described in Section I.¹⁶³ Prior to the passage of the FFPSA, the Title IV-E program only covered a portion of expenses for eligible children removed from their homes and placed in a foster family home or in some form of congregate care.¹⁶⁴ Any pre-removal services, supportive services in the least restrictive setting, the child’s home, were funded entirely by states.¹⁶⁵ The FFPSA now permits the use of Title IV-E funds for pre-removal services.¹⁶⁶ It also places a cap on the use of federal funds for congregate care like group homes and institutions, the most restrictive, least family-like setting.¹⁶⁷

Once the FFPSA goes into effect, there will be no Lookback for pre-

159. *Hearing on the Implementation of the Fostering Connections to Success and Increasing Adoptions Act Before the Subcomm. on Income Sec. & Family Support of the H. Comm. on Ways & Means*, 111th Cong. 46 (2009) (statement of Linda Spears, Vice President, Policy and Public Affairs, Child Welfare League of America).

160. The intention was that by 2018, the AFDC Lookback requirement would be completely eliminated. With the passage of the Family First Prevention Services Act in 2018, Congress froze the phasing out of the Lookback requirement. Now the only children for which the Lookback requirement remains are those under two years.

161. Wiltz, *supra* note 42.

162. A letter sent on behalf of almost 300 child welfare organizations to Congress stated:

[W]e are writing to thank Congress for enacting the *Family First Prevention Services Act* as part of the *Bipartisan Budget Act of 2018*. This landmark bipartisan legislation will strengthen families so more children can remain safely with their parents and kinship caregivers and avoid unnecessary placements in foster care. Children fare best in families, and this newly enacted law represents an historic step toward better aligning federal child welfare policy with this goal. We represent advocates for children, youth, and families, medical and public health professionals, public and private providers, foster parents, adoptive parents, kinship caregivers, and alumni of foster care, and it is our strong belief that these reforms will improve the lives of the most vulnerable children and families.

Letter from Abriendo Puertas/Opening Doors et al., to Mitch McConnell, Charles Schumer, Paul Ryan, and Nancy Pelosi, U.S. Cong. (May 15, 2018), <https://www.childrensdefense.org/wp-content/uploads/2018/08/ffpsa-thank-you-letter-1.pdf> [<https://perma.cc/92K2-NNWE>].

163. Family First Prevention Services Act, Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 170 (2018).

164. 42 U.S.C. § 671 (2018) (stating that the federal government will reimburse states for maintenance payments for children *in foster care*).

165. *Id.*

166. Family First Prevention Services Act, Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 170 (2018).

167. *Id.*

removal services aimed to keep children in the home and a very limited Lookback requirement for adoption assistance that is intended to be eventually phased out.¹⁶⁸ The Lookback for federal foster care maintenance payments, however, remains untouched.¹⁶⁹

III. WHY IS THE AFDC LOOKBACK A PROBLEM?

The AFDC Lookback presents numerous policy problems that have been the subject of much discussion in recent years.¹⁷⁰ A few of these problems are discussed below, though this is by no means an exhaustive list.

A. THE LOOKBACK FAILS TO CONSIDER THE NEEDS OF CAREGIVERS

Eligibility for federal assistance is based not on the financial resources of caregivers but on the resources of parents—it is the resources of those *who no longer bear responsibility for the care of the child* that are used for the determination. While this may present a problem to all caregivers, it is most likely to impact relative caregivers and their foster children.

Relative caregivers are statistically more likely to be indigent and therefore in need of maintenance payments than non-related caregivers.¹⁷¹ Compared to non-related caregivers, relative caregivers are less likely to have a high school degree, more likely to be single, and more likely to be over the age of fifty and living on a fixed-income.¹⁷² In fact, a California study that followed relative and non-relative caregivers for several years discovered that the average household yearly income for related caregivers was nearly \$20,000 less than the average yearly income for non-related

168. *See id.*

169. *See* 42 U.S.C. § 672.

170. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-323R, SUMMARY OF PROPOSALS TO ADDRESS INCOME ELIGIBILITY REQUIREMENT FOR FEDERAL FOSTER CARE REIMBURSEMENT 14–25 (2013) (summarizing fourteen proposals aimed at solving the federal AFDC-FC problem—twelve of which suggest eliminating any means testing from eligibility, and two of which suggest basing eligibility on TANF standards rather than AFDC). In addition to legislators, child welfare advocates have also called for the repeal of the AFDC Lookback. F. SCOTT MCCOWN, CTR. FOR PUB. POLICY PRIORITIES, THE FEDERAL ROLE IN FUNDING CHILD PROTECTION: HOW ELIMINATING THE “LOOKBACK” COULD HELP TEXAS (2007), <http://library.cppp.org/files/4/CPS%20Look%20Back.pdf> [<https://perma.cc/34VY-KH9Y>]; Christine James-Brown, *Look Back Anniversary Is a Time to Call for New Direction*, HUFFPOST (July 19, 2012, 10:22 AM), https://www.huffpost.com/entry/look-back-anniversary-is-_b_1676640 [<https://perma.cc/JF9J-TKR3>]. *Contra* Richard Wexler, *The IV-E “Look Back” Is a Bureaucratic Nightmare; Here’s Why We Should Keep It*, IMPRINT (Apr. 5, 2016, 6:16 AM), <https://imprintnews.org/child-welfare-2/iv-e-lookback-bureaucratic-nightmare-heres-keep/17193> [<https://perma.cc/PXE2-HW8Z>] (arguing that, though the Lookback is “clumsy” and “cumbersome,” it is one of the few “brakes” that discourages the removal of children from their homes in a system that otherwise incentivizes their removal).

171. CONG. RES. SERV., CHILD WELFARE 2012, *supra* note 37, at 18; JENNIFER EHRLE ET AL., KINSHIP FOSTER CARE: CUSTODY, HARDSHIPS, AND SERVICES 1–2 (2003).

172. EHRLE ET AL., *supra* note 171.

caregivers.¹⁷³ Because relative caregivers are typically more willing to accept sibling groups and children with disabilities, a relative caregiver's income often must stretch to cover more children or children who need greater care than a non-relative caregiver's income.¹⁷⁴

It is no surprise then that 50 percent of children in kinship foster care live in a low-income household, while only 24 percent of children in non-relative foster care do.¹⁷⁵ A recent study revealed that children receiving benefits in kinship foster care were significantly less likely to live in poverty than children living with relatives informally and without benefits.¹⁷⁶ Thus, payments made to related foster families “are integral in reducing the odds of poverty for children in foster care.”¹⁷⁷

Despite the likelihood that relative caregivers may need maintenance payments, the income of caregivers plays no part in determining which children receive Title IV-E payments. Instead, eligibility is based on the income of those who no longer have the legal or financial obligation to provide for the child. The Ninth Circuit case *California Department of Social Services v. Thompson*, also known as *Rosales*, exemplifies this problem.¹⁷⁸ In *Rosales*, a child had been living informally with his grandmother for some time before the California dependency court took jurisdiction based on his mother's unfitness.¹⁷⁹ In determining his AFDC eligibility, the state considered his mother's income rather than his grandmother's, despite the fact that he was living with his grandmother at the time of removal.¹⁸⁰ Unfortunately, this meant that he was denied Title IV-E payments because, while his grandmother's income was below the AFDC threshold, his mother's was not.¹⁸¹ The Ninth Circuit held that this was an incorrect reading of Title IV-E, and that whatever home the child had been living in at the time of removal should be the subject of the income test.¹⁸² Congress “corrected” this even before the child in *Rosales* received his benefits¹⁸³—now it is always the income of the child's parent or guardian that is tested, even if the

173. Non-relative caregivers' average yearly income was \$51,320, but relative caregivers' average yearly income was only \$32,424. This includes foster care benefits. Alexander, *supra* note 25, at 397.

174. *Id.*

175. EHRLE ET AL., *supra* note 171, at 2 fig. 2.

176. Jessica Pac et al., *Poverty Among Foster Children: Estimates Using the Supplemental Poverty Measure*, SOC. SERV. REV. 8, 35 (2017).

177. *Id.*

178. Cal. Dep't of Soc. Servs. v. Thompson (*Rosales*), 321 F.3d 835, 838–39 (9th Cir. 2003).

179. *Id.* at 844.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Rosales v. Thompson*, NAT'L CTR. FOR YOUTH LEADERSHIP, <https://youthlaw.org/case/rosales-v-thompson> [<https://perma.cc/47TF-ZXK2>].

child's caregiver's household would qualify for AFDC.¹⁸⁴

B. THE LOOKBACK DOES NOT KEEP PACE WITH INFLATION

The percentage of children who qualify for federal eligibility, or the “penetration rate,”¹⁸⁵ has declined since July 16, 1996.¹⁸⁶ In fact, in 1996, 54 percent of foster children were eligible for Title IV-E; in 2013, that number was only 39 percent.¹⁸⁷ When surveyed about the decline, most state administrators identified the Lookback as the cause.¹⁸⁸ The reason for this is simple: unlike TANF income thresholds, which states may adjust for inflation, the AFDC Lookback is frozen at the July 16, 1996 threshold and cannot be adjusted for inflation.¹⁸⁹

To illustrate: a family of four in California would need a yearly income below \$15,911 to have been eligible in 1996; if adjusted for inflation that number would be \$23,550 in 2013 and even more today.¹⁹⁰ Thus, a family of four that makes only \$16,000 a year would not qualify, even though the family would qualify if the AFDC standard were adjusted for inflation. In fact, the average income threshold for states—\$695 for a family of three—is 64 percent of the 1996 federal poverty guideline but only 39 percent of the 2019 federal poverty guideline.¹⁹¹ In about three-quarters of states, the 1996

184. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (amending Title IV-E so that the income test is based on the home of the child's parent or guardian, not the home in which the child is living at the time of removal).

185. Mangold, *supra* note 2, at 580 (“The percentage of children in out-of-home placements who receive federal maintenance reimbursements under title IV-E of the Social Security Act is called the state penetration rate.”).

186. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-376, FOSTER CARE: ADDITIONAL ACTIONS COULD HELP HHS BETTER SUPPORT STATES' USE OF PRIVATE PROVIDERS TO RECRUIT AND RETAIN FOSTER FAMILIES 16–18 (2018) [hereinafter GAO, FOSTER CARE], <https://www.gao.gov/assets/700/692108.pdf> [<https://perma.cc/BT98-8JPW>].

187. *Id.*

188. SCARCELLA ET AL., *supra* note 100; see also CONG. RES. SERV., CHILD WELFARE 2012, *supra* note 37, at 21 (noting that, while not the only factor leading to the penetration rate's decline, “[t]he fact that the income test is not adjusted for inflation makes it an obvious factor in the decline in federal foster care coverage”); *New Report Shows 35,000 Fewer Abused and Neglected Children Eligible for Federal Foster Care Support in 2005, Increasing Burden on States*, NATIVE AM. TIMES, Feb. 16, 2007, at 7; ELIZABETH JORDAN & DANA DEAN CONNELLY, RESEARCH BRIEF: AN INTRODUCTION TO CHILD WELFARE FUNDING, AND HOW STATES USE IT 5 (2016), <https://www.childtrends.org/publications/an-introduction-to-child-welfare-funding-and-how-states-use-it-3> [<https://perma.cc/67VB-G7BW>].

189. Rep. John Lewis highlighted the problem in his 2009 introduction of The Look-Back Elimination Act of 2009: “Congress locked the income eligibility requirement for federal foster care [in 1996] Since that time, the federal law has not been changed, and despite changing economic realities like inflation and wage growth, states cannot update their income eligibility requirements.” 155 Cong. Rec. 118, E2126 (2009).

190. GAO, FOSTER CARE, *supra* note 186.

191. EMILIE STOLTZFUS, CONG. RESEARCH SERV., MEMORANDUM: THE TITLE IV-E INCOME TEST INCLUDED IN THE “LOOKBACK” 5 (2019).

income level threshold is 50 percent or less than the federal poverty level.¹⁹² As the late Congressman John Lewis highlighted in his introduction of a bill to eliminate the Lookback, the AFDC limit is “so low that even a parent’s part-time job at minimum wage could render a [child] ineligible.”¹⁹³

According to Title IV-E, the purpose of the act is to “enabl[e] each State to provide . . . foster care.”¹⁹⁴ The financial burden of foster care, which Title IV-E intended to be shared between the federal government and states, is increasingly borne by states. In fact, the increasing burden on states “represents an annual loss of over \$226 million.”¹⁹⁵ As discussed below, administration regarding the Lookback is costly—it is feasible that in the near future, states may decline to implement Title IV-E altogether because the cost to implement the program outstrips the federal aid available for eligible children.

C. THE LOOKBACK ENCOURAGES CHILD WELFARE AGENCIES TO MAKE DECISIONS THAT MAY NOT BE IN THE BEST INTEREST OF CHILDREN

One common criticism of the dependency system generally is that it focuses too much on poor families—that it separates children from indigent parents more often than necessary and ignores the transgressions of middle- and upper-class parents.¹⁹⁶ There is a long history of child welfare agencies unjustifiably associating poverty and negligence.¹⁹⁷ Even now, children in foster care come overwhelmingly from indigent families.¹⁹⁸

Some scholars identify the AFDC Lookback as one source of this disparity.¹⁹⁹ The Lookback gives states an incentive to associate negligent parenting with poverty²⁰⁰ because the federal government reimburses states only for expenses associated with children from poor households.²⁰¹ Thus, states have an incentive to take custody of children from indigent parents and overlook the negligence of parents who would not have been AFDC-eligible.²⁰² This is a problem for children both above and below the July 16,

192. CONG. RESEARCH SERV., R43458, CHILD WELFARE: AN OVERVIEW OF FEDERAL PROGRAMS AND THEIR CURRENT FUNDING 15 (2018).

193. 155 Cong. Rec. 118, E2126 (2009) (statement of Rep. John Lewis).

194. 42 U.S.C. § 670 (2018) (stating the Congressional declaration of purpose in creating Title IV-E).

195. Armstrong, *supra* note 28, at 211 (discussing a statement made by Erwin McEwen, the then Director of the Illinois Department of Children and Family Services).

196. Lawrence-Webb, *supra* note 7, at 20–21.

197. *Id.*

198. Pac et al., *supra* note 176, at 2.

199. *E.g.*, Lawrence-Webb, *supra* note 7, at 20–21.

200. Lawrence-Webb, *supra* note 7, at 21.

201. *See* 42 U.S.C. § 672.

202. Lawrence-Webb, *supra* note 7, at 20–21; Mangold, *supra* note 2, at 580 (“To decrease the state

1996 income line: if below, a child may be targeted due to his or her poverty; if above, abuse or neglect may go untreated.

The FFPSA may exacerbate this problem. Per the FFPSA, all children—not merely those who are AFDC eligible—are eligible for pre-removal service funding.²⁰³ This means that states will have an incentive to keep some children in their parent's homes if those homes are not AFDC-eligible, even if removal would be justified. To illustrate, if a child and his family receive pre-removal services under the FFPSA, but, because his home of removal is above the AFDC income standard, he is not eligible for federal maintenance payments, a state will have an incentive to keep the child in the home even if removal would be in his best interest because otherwise the state would lose the federal reimbursement it receives for his care.²⁰⁴ On a larger scale, this means that the concerning tie between the child welfare system and poverty will only continue to grow.

D. THE LOOKBACK IS ADMINISTRATIVELY DIFFICULT AND EXPENSIVE

For every child placed in a family foster home, states must determine whether the child would have been eligible for AFDC by the July 16, 1996 standard at the time of the child's removal.²⁰⁵ To do this, states must determine the following for each child: who is and is not within the child's family unit; what dates qualify as the "time of removal"; the income of those within the family unit at the time of removal; the assets of those within the family unit at the time of removal; and the value of those assets at the time of removal.²⁰⁶ Families involved in the child welfare system are often transient, so this can present a challenge.²⁰⁷ In fact, this process is so cumbersome that states often must either employ a dedicated staff for these determinations or hire an independent contractor to conduct the investigations.²⁰⁸ Altogether, the administration involved in determining AFDC eligibility costs states billions of dollars annually, billions of dollars

funding exposure, states can either increase the penetration rate or attempt to limit the number of non-eligible children served by foster care.”)

203. Hughes, *supra* note 59.

204. *Id.*

205. See 42 U.S.C. § 672(a)(1).

206. 42 U.S.C. § 672(a)(3)(A)–(B) (describing the process of determining the income of a child's home of removal, including calculating a child's assets); U.S. DEP'T OF HEALTH & HUMAN SERVS., TITLE IV-E FOSTER CARE ELIGIBILITY REVIEW GUIDE 40–41 (2012).

207. Armstrong, *supra* note 28, at 222–24.

208. *Id.* at 225–26; Mangold, *supra* note 2, at 597–99. MAXIMUS is one example of an independent contractor that offers child welfare eligibility outsourcing services. According to their website, they have reviewed over one hundred and seventy-five thousand Title IV-E eligibility cases across twenty-four states. MAXIMUS, <https://maximus.com> [<https://perma.cc/FEN2-V2LJ>].

that could be used to administer services.²⁰⁹ As the number of children eligible for Title IV-E declines, it is possible that the cost of implementing the program could soon outweigh any benefits.

IV. AN OVERVIEW OF EQUAL PROTECTION ANALYSIS

The Fourteenth Amendment forbids each state to “deny to any person within its jurisdiction the equal protection of the laws.”²¹⁰ In other words, a state statute may not distinguish between individuals or groups “on the basis of criteria wholly unrelated to the objective of that statute.”²¹¹ While the Constitution never explicitly makes a similar mandate of the federal government, the Supreme Court has incorporated a promise of equal protection into the Due Process clause of the Fifth Amendment.²¹² The reasoning is that it would be “unthinkable” to prevent states from making invidious classifications but allow the federal government to do so.²¹³ Thus, classifications at both the state and federal level must be “reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”²¹⁴

The AFDC Lookback implicates Equal Protection because it distinguishes between two classes of children: those whose parents would qualify for AFDC based on a state’s 1996 standard and those whose parents would not. While the requirement may implicate Equal Protection, no case has ever challenged the AFDC Lookback on Equal Protection grounds.

A. TRADITIONAL TIERS OF SCRUTINY ANALYSIS

Distilled to its simplest form, Equal Protection analysis is a comparison of ends and means. Courts consider the purpose of a classification (the ends), or even, sometimes, a hypothesized purpose,²¹⁵ and compare that purpose to

209. Armstrong, *supra* note 28, at 224–26.

210. U.S. CONST. amend. XIV, § 1.

211. Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (holding that there was no rational basis for a law to distinguish between married and unmarried persons regarding the purchase of contraceptives, and that it was therefore unconstitutional).

212. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that a guarantee of equal protection is implicit in the Fifth Amendment and therefore applies to the federal government and the District of Columbia).

213. *Id.* at 500 (“In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”).

214. Eisenstadt, 405 U.S. at 447 (quoting Reed v. Reed, 404 U.S. 71, 75–76 (1971)).

215. *E.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (“Where, as here, there are plausible reasons for Congress’ [sic] action, our inquiry is at an end. It is, of course, ‘constitutionally irrelevant whether this reasoning in fact underlay the legislative decision’” (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960))).

the classification itself (the means).²¹⁶ If the purpose is insufficient to justify the classification, the law is unconstitutional; if the purpose is sufficient, but the classification is insufficiently tailored to that purpose, the law is, again, unconstitutional.²¹⁷ Thus, only laws with both a sufficient purpose and a classification sufficiently tailored to that purpose are constitutional.

How sufficient that purpose needs to be and how tailored that classification needs to be to that purpose depend on where the classification falls within three “tiers of scrutiny.”

“Strict scrutiny” is the most stringent tier. Under strict scrutiny, laws are presumptively unconstitutional unless the government proves that the purpose of the action is compelling, and the action is narrowly tailored to achieve that compelling purpose.²¹⁸ This is a difficult burden to meet; very few challenged laws pass the test of strict scrutiny.²¹⁹

Courts apply strict scrutiny to two types of classifications. First, courts use strict scrutiny when a government distinguishes between classes based on certain suspect categories—classifications that “supply a reason to infer antipathy.”²²⁰ Classifications based on race,²²¹ national origin,²²² religion,²²³

216. *E.g.*, *Pennell v. City of San Jose*, 485 U.S. 1, 14–15 (1988) (holding that a city ordinance that treated differently two classes of landlords—those that do and do not have “hardship” tenants—was not an Equal Protection violation, given that the purpose of the ordinance was to serve the legitimate purpose of protecting tenants, and it was not irrational to treat landlords who might have vulnerable tenants differently in service of that purpose).

217. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 191 (1976) (recognizing that the proposed governmental interest—traffic safety—was legitimate, but nevertheless declaring the law unconstitutional because the classification was not sufficiently related to the achievement of the interest); *Eisenstadt*, 405 U.S. at 442–43 (holding that the government interest in preventing unmarried persons from purchasing contraceptives was insufficient because “the statutory goal was to limit contraception in and of itself,” which “conflicted ‘with fundamental human rights’” (quoting *Griswold v. Connecticut*, 381 U.S. 479 (1965))).

218. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 784 (2007) (stating that the government bears the burden of justifying classifications based on a suspect class, like race).

219. As famously articulated by Gerald Gunther, strict scrutiny is “‘strict’ in theory and fatal in fact.” Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

220. *Pers. Adm’r v. Feeney*, 442 U.S. 256, 272 (1979).

221. *E.g.*, *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) (“But we deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications ‘constitutionally suspect,’ and subject to the ‘most rigid scrutiny,’ and ‘in most circumstances irrelevant’ to any constitutionally acceptable legislative purpose.” (citations omitted)).

222. *E.g.*, *Hernandez v. Texas*, 347 U.S. 475, 479 (1954) (“The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment.”).

223. *E.g.*, *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) (“A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.”).

and alienage²²⁴ are subject to strict scrutiny for this very reason. Thus, a statute that excludes from jury service people of Chinese ancestry would be subject to strict scrutiny because the statute distinguishes between classes of people on the basis of national origin, one of the suspect categories.

Second, courts apply strict scrutiny to classifications that discriminate as to the exercise of a fundamental right.²²⁵ For example, a law mandating that all citizens owing unpaid taxes be sterilized would be subject to strict scrutiny not because the classification between tax-paying and tax-owing citizens is problematic, but because the right to procreation is so fundamental it may not arbitrarily be granted to one class of persons while being withheld from another.²²⁶

While strict scrutiny is the tier most critical of government action, “rational basis review” is the most deferential. Laws that receive only rational basis review are rarely deemed unconstitutional on Equal Protection grounds.²²⁷ This is because legislation is presumed to have a rational basis.²²⁸ To overcome that presumption, a challenger must prove that either there is no possible legitimate purpose to the legislation,²²⁹ or, if there could be a legitimate purpose, that the classification rests on grounds “wholly irrelevant” to the achievement of that purpose.²³⁰

Under rational basis review, courts are not limited to rationales actually proposed by the government and may hypothesize and speculate as to possible intent.²³¹ Because nearly any rationale may suffice to justify a classification under rational basis review, it falls to the challenger to “negative every conceivable basis” that might support the classification.²³²

224. *E.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 8–10 (1977) (applying strict scrutiny to a law that barred resident aliens from receiving financial aid for education).

225. *E.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (holding that a classification which burdened the right to travel from one state to another was a violation of the Equal Protection Clause); *Skinner v. Oklahoma*, 316 U.S. 535, 541–43 (1942) (holding that a law which permitted the sterilization of convicted criminals was unconstitutional on equal protection grounds).

226. *See Skinner*, 316 U.S. at 541–43.

227. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 712 (5th ed. 2015) (“Since 1937, the Court has sided with the government in the vast majority of instances in which rational basis review has been used.”).

228. *Hodel v. Indiana*, 452 U.S. 314, 323 (1981) (stating that legislation has a “presumption of constitutionality” (citations omitted)).

229. *E.g.*, *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (holding that a provision of the Food Stamp Act was irrelevant to the state’s purpose and was therefore unconstitutional).

230. *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (holding that a state law which criminalized the selling of certain goods on Sunday was not “wholly irrelevant” to the government’s legitimate purpose, and therefore did not violate the Equal Protection Clause).

231. *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955).

232. *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) (holding that there was a rational basis to Kentucky’s discriminatory treatment of in-state and out-of-state tax accounts, and that the classification

As Justice Marshall noted in *Hodel v. Indiana*, this is a “heavy burden.”²³³

Occasionally, the Supreme Court finds that a classification warrants more scrutiny than rational basis review but less than strict scrutiny. Courts apply “intermediate scrutiny” to “quasi-suspect” classifications, like gender.²³⁴ Like strict scrutiny, the burden rests with the government where intermediate scrutiny applies.²³⁵ Unlike strict scrutiny, however, the legislation need not be absolutely necessary to serve a compelling interest, but only substantially related to an important interest.²³⁶

Rational basis review is the default; unless there is reason to apply heightened scrutiny—either strict or intermediate scrutiny—courts will only apply the minimum level of scrutiny.²³⁷

One key difference between heightened scrutiny and rational basis review is the degree to which courts will tolerate over-inclusive classifications (classifications that include additional persons beyond those within the class the government action intended to affect) and under-inclusive classifications (classifications that exclude persons the government intended to affect).²³⁸ If a government action is reviewed with strict scrutiny, it must be narrowly tailored to serve its purpose; if a government action is reviewed with rational basis review, courts will tolerate a fair amount of over- and under-inclusiveness.²³⁹

For example, in *New York City Transit Authority v. Beazer*, the Supreme Court considered a New York regulation that prevented individuals who used narcotics from holding Transit Authority positions.²⁴⁰ The law was over-

was therefore constitutional).

233. *Hodel*, 452 U.S. at 332 (explaining that social and economic legislation is presumptively valid unless a challenger proves that “any combination of legitimate purposes” cannot sustain the classification (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979))).

234. *E.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to a statute that allowed women to drink certain alcoholic beverages at age eighteen but withheld the same privilege from men until the age of twenty-one).

235. *E.g.*, *United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that a Virginia classification based on gender was unconstitutional because the classification did not serve an important governmental interest).

236. *Craig*, 429 U.S. at 197; CHEMERINSKY, *supra* note 227.

237. *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“At a minimum, a statutory classification must be rationally related to a legitimate governmental purpose.”).

238. For example, if a state passed a piece of legislation intended to benefit men, but the language of the legislation was that the benefit goes to “persons over six feet tall,” the legislation would be both over- and under-inclusive. It would be over-inclusive because it would include women who are over six feet tall; it would be under-inclusive because it would exclude men who are under six feet tall.

239. *Vance v. Bradley*, 440 U.S. 93, 108 (1979) (“Even if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by Congress imperfect, it is nevertheless the rule that in a case like this ‘perfection is by no means required.’” (quoting *Phillips Chem. Co. v. Dumas Indep. Sch. Dist.*, 361 U.S. 376, 385 (1960))).

240. *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 572 (1979).

inclusive because it denied employment to individuals who legally used methadone in heroin treatment programs, but, despite its over-inclusivity, the Supreme Court upheld the regulation.²⁴¹ The Court held that over-inclusiveness would be tolerated under rational basis review if the regulation was related to a legitimate government interest, in this case public safety.²⁴² The Court offered the reasoning that a less over-inclusive rule would be more costly than the regulation as it stood.²⁴³ Had the Court evaluated the regulation with strict scrutiny, a more narrow tailoring would likely be required, even if that regulation would be more costly to implement.

B. JUSTICE MARSHALL'S SLIDING-SCALE APPROACH

The tiers of scrutiny, though securely established precedent, are often the subject of criticism. Justice Marshall is among the tiers' most noted critics,²⁴⁴ though he is certainly not alone.²⁴⁵ Legal scholars have noted that the Court applies not three tiers of scrutiny but a plethora of standards: in some cases strict scrutiny is truly strict, but in others less so;²⁴⁶ in some cases

241. *Id.* at 591–92.

242. *Id.* at 592.

243. *Id.* at 590.

244. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 455 (1985) (Marshall, J., concurring in part and dissenting in part); *Plyler v. Doe*, 457 U.S. 202, 230–31 (1982) (Marshall, J., concurring); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–99 (1973) (Marshall, J., dissenting); *Dandridge v. Williams*, 397 U.S. 471, 519–21 (1970) (Marshall J., dissenting).

245. Justice Stevens, too, was highly critical of the rigidity of the Equal Protection doctrine. *E.g.*, *Bush v. Vera*, 517 U.S. 952, 1010 (1996) (Stevens, J., dissenting) (“The conclusion that race-conscious districting should not always be subject to strict scrutiny merely recognizes that our equal protection jurisprudence can sometimes mislead us with its rigid characterization of suspect classes and levels of scrutiny.”). Rather than applying different levels of scrutiny—which, per Justice Stevens, amounted to a “double standard”—the Court ought to simply engage in a case-by-case inquiry examining the relevance of disparate treatment to a legitimate public purpose. *Craig v. Boren*, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) (“There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.”). More specifically, courts should consider not whether a class is suspect or not, but instead should ask three questions: “What class is harmed by the legislation, and has it been subjected to a ‘tradition of disfavor’ by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment?” *Cleburne Living Ctr.*, 473 U.S. at 453 (Stevens, J., concurring). These inquiries reveal whether a rational basis supports a legislative classification. *Id.* A racial classification will almost certainly be struck down not because race is an inherently suspect classification but because race is unlikely to be relevant to a legitimate public purpose; gender classifications will sometimes be upheld, sometimes struck down, not because gender is “quasi-suspect” but because gender is “sometimes relevant and sometimes irrelevant.” *Id.* at 453–54.

246. *Compare City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (striking down a local level race-based affirmative action program, despite a lack of harmful intent, because “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification”), *with Metro Broad., Inc. v. FCC*, 497 U.S. 547, 565 (1990) (“[R]aceconscious classifications adopted by Congress to address racial and ethnic discrimination are

intermediate scrutiny is distinct from strict scrutiny, yet in others it is almost one and the same;²⁴⁷ and in some cases rational basis review seems like no review at all, while in others it is as though the Court applies a more pointed review.²⁴⁸

Justice Marshall first took aim at the tiers of scrutiny in his dissent to the 1970 Supreme Court case *Dandridge v. Williams*. In *Dandridge*, the Supreme Court upheld a Maryland AFDC program that set a maximum grant that a family could receive.²⁴⁹ The effect of this maximum was that small families would receive benefits for each child, but large families would receive benefits for some children but none for others.²⁵⁰ The majority applied only deferential rational basis review to the scheme because it neither infringed on a fundamental right nor discriminated against a suspect class.²⁵¹ As is so often the case under rational basis review, the majority upheld the classification.²⁵² In his dissent, Justice Marshall argued that the Court should not apply one highly deferential review in some cases and one highly critical review in others. Instead, the Court should base its scrutiny on three factors: first, “the character of the classification in question”; second, “the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive”; and third, “the asserted state interests in support of the classification.”²⁵³

One could conceptualize Justice Marshall’s approach as a sliding scale:²⁵⁴ the more invidious the classification, or the more important the government benefit denied, the more scrutiny ought to be applied to the classification. After considering those first two factors, courts then consider the government’s asserted interest in the classification. If the asserted government interest is relatively unimportant compared to the invidiousness of the classification and the importance of the benefit denied, the government action is likely a Fourteenth or Fifth Amendment Equal Protection violation.

subject to a different standard than such classifications prescribed by state and local governments.”).

247. Compare *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (holding that a gender classification receiving intermediate scrutiny required only an “important governmental objective”), with *United States v. Virginia*, 518 U.S. 515, 534 (1996) (holding that a gender classification required an “exceedingly persuasive justification,” rather than just an important justification, to be constitutional).

248. Compare *Lyng v. Int’l Union*, 485 U.S. 360, 370 n.8 (1988) (rejecting the argument that animus on the part of the legislature would justify greater scrutiny than traditional rational basis review), with *Cleburne Living Ctr.*, 473 U.S. at 449–50 (claiming to apply rational basis review but refusing to hypothesize legislative rationales as is typically common in rational basis review, largely because there was reason to believe the government’s challenged action was based on distaste for a particular group).

249. *Dandridge v. Williams*, 397 U.S. 471, 473–75 (1970).

250. *Id.*

251. *See id.* at 486–87.

252. *Id.* at 487.

253. *Id.* at 520–21 (Marshall, J., dissenting).

254. Gunther, *supra* note 219, at 17.

Justice Marshall used this analysis to argue that the Maryland AFDC limitation was unconstitutional on equal protection grounds in *Dandridge*. He first considered the character of the classification: the “distinction between large and small families” was not “one that readily commend[ed] itself as a basis for determining which children [we]re to have support approximating subsistence and which [we]re not” because the factor was one over which children had no control.²⁵⁵ Similarly, the importance of the governmental benefits denied, welfare payments, “the stuff that sustains those children’s lives,” also pointed to greater scrutiny.²⁵⁶ Because the character of the classification and importance of welfare benefits to children pointed to greater scrutiny, Justice Marshall was skeptical of the state’s asserted interests—conserving funds, encouraging employment, and keeping welfare payments consistent with those earning a minimum wage—and engaged in a more searching inquiry than is traditional to rational basis review.²⁵⁷ He concluded that Maryland’s AFDC limitation was unconstitutional, not because it discriminated as to the exercise of a fundamental right or between suspect classifications, but because there was insufficient reason to deny something as crucial as welfare payments on the basis of something as trivial as family size.²⁵⁸

Justice Marshall consistently argued that this approach, rather than the rigid, tiered analysis, was more appropriate when considering social legislation.²⁵⁹ According to Justice Marshall, under tiered analysis, the “only critical decision” was which tier ought to be applied—if subject to heightened scrutiny, the statute would almost surely be struck down, and if not, almost surely upheld.²⁶⁰ The problem, per Justice Marshall, was that the Court had “apparently lost interest in recognizing further ‘fundamental’ rights and ‘suspect’ classes.”²⁶¹ This was “no surprise” to Marshall: why, after all, would the Court “expand the number of categories of rights and classes subject to strict scrutiny, when each expansion involves the invalidation of virtually every classification bearing upon a newly covered

255. *Dandridge*, 397 U.S. at 523 (Marshall, J., dissenting).

256. *Id.* at 522.

257. *Id.* at 524.

258. *Id.* at 525.

259. *Lyng v. Castillo*, 477 U.S. 635, 643 (1986) (Marshall, J., dissenting); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 460 (1985) (Marshall, J., dissenting); *Plyler v. Doe*, 457 U.S. 202, 231 (1982) (Marshall, J., dissenting); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting); *Marshall v. United States*, 414 U.S. 417, 432 (1974) (Marshall, J., dissenting); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting); *Richardson v. Belcher*, 404 U.S. 78, 90–91 (1971) (Marshall, J., dissenting).

260. *Murgia*, 427 U.S. at 319 (Marshall, J., dissenting).

261. *Id.* at 318–19.

category”²⁶² And just because the Court was reluctant to recognize additional fundamental rights or suspect classes, it did not follow that the legislation should receive virtually no scrutiny under rational basis review.²⁶³

Justice Marshall argued not only that the Court ought to apply this sliding-scale approach, but also that, in many cases, the Court was already using this analysis.²⁶⁴ According to Justice Marshall, “[t]ime and again” the Court had struck down legislation receiving only rational basis review after engaging in the “probing look” doctrinally reserved for suspect classifications.²⁶⁵ Justice Marshall was highly critical of silently applying a sliding-scale approach while publicly discussing tiered analysis, as this led to “unpredictable” results, forcing parties and judges to “assess the constitutionality of legislation . . . on an *ad hoc* basis.”²⁶⁶ Thus, Justice Marshall argued, the Court ought to drop the “pretense” of tiered analysis and outwardly recognize the sliding-scale approach as doctrine.²⁶⁷

There is reason to believe that Justice Marshall was right: the alternative approach proposed by Justice Marshall explains otherwise surprising Equal Protection decisions. For example, in *United States Department of Agriculture v. Moreno*, the Supreme Court struck down a provision of the Food Stamp Act despite applying only rational basis review and determining that Congress might have had a legitimate purpose for the provision.²⁶⁸ The challenged provision granted food stamps to many but rendered ineligible households if one or more person in the household was unrelated to the other members.²⁶⁹ While the Court agreed that the proposed purpose—preventing welfare fraud—might be legitimate, it nevertheless struck down the law after using the sort of trenchant analysis typical of heightened scrutiny.²⁷⁰

Under rational basis review, courts usually accept proposed purposes for government action and even speculate as to possible purposes themselves. In *Moreno*, however, the Court was skeptical of the proposed purpose (preventing welfare fraud), but rather than speculate as to other possible purposes it dove into the legislative history behind the act to note that the actual purpose may have been to exclude “hippies” from participation in the program.²⁷¹ Similarly, in applying rational basis review,

262. *Id.* at 319.

263. *Id.*

264. *Id.*

265. *Id.* at 320.

266. *Id.* at 321.

267. *Id.*

268. *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 529–38 (1973).

269. *Id.* at 530.

270. *Id.* at 529–38.

271. *Id.* at 534.

courts usually only consider whether legislators could rationally believe that the classification might lead to a legitimate purpose and do not probe far into evidence. In *Moreno*, however, the Court analyzed whether the provision of the Food Stamp Act in question would actually prevent welfare fraud in practice and even noted that there was no evidence connecting households of unrelated persons to welfare fraud.²⁷² Finally, the Court even considered the over- and under-inclusiveness of the food stamp provisions²⁷³ despite the fact that courts are usually tolerant of over- and under-inclusiveness when a government action receives only rational basis review.²⁷⁴ Thus, while claiming to only apply rational basis review, the analysis was strikingly similar to heightened scrutiny.

Justice Marshall's Equal Protection analysis explains this anomaly. In *Moreno*, Justice Brennan's majority opinion engages in an analysis similar to that described in *Dandridge*. Despite claiming to apply only rational basis review, Justice Brennan is critical of the food stamp provision *because* it involves the "denial of essential federal food assistance."²⁷⁵ In other words, he grants greater scrutiny to the legislation because of the second of Justice Marshall's factors: the importance of the government benefit to the disadvantaged class. Because the Court applies greater scrutiny, the Court is more demanding of proposed legislative rationales and less willing to propose its own hypothetical rationales,²⁷⁶ and even engages in the sort of over- and under-inclusiveness analysis rarely used under rational basis review.²⁷⁷

Moreno is not alone in applying Justice Marshall's approach while claiming to apply traditional tiered scrutiny.²⁷⁸ For example, in *Plyler v. Doe*, the Supreme Court struck down a Texas law that allowed public school districts to deny enrollment to children if they were not legal citizens.²⁷⁹ The

272. *Id.* at 535 (referring to the government's assertion that the limitation would prevent welfare fraud as a "wholly unsubstantiated assumption").

273. *Id.*

274. *Id.*

275. *Id.* at 535–36.

276. *Id.*

277. *Id.* at 535–46.

278. This is true even of cases decided after Justice Marshall's retirement from the Court. For example, in *Romer v. Evans*, 517 U.S. 620, 632–33 (1996), Justice Kennedy applied rational basis review to strike down an amendment to the Colorado Constitution that would prohibit sexual orientation-based antidiscrimination laws. While claiming to apply rational basis review, Justice Kennedy considered the same factors Justice Marshall listed in *Dandridge*—the character of the classification (one affecting a "politically unpopular group"), the nature of the governmental benefit denied (legal protection from discrimination)—and then balanced those concerns against Colorado's stated interests (protecting freedom of association and conserving resources to fight other forms of discrimination), before holding the amendment unconstitutional. *Romer*, 517 U.S. at 627, 634–35 (quoting *Moreno*, 413 U.S. at 534).

279. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

Court considered the character of the classification (a distinction between groups of children based on factors outside of their control)²⁸⁰ and the importance of the benefit denied (basic education).²⁸¹ After that analysis revealed “the proper level of deference to be afforded” to the Texas law—a heightened scrutiny—the Court then considered Texas’s asserted interests before concluding that the law was, indeed, an Equal Protection violation.²⁸²

V. THE AFDC LOOKBACK AND EQUAL PROTECTION

As mentioned before, the level of scrutiny a court applies to a classification will often determine the success of an Equal Protection claim—though not always. If challenging the Lookback on Equal Protection grounds, the odds of success drastically improve if one convinces the court that heightened scrutiny ought to apply.

A. THE LEVEL OF SCRUTINY APPLIED TO THE AFDC LOOKBACK UNDER TRADITIONAL EQUAL PROTECTION

What standard of scrutiny ought to apply varies based on how one frames the AFDC Lookback. Below, I have considered different ways one could frame the Lookback and any arguments that might be made that the classification should receive heightened scrutiny. As will be made clear, however, a court would likely decline to apply heightened scrutiny under the traditional approach.

1. The AFDC Lookback Classifies Based on Wealth

The most obvious way to frame the AFDC Lookback is that it distinguishes between two groups of children based on the wealth of their parents. However, the Supreme Court has never held that classifications based on wealth are inherently suspect, a fact the Court has repeated frequently.²⁸³

While poverty is not itself a suspect class, the division between the poor and the wealthy bears statistical similarity to divisions based on suspect

280. *Id.* at 220 (arguing that the character of the classification was one deserving of scrutiny because “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice”).

281. *Id.* at 221 (noting the importance of education “in maintaining our basic institutions,” and that a lack of education has a “lasting impact . . . on the life of the child”).

282. *Id.* at 223.

283. *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (“[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny.”).

classifications, especially race.²⁸⁴ Again, the Supreme Court has never held that wealth discrimination is race discrimination based on this statistical similarity, and the Ninth Circuit has held outright that it does not.²⁸⁵ But, if a statute that is facially neutral unduly impacts a suspect class and the intention was that it impact that suspect class, the statute may be unconstitutional on Equal Protection grounds.²⁸⁶ Thus, a challenger could argue that a wealth classification deserves strict scrutiny because it was intended to be racially discriminatory. To do this, though, a challenger would need to prove both that the intention behind the facially neutral law is discriminatory, and that the effect of the facially neutral law is discriminatory.²⁸⁷ This is no easy task.

One could argue that the wealth discrimination in the AFDC Lookback has a disparate impact on suspect and quasi-suspect classes. Among kin foster caregivers, African American women are disproportionately represented.²⁸⁸ It could be argued, then, that the impact this has on foster caregivers—specifically, that they are footing the bill, so to speak, based on another household's income—has a disparate impact on both a suspect class (race) and a quasi-suspect class (gender). For this to be successful, though, one would need to prove that there is both a discriminatory impact and a discriminatory intent, and there is no evidence that legislators intended that the Lookback exclude African American children from the federal maintenance payment program. In fact, the history of the Flemming Rule and the AFDC Lookback evidence the opposite: the intention was to *prevent* racial discrimination by states in their administration of AFDC benefits.

2. The AFDC Lookback Prevents Families from Living Together

While the Supreme Court has never held that classifications based on wealth are suspect, the Court has applied heightened scrutiny to wealth classifications if that classification interferes with the exercise of a

284. In 2016, the median income for non-Hispanic White households was \$65,041, but \$39,490 for Black households. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2016, at 7 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/demo/P60-259.pdf> [<https://perma.cc/62P8-VRBQ>].

285. *Ybarra v. Town of Los Altos Hills*, 503 F.2d 250, 253 (9th Cir. 1974) (“[D]iscrimination against the poor does not become discrimination against an ethnic minority merely because there is a statistical correlation between poverty and ethnic background.”).

286. *E.g.*, *Rogers v. Lodge*, 458 U.S. 613, 622 (1982) (holding that a facially neutral voting system was unconstitutional because the intention behind it was racially discriminatory).

287. *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (holding that a criminal defendant seeking to establish an equal protection violation must show both a discriminatory intent and a discriminatory impact).

288. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1623 (2001) (describing the importance of kinship care in the Black community and the impact that kinship foster care policies have on the community).

fundamental right.²⁸⁹ In *Harper v. Virginia State Board of Elections*, for example, the Supreme Court held that a poll tax that discriminated based on wealth was unconstitutional not because wealth was a suspect class but because the statutory discrimination prevented the poor from exercising their fundamental right to vote.²⁹⁰ Similarly, wealth classifications burdening the right to become a candidate for public office²⁹¹ and the right to a criminal defense have also been deemed unconstitutional on Equal Protection grounds.²⁹² Notably, though, the Supreme Court has held that there is no fundamental right to subsistence.²⁹³

One might argue that the AFDC Lookback deserves heightened scrutiny because it burdens a fundamental right: the right to keep a family together. In *Moore v. City of East Cleveland*, the Supreme Court held that a zoning law that prevented a grandmother from living with her two grandsons unconstitutionally infringed on the exercise of the fundamental right to live with one's relatives, including extended family.²⁹⁴ One might argue that because the AFDC Lookback disproportionately impacts relative caregivers, forcing some to decline accepting foster children because they do not meet the 1996 AFDC standard for their state, it burdens an extended family's fundamental right to live together. This connection is perhaps too tenuous for courts, as evidenced by the fact that equal protection challenges to classifications between relative and non-relative caregivers have received only rational basis review.²⁹⁵

3. The AFDC Lookback Limits the Application of Other Title IV-E Protections

Another way to frame what the AFDC Lookback does is not that it excludes children whose homes of removal are above the 1996 AFDC standard from participating in the federal payment program (though it does),

289. *E.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966) (“[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.”).

290. *Id.*

291. *E.g.*, *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (“Selection of candidates solely on the basis of ability to pay a fixed fee without providing any alternative means is not reasonably necessary to the accomplishment of the State’s legitimate election interests.”).

292. *Griffin v. Illinois*, 351 U.S. 12, 16–17 (1956) (holding that a fee for a convicted criminal to receive a copy of their record for appeal was a violation of both the Due Process and Equal Protection clauses).

293. *Lavine v. Milne*, 424 U.S. 577, 584 n.9 (1976) (“Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support.” (citing *Dandridge v. Williams*, 397 U.S. 471 (1970))).

294. *Moore v. City of East Cleveland*, 431 U.S. 494, 520 (1977).

295. *E.g.*, *Lipscomb v. Simmons*, 962 F.2d 1374, 1380 (9th Cir. 1992) (en banc) (applying rational basis review to an Oregon statute that awarded state benefits exclusively to unrelated caregivers).

but that it excludes those same children from the protections provided by the other criteria for Title IV-E eligibility.

As mentioned above, the AFDC Lookback is only one of the eligibility requirements for participation in the Title IV-E program. In addition to having been removed from an AFDC-qualifying household, a child must be the responsibility of the state and have been placed in a licensed home. More importantly, the child must also have been removed by either a judicial determination that “continuation in the home . . . would be contrary to the welfare of the child” or by the parent or guardian voluntarily placing the child with a relative.²⁹⁶ And if removal was based on a judicial determination, the state must have made “reasonable efforts” to prevent the need for removal.²⁹⁷

The fact that Title IV-E excludes children who have been removed from the custody of their parents without a judicial determination should not be surprising. The Court has held time and again that parents have a fundamental—though not unlimited—right in the custody and care of their children.²⁹⁸ In most cases, a parent is warranted some due process—for example, a judicial determination—before his or her child may be removed from the home.²⁹⁹ It is certainly rational that the federal government would opt not to fund the removal of children without judicial determination and in violation of this constitutional right. But, by coupling this eligibility requirement with the AFDC Lookback, Title IV-E limits the application of the judicial determination requirement only to AFDC-qualifying children.

To illustrate: if a child’s home of removal qualifies for AFDC, Title IV-E encourages states to refrain from removing the child without a judicial

296. 42 U.S.C. § 672(a)(2)(A) (2018) (enumerating eligibility criteria for federal reimbursement of foster care maintenance payments).

297. *Id.* § 672(a)(2)(A)(ii).

298. *E.g.*, *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘rights far more precious . . . than property rights’” (citations omitted)). *See also Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that a parent’s power to control the education of his or her own child including the right enroll a child in foreign language classes).

299. *E.g.*, *Stanley*, 405 U.S. at 649 (holding that, “as a matter of due process of law,” a father “was entitled to a hearing on his fitness as a parent before his children were taken from him”).

determination because otherwise the child would not qualify for the Title IV-E program and the state alone would be responsible for paying any maintenance payments. If a child's home of removal does not qualify for AFDC, it does not matter whether the child was removed with or without a judicial determination—no matter what, the state will not receive any federal funds for the care of this particular child. Thus, Title IV-E protects children whose homes of removal qualify for AFDC from removal without judicial determination but does not provide the same protection to children whose homes do not qualify for AFDC.

The problem with this particular way of framing the issue is that Title IV-E distinguishes between two classes as to who receives federal protection of the fundamental right, but it does not actually burden the exercise of the fundamental right. In other words, Title IV-E does not actually remove children from the custody of their parents without judicial determination, it just declines to protect some of those children from state removal without judicial determination.

A parallel could be drawn to the 1980 Supreme Court case *Harris v. McRae*. In *Harris*, the Court considered the constitutionality of the "Hyde Amendment," an amendment to the Medicaid program that denied public funding for certain abortions, limiting indigent women's access to an abortion.³⁰⁰ While the Supreme Court recognized a fundamental right to abortion access,³⁰¹ a five Justice majority upheld the Hyde amendment.³⁰² The rationale was that, while the "government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation."³⁰³ In other words, the federal government could not infringe on the exercise of that right, but need not offer additional protections as to the exercise of the right—in this case, Medicaid payments.

The same argument could be made about the AFDC Lookback: it would be unconstitutional if Title IV-E directly removed non-eligible children from their homes without judicial determination or if Title IV-E incentivized removal without judicial determination. But Title IV-E does neither of these things: it simply declines to offer additional federal protection against removal for some children but not others.

300. *Harris v. McRae*, 448 U.S. 297, 300–01 (1980).

301. *Roe v. Wade*, 410 U.S. 113, 154 (1973).

302. *Harris*, 448 U.S. at 326–27.

303. *Id.* at 316.

B. THE LEVEL OF SCRUTINY APPLIED TO THE AFDC LOOKBACK UNDER JUSTICE MARSHALL'S SLIDING SCALE APPROACH

As described above, Justice Marshall argued that courts, while claiming to apply strict or intermediate scrutiny or rational basis review, often instead apply a sliding scale, varying scrutiny based on the character of the classification and the importance of the benefit denied to the class, before comparing those factors to the importance of the government interest served by the act. Here, all of these factors point to the application of more probing scrutiny in analyzing the Lookback, even if traditional Equal Protection analysis does not.

First, consider the character of the classification. In the case of the Lookback, the disadvantaged class is children—and through them their foster families—whose homes of removal do not meet the 1996 AFDC income standard. The Supreme Court noted in *Levy v. Louisiana* that children who belong to a class due to “no action, conduct, or demeanor of theirs” warranted special protection under Equal Protection,³⁰⁴ a notion repeated in *Plyler*.³⁰⁵ In the case of the Lookback, children are in much the same position: foster children have no control over whether their parents' incomes are above or below the July 16, 1996 AFDC income level, or whether a child welfare agency chooses to leave them in the home of their parents or remove them and place them with a foster parent, or whether, if removed, the child is placed with a foster parent who needs maintenance payments to care for the child. To determine whether a child is guaranteed maintenance payments in his or her foster home based on the income of his or her parents is as punishing to vulnerable children as it is non-sensical.

Second, the benefit denied to the class—maintenance payments—is crucial to those disadvantaged by the legislation. As described above, maintenance payments enable foster families to provide the basic care children need. In many cases, maintenance payments may amount to subsistence payments—payments necessary to keep the child in question safe and healthy. Just as was the case *Moreno* and Justice Marshall's *Dandridge* dissent, benefits providing food and other basic welfare needs are so important as to push Justice Marshall's sliding scale toward a heightened scrutiny.

If a court were to silently apply Justice Marshall's approach to Equal Protection, as is sometimes the case, it would likely apply a greater scrutiny than traditional rational basis review.

304. *Levy v. Louisiana*, 391 U.S. 68, 72 (1968).

305. *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

VI. TESTING “EVERY CONCEIVABLE RATIONALE” OF THE AFDC LOOKBACK

As described above, one could argue that the AFDC Lookback warrants heightened scrutiny—either under the traditional approach or Justice Marshall’s approach to Equal Protection. Because rational basis review is the minimum level of review applied to a challenged government action, I have approached the analysis as though the Lookback would receive only rational basis review: to prove that the Lookback is unconstitutional under rational basis review, one would need to prove that the classification between children with AFDC-eligible parents and children without either lacks any legitimate purpose, or is irrelevant to the achievement of a legitimate purpose. As established, this is a heavy burden; it requires one to “negative” every possible rationale for the limitation, not simply the rationale the legislature used.

Below are possible rationales for the Lookback and an examination of whether each is rationally related to a legitimate government interest.³⁰⁶ As will be made clear, most rationales could not stand even under the most deferential rational basis review. If a rationale could possibly survive rational basis review (and there is, in my opinion, only one that might), I also consider whether the rationale could survive heightened scrutiny should a court approach the question as Justice Marshall argued courts often do.

A. “THE AFDC LOOKBACK PREVENTS STATES FROM USING ‘SUITABLE HOME’ REQUIREMENTS”

The original rationale of the AFDC Lookback was that it would prevent states from denying children’s AFDC benefits based on arbitrary or discriminatory reasons. Preventing the arbitrary and discriminatory application of laws is certainly a legitimate interest of the federal government,³⁰⁷ and was certainly a legitimate interest in 1961 when the AFDC Lookback was created.

The modern structure of welfare cannot sustain this rationale. A link to AFDC does not prevent states from denying welfare benefits to children based on the “unsuitability” of their homes for one simple reason: AFDC is no longer a statutory source of welfare benefits. Whereas the previous justification was that the federal government would only reimburse states for

306. Note that I do not consider here rationales that would obviously serve only illegitimate purposes (for example, that the purpose of the Lookback is to encourage the separation of indigent parents from their children).

307. See *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (holding that a city ordinance “which clothes a single individual” with the power to punish persons based on their nationality was “inoperative and void.”).

the removal of children if those children continued to receive their benefits, there is no such promise here: a state could remove a child from his or her home, place the child in a foster home, and then deny the child benefits under TANF, AFDC's successor, without conflicting with any part of Title IV-E. There is no rational connection between the original intent of the legislation and its modern application.

B. "THE AFDC LOOKBACK ENCOURAGES STATES TO MAKE DECISIONS IN THE BEST INTERESTS OF CHILDREN"

As mandated by its *parens patriae* obligation, a state has a duty to make decisions regarding the foster children in its custody in accordance with the children's best interest.³⁰⁸ One potential rationale for the Title IV-E eligibility requirements is that they encourage states to conduct procedures that are in the best interest of children.

Most of the Title IV-E eligibility requirements do have some sort of connection to a child's best interest. For example, the requirement that a court must make a judicial determination that "continuation in the home . . . would be contrary to the welfare of the child"³⁰⁹ before a child is removed from his or her home serves to ensure that states do not arbitrarily remove children from their homes absent good cause. Another requirement, that the foster family home in which the child is placed must meet certain licensing requirements,³¹⁰ serves the best interest of children by ensuring that homes in which the state places children are safe.³¹¹ Certainly, the argument can and has been made that these requirements do not serve the best interest of children in practice,³¹² but the requirements themselves at least bear a rational relationship to a child's health, safety, and happiness.

Unlike these requirements, the AFDC Lookback has no connection to

308. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (arguing that the state has "a *parens patriae* interest in preserving and promoting the welfare of the child").

309. 42 U.S.C. § 672(a)(2)(A) (2018) (enumerating eligibility criteria for federal reimbursement of foster care maintenance payments).

310. *Id.* § 672(a)(2)(C).

311. Some argue that licensing requirements are too strict for relative caregivers, and that in many cases, it would be in the best interest of children to place the child with a relative that does not meet a state's licensing requirement rather than with a licensed non-relative. *E.g.*, Randi Mandelbaum, *Trying to Fit Square Pegs Into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 *FORDHAM URB. L.J.* 907, 922–23 (1995) ("Many of the child protection and safety requirements for licensure, however, are unduly formalistic and formulaic. Low-income kinship caregivers are often unable to meet these requirements and are thus prohibited from participating in the foster care program." (citations omitted)). Some states apply their licensing requirements more flexibly to kin caregivers. *E.g.*, CONN. GEN. STAT. § 17a-114-14 (2010) (waiving licensing requirements—like the requirement that a foster home have a certain number of bedrooms—in cases where a foster child is placed with a relative caregiver).

312. *See, e.g.*, Alexander, *supra* note 25, at 410–13.

health or safety concerns. In fact, as argued above, the very nature of Title IV-E undermines the execution of a state's *parens patriae* power because it encourages states to make decisions based on potential reimbursement rather than a child's best interest. For example, the AFDC Lookback disincentivizes the removal of some children from potentially abusive homes: if a child's home is not AFDC-eligible, the state is reimbursed for a portion of the child's in-home services (per the FFPSA), but is saddled with the entire bill as soon as the child is removed. The structure of Title IV-E encourages states to consider factors beyond those relevant to the interests of the child, namely, the state's own financial interests.

This does not necessarily mean that the AFDC Lookback is unconstitutional on equal protection grounds. After all, the promise of equal protection "does not prohibit legislatures from enacting stupid laws."³¹³ The fact that the requirement undermines the goal of a child's safety is not unconstitutional if the legislature had a rational basis to believe that it would serve that goal—or any goal.³¹⁴ However, to justify the requirement with the rationale that it serves the best interest of children requires some sort of connection between the rule—only children whose homes of removal would have been eligible for AFDC receive federal benefits—and a child's interests, and there simply is none.

The licensing requirement illustrates the distinction: kin caregivers are less likely to pass licensing requirements,³¹⁵ and thus the licensing requirement will prevent funding of a placement that is in a child's best interest in some cases. However, the requirement still bears some sort of connection to child safety, even if it does so clumsily. This is not the case regarding the AFDC Lookback.

C. "THE AFDC LOOKBACK ENCOURAGES STATES TO IMPROVE THE ADMINISTRATION OF FOSTER CARE BENEFITS"

Another possible rationale for the AFDC Lookback is that it encourages states to improve the administration of foster care benefits. Some of the other Title IV-E requirements serve this purpose. For example, the requirement that children be placed in licensed foster homes encourages states to develop a system that effectively and efficiently licenses foster homes, thereby maximizing the number of Title IV-E eligible children. Similarly, the

313. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (quoting Justice Marshall, referring to the Court's legislative deference).

314. *See Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911) ("When [a] classification . . . is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.")

315. Mandelbaum, *supra* note 311.

requirement that states make a reasonable effort to prevent removal before placing a child in foster care encourages states both to make reasonable efforts and to document those reasonable efforts effectively.

The AFDC Lookback encourages states to investigate and document AFDC eligibility as effectively as possible. Unlike the other requirements, however, there is no other purpose for determining AFDC eligibility apart from the Lookback itself. The federal licensing requirement serves a rational federal interest because licensing foster homes at the state level serves an important state purpose. States have a safety interest in licensing foster homes, and Title IV-E encourages states to implement effective systems to maximize their reimbursement. By contrast, AFDC eligibility serves no other purposes apart from Title IV-E eligibility. To justify the AFDC Lookback by arguing that Congress has a rational interest in ensuring states effectively determine AFDC eligibility is a circular argument: a requirement for AFDC eligibility cannot be justified by arguing that the reason for the requirement is to have an efficient system for determining if the requirement is met.

D. “THE AFDC LOOKBACK PROTECTS THE FEDERAL GOVERNMENT’S LIMITED RESOURCES”

The federal government has a legitimate interest in protecting its limited financial resources.³¹⁶ For example, the Ninth Circuit held in *Lipscomb v. Simmons* that concern for the public fisc justified an Oregon policy that granted state foster care payments to non-related caregivers but did not grant them to relative caregivers.³¹⁷ The state argued that it could not pay for every child and so it had to draw a line.³¹⁸ This line between related and unrelated foster parents was rationally related to the government’s interest and the purpose of the foster care legislation in general.³¹⁹ If not every child’s placement could be funded, it was rational to exclude relatives because relatives were more likely to accept a child regardless of whether they received state maintenance payments.³²⁰ By cutting payment to those most likely to care for children without payment, the state could then “maximize the amount of money available for the benefit of abused and neglected children in need of foster care.”³²¹

One might argue that the AFDC Lookback serves a similar purpose

316. *Lipscomb v. Simmons*, 962 F.2d 1374, 1380–81 (9th Cir. 1992) (en banc).

317. *Id.*

318. *Id.* at 1384.

319. *Id.* at 1380–81.

320. *Id.*

321. *Id.* at 1380.

here. By limiting the children eligible for foster care maintenance payments, the federal government may maximize the amount that can be spent on the in-home services now permitted by the FFPSA. If the government ensures that states provide proper in-home services, this would perhaps reduce the need for foster care.

This logic would justify any limitation on the Title IV-E eligibility of children no matter how ridiculous or invidious. If the federal government specified that only left-handed children were eligible for the Title IV-E program, it would certainly save resources that could then fund in-home services. It would be unconstitutional, however, because the classification is not rationally related to either the purpose of Title IV-E or the objective of the limitation.³²²

It may be rational for the federal government to exclude from eligibility children placed in *foster homes* that do not require maintenance payments—resources are limited and it is rational to limit the federal guarantee of maintenance payments only to the children *placed* in homes where maintenance payments are necessary. Unless there is a reason why states need federal reimbursement for children removed from AFDC-eligible homes specifically and do not for other children, the line drawn is as arbitrary as the left-handed classification.

1. “The Federal Government Has Limited Resources—the AFDC
Lookback Ensures Those Resources Go to the Children Most in Need”

One possible rationale is that, because the federal government has limited resources, it must ensure that those resources serve the children most in need of maintenance payments. This is certainly a reasonable rationale for many wealth classifications. For example, the state of Georgia draws the line for receipt of TANF benefits at \$745 a month for a family of three; families of three with an income of \$746 a month are ineligible for TANF in the state.³²³ While there is no substantial difference between a person whose income is barely below \$745 per month and a person whose income is barely above \$745 per month, this classification would likely pass rational basis review.³²⁴ Protecting limited resources is a rational basis for drawing a line that limits the number of people eligible for TANF; the question is whether the placement of the line is rationally related to the overall purpose of the legislation. In the case of Georgia’s income limitation it would be: the overall

322. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 632 (1969) (arguing that the proposed basis for a residency requirement in receipt of welfare benefits was irrational because it related neither to the overall purpose of AFDC or the proposed purpose of the residency requirement).

323. GA. DEP’T HUM. SERVS., *supra* note 37.

324. *Id.*

purpose of TANF is to ensure families have enough resources to care for their children, so excluding families that are more likely to have resources of their own (in other words families with a greater income) is rationally related to the overall goal. By contrast, drawing a line that excludes, say, families that live in blue houses would not be rationally related to the overall goal because there is no rational reason to believe that families living in blue houses would be less likely to need maintenance payments than other families.

Like Georgia's TANF limitation, the AFDC Lookback is an income classification, and like Georgia's TANF limitation, the federal government certainly has a legitimate interest in ensuring that limited resources are used to aid the foster children who are most in need. The problem with this potential rationale is that the AFDC Lookback does not help states provide aid to the foster children who are most in need, it helps states provide aid to the foster children who would have been the most in need *if they remained in their home of removal*. The children to whom this applies have been removed from the care of the person or persons on whom the AFDC Lookback income test is based and placed in the care of another person or persons who might themselves be indigent. Yet the income of a caregiver has no impact on whether a child is eligible for Title IV-E payments.

To draw a parallel, it is as though the state of Georgia, in an attempt to conserve its limited resources, set an income threshold for the receipt of TANF benefits at \$745 a month for a family of three. But rather than test a family's own income to determine whether that family receives benefits, the state tests the income of the family's neighbor to make the determination. The fact that an income test is used at all is not irrational, the income test is just applied to the wrong household.

As mentioned before, scenarios where a caregiver's income is below the 1996 AFDC limit but a parent's income is not occur relatively frequently.³²⁵ It is common to place children with grandparents living on a fixed income, for example.³²⁶ If a limitation was rationally related to the legitimate governmental interest of ensuring that states grant aid to the children who are most in need, the AFDC Lookback would be based on *caregiver* income, not the income of the home of removal.

The FFPSA highlights this irrationality. Now, per the FFPSA, states may use federal funds for in-home services.³²⁷ While there are limitations on

325. *E.g.*, Cal. Dep't of Soc. Servs. v. Thompson, 321 F.3d 835, 838–39 (9th Cir. 2003).

326. EHRLE ET AL., *supra* note 171.

327. Family First Prevention Services Act, Pub. L. No. 115-123, div. E, tit. VII, 132 Stat. 170 (2018).

what in-home services it may be used for, there is no AFDC Lookback equivalent limiting which families are eligible. In other words, the income of a child's parent is relevant when the child is placed outside of the home but is irrelevant when the child remains in the home.

2. "The Federal Government Has Limited Resources—the AFDC Lookback Uses Those Resources to Encourage States to Provide Payments to Children They Might Otherwise Decline to Fund"

Another possible rationale mimics the intention of the Flemming Rule: states might decline to provide maintenance payments for certain children.³²⁸ If the federal government felt that this was wrong, it might offer to reimburse states for the care of those children, and in doing so, discourage states from denying them maintenance payments.

Lipscomb v. Simmons illustrates that states sometimes do choose to fund only certain classes of foster children—in that case, only children who lived with a non-related foster parent.³²⁹ There is no reason to believe, though, that states would decline to fund the maintenance of children from indigent households if not for the AFDC Lookback. States might decline to fund children who do not need a financial incentive for placement,³³⁰ or children likely to be placed in an affluent household. Children from AFDC-eligible households do not fit into either of these categories. In fact, if there is a rational basis for a classification based on the AFDC eligibility of a foster child's home of removal, it would be the inverse of the law as it stands now: income levels tend to be similar across members of the same family;³³¹ thus, if a child's home of removal is relatively affluent, it is likely that the child's relatives—and therefore, potential caregivers—are also relatively affluent and able to care for a child without the receipt of maintenance payments. States might then decline to fund children from AFDC *ineligible* homes on the grounds that a kin caregiver would likely be able to care for a child from that home without financial assistance. If this were the case, a federal law offering states reimbursement for the funding only of children from AFDC-*ineligible* homes might have a rational basis, but not the inverse.

328. Cf. Lawrence-Webb, *supra* note 7 (describing the origin of the Flemming Rule as an attempt to prevent states from denying aid to certain children).

329. *Lipscomb v. Simmons*, 962 F.2d 1374, 1376 (9th Cir. 1992) (en banc).

330. *Id.*

331. See Raj Chetty et al., *Economic Mobility*, in PATHWAYS: THE POVERTY AND INEQUALITY REPORT 2015, at 55 (2015).

3. “The Federal Government Has Limited Resources—the AFDC Lookback Ensures That There is Adequate Funding for the Children Requiring the Most Expensive Care”

The maintenance of some children is more expensive than others. Children with physical, emotional, or intellectual disabilities and children who are sick are typically more expensive to care for than other children.³³² States’ maintenance payment structures often reflect this, with households caring for children with disabilities or illnesses receiving greater maintenance payments than others.³³³ One possible rationale for the AFDC Lookback is that it ensures states have adequate funding to offer maintenance payments for the children for whom care is more expensive.

For this to be the case, there would need to be some sort of correlation between the issues that make some children more expensive to provide care and AFDC eligibility. Certainly, some physical, emotional, and intellectual disabilities are more likely to be diagnosed in low-income households.³³⁴ Similarly, poor children are more likely to suffer from certain illnesses and more likely to be described as having behavioral issues.³³⁵ This is perhaps the strongest justification for the AFDC Lookback: because children from the poorest households are more likely to suffer problems that would make their care expensive, the state has a rational interest in ensuring state governments have adequate funds for the care of those children.

Certainly, there are children who do not come from low-income households that suffer from similar ailments, and certainly there is an ever-growing swath of homes that are, by modern standards, impoverished but do not qualify for federal maintenance standards based on the 1996 standard for AFDC eligibility. The AFDC Lookback, then, is both under- and over-inclusive.³³⁶

332. Donna Anderson et al., *The Personal Costs of Caring for a Child with a Disability: A Review of the Literature*, 122 PUB. HEALTH REPS. 3, 4 (2007); Mark Stabile & Sara Allin, *The Economic Costs of Childhood Disability*, 22 FUTURE OF CHILD. 65, 65 (2012).

333. E.g., CAL. WELF. & INST. CODE § 11461(e)(1) (West 2020).

334. Amy J. Houtrow, *At the Intersection of Poverty and Disability: Supplemental Security Income for Children with Disabilities Due to Mental Health Problems*, 96 PHYSICAL MED. & REHABILITATION 2094, 2094 (2015) (“Poverty is a risk factor for poor health outcomes and disability, and having a disability in the family is a risk factor for poverty.”).

335. See REED JORDAN ET AL., HOST YOUTH: THE CHALLENGES OF GROWING UP IN LOW-INCOME HOUSING 1–4 (2013), <https://www.urban.org/sites/default/files/publication/24186/412953-HOST-Youth-The-Challenges-of-Growing-up-in-Low-Income-Housing.PDF> [<https://perma.cc/QT9J-88JW>].

336. If the AFDC Lookback was a state classification rather than federal, it would be hard to justify the over- and under-inclusiveness. States have a *parens patriae* duty to each individual child they take into their charge. An over- or under-inclusive policy that denies benefits to some state wards who need it in their home of placement, as a state AFDC Lookback would, would not serve the *individual interests* of each child in state custody. An over- or under-inclusive policy that lets some state wards fall through the cracks would mean a state has failed in its *parens patriae* duty to some children in its custody. The

If the AFDC Lookback classification received strict or even intermediate scrutiny, the under- or over-inclusiveness might prove it to be an unconstitutional violation of equal protection.³³⁷ However, because this classification would likely only receive rational basis review, there is no need for the classification to be narrowly tailored or substantially related to the purpose of the legislation.³³⁸

Under rational basis review, over- and under-inclusive legislation is often tolerated because a more precise articulation would be more expensive or more difficult to apply.³³⁹ That is not the case here. If the rationale for the AFDC Lookback is that children from the poorest homes are statistically more likely to suffer problems that would necessitate higher maintenance payments, one potential solution would be to link receipt of maintenance payments from the federal government to AFDC eligibility. As mentioned before, this is over-inclusive because many AFDC eligible children do not suffer from the problems that necessitate higher payments, and it is under-inclusive because many non-AFDC eligible do. A more precise articulation of the rule would be: the federal government, because it cannot afford to reimburse states for the maintenance payments of all children, will reimburse states only for children who are actually diagnosed with certain physical, emotional and intellectual disabilities. This would be a more precise law aimed at the same purpose. Additionally, this more precise version would be cheaper and easier to apply. AFDC eligibility is a costly determination that serves no purpose to the child welfare system apart from its role in Title IV-E. The determination of a foster child's eligible diagnosis, however, does serve a purpose outside of determining Title IV-E eligibility: states grant increased maintenance payments to those children, and so the determination of a child's diagnosis could serve both Title IV-E and state purposes, making eligibility determination a less superfluous and expensive task.

While some over- and under-inclusiveness is tolerated under rational basis review, it does not follow that *all* over- and under-inclusiveness is tolerated.³⁴⁰ With every year that passes, the frozen AFDC Lookback

dissent made a similar argument in *Lipscomb v. Simmons*. *Lipscomb v. Simmons*, 962 F.2d 1374, 1388–89 (9th Cir. 1992) (en banc) (Kozinski, J., dissenting) (“When the state acts *in loco parentis* . . . it takes on a grave responsibility *to that child*, stepping into the shoes of the parents whose place it takes. The decisions it makes with respect to the child must . . . be guided by an overarching objective: maximizing the child’s welfare. Each child is entitled to have key decisions as to its care made in light of his own best interests, rather than to serve some collateral purpose.” (emphasis in original) (citations omitted)). Because the federal government does not take children into its custody, it does not have the same *parens patriae* duty to children in state custody.

337. See *Planned Parenthood of the Great Nw. v. State*, 375 P.3d 1122, 1139 (Alaska 2016).

338. *Vance v. Bradley*, 440 U.S. 93, 109 (1979).

339. *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 573 (1979).

340. See *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 537 (1973).

becomes more and more over- and under-inclusive as inflation makes fewer and fewer households and therefore fewer and fewer children meet the requirement. It is feasible that, even if it does not do so now, eventually the classification will be so over- and under-inclusive as to be “not only ‘imprecise,’ [but] wholly without any rational basis.”³⁴¹

If a court applied Justice Marshall’s sliding-scale approach to Equal Protection, the over- and under-inclusiveness of the Lookback could not survive the greater scrutiny a court would likely apply. Per Justice Marshall’s *Dandridge* dissent, a court, bearing in mind the class in question and importance of the benefit denied to the class (both of which, in this case, point to greater scrutiny), then considers the importance of the governmental interest at stake. As described in the previous Section, most of the rationales that could possibly justify the AFDC Lookback are not rationally related to a legitimate government purpose. The interest here—using limited resources to ensure states provide maintenance to the children who require the most expensive care—may have a rational relationship to the Lookback, but the Lookback is wildly over- and under-inclusive. It excludes children from non-AFDC eligible households who have illnesses or disabilities and grants maintenance payments to children from AFDC-eligible households who do not require more expensive care. While courts tolerate some over- and under-inclusiveness under rational basis review, statutes that receive more probing scrutiny—as would be the case here under Marshall’s Equal Protection—require narrower tailoring. A court applying Marshall-style analysis would likely consider whether there is a more precise way to reach this proposed purpose, namely, granting eligibility to children based on whether they actually have an illness or disability. There certainly is: Title IV-E could reimburse states for maintenance payments to children who actually have the illnesses or disabilities making their care more costly.

While the Court in *Moreno* never explicitly dealt with over- or under-inclusiveness, it applied the same analysis to the Food Stamp limitation in that case.³⁴² The Court held that, while the government had a rational interest in preventing welfare fraud, the “related household” limitation would eliminate many individuals who were not committing welfare fraud (or a part of “hippie communes”) from eligibility.³⁴³ While “[t]raditional equal protection analysis [did] not require that every classification be drawn with precise ‘mathematical nicety,’” the classification, the Court held, was more than merely “imprecise.”³⁴⁴ The argument was that those committing welfare

341. *Id.* at 538.

342. *Id.* at 536.

343. *Id.* at 537.

344. *Id.* at 538 (citations omitted).

fraud had the financial means to alter their living arrangements so they could continue to receive benefits.³⁴⁵ Those most likely to be affected by the “related household” limitation were those who could not afford to alter their living arrangements—those who rightfully qualified for food stamps.³⁴⁶ In other words, the law was so over- and under-inclusive as to render the purpose of the legislation virtually moot.

As inflation makes the AFDC income threshold increasingly outdated, and as the over- and under-inclusiveness of the regulation continues to grow, this rationale—already tenuous at best—holds less and less water no matter whether traditional tiered scrutiny or Justice Marshall’s sliding scale approach is applied.

CONCLUSION

When DHEW implemented the Flemming Rule in 1960, and when Congress made it law in 1961, the intent was to prevent the arbitrary withholding of welfare benefits. Ironically, the Flemming Rule is the source of arbitrary withholding of benefits today. This time, it is the federal government withholding benefits from states, but for an irrational reason: that the homes that no longer care for foster children cannot afford to care for foster children.

With each passing year, as inflation makes the archaic AFDC income standards increasingly outdated, the argument that the AFDC Lookback is irrational becomes stronger. A legislative solution to this problem would be simplest. An amendment that would either remove the Lookback entirely, or allow adjustments that make it consistent with inflation, or make the determination based on the home of placement rather than the home of removal, would be an improvement on the current policy. Now that Congress has capped the use of federal funds for congregate care, there may be an increase in the number of children placed in family foster care, thus making it even less likely that Congress would bite the financial bullet, so to speak, and increase its fiscal commitment to state family foster care.

The consequence is that states may find it increasingly arduous to adequately exercise their *parens patriae* power in the care of our most vulnerable population. While an equal protection claim would likely only receive rational basis review, a judicial remedy may be the only, if not the ideal, solution. As Secretary Flemming argued, it was wrong to deny benefits to children based on the “sins” of their parents; surely now, it is wrong to deny benefits based on the “sins” of Congresses past.

345. *Id.* at 537–38.

346. *Id.*