

THE FOSTER CARE SYSTEM LOOKING FORWARD: THE GROWING FISCAL AND POLICY RATIONALE FOR THE ELIMINATION OF THE “AFDC LOOK-BACK”¹

Shardé Armstrong*

In 1996, when Congress repealed the Aid to Families with Dependent Children (AFDC) program, it failed to amend the federal foster care program (Title IV-E) to remove the existing link between the AFDC income eligibility provision and federal reimbursements to states for foster care and other child welfare expenditures. Congress’s failure to adjust this standard to account for inflation has caused the number of families eligible for federal foster care funds to decline precipitously over time. As a result, fewer children and their families have access to much needed preventative services as states, seeking to balance their budgets, divert funding from these services to pay for increasing out-of-home placement costs. Furthermore, cumbersome income eligibility assessments required under Title IV-E are administratively costly, directing still more funds away from needy families. Despite extensive lobbying and the promulgation of numerous proposals to remove the problematic link, Congress has failed to act. This note argues that the federal government should share in the cost of maintaining all foster children, not only those labeled “poor enough” by an archaic and irrelevant standard.

* J.D., 2013, New York University School of Law; B.A., 2008, Taylor University. I owe a great debt to FosterClub and its founder, Celeste Bodner, for encouraging foster youth across the country to survey their surroundings and to use their collective voice for change. An even greater debt is owed to Natasha Silber for her contribution to this note through her support, guidance, and thoughtful feedback. Thank you to Anthony and Madam Ambassador Beatrice Welters, Deborah Malamud, Thelma Duggin and Jeannie Forest, without whom law school would have been an impossible dream. Additionally, I would like to thank the staff of the *New York University Journal of Legislation and Public Policy*, particularly Winnie Nwapa, for their contributions to this note and their skillful editing. Finally, I would like to thank Mark and Cindi Lantz and my AnBryce family for making law school possible.

1. “AFDC look-back” and “look-back” are used interchangeably to describe the link between federal child welfare funding and the cash welfare program described herein. This note also adopts a spelling of “look-back” consistent with Representative Lewis’s usage in his Look-back Elimination Act. 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).

- INTRODUCTION..... 194
 - I. A PRIMER ON THE “AFDC LOOK-BACK” 200
 - II. THE STRUCTURE OF CHILD WELFARE FINANCING AFTER THE AFDC LOOK-BACK 207
 - A. Available Federal Child Welfare Funds..... 209
 - 1. Title IV-E 209
 - 2. Title IV-B Funding..... 212
 - B. Decreasing Federal Child Welfare Funding 214
 - III. POLICY AND FISCAL IMPLICATIONS OF THE AFDC LOOK-BACK 214
 - A. Federal Financial Structure Discourages the Funding of Front-End Services and Fails to Keep Pace with Changes in the Child Welfare Field 216
 - B. Federal Financial Structure Discourages the Funding of Post-Care Services 220
 - 1. Inadequate Funding for Reunification and Post-Reunification Services 220
 - 2. Inadequate Funding for Other Permanency Services 222
 - C. Fiscal Implications on the AFDC Look-back..... 224
 - 1. Title IV-E eligibility determinations result in the loss of billions of dollars 224
 - 2. The Look-back Results in Uneven Outcomes for Children 227
 - 3. The AFDC Look-back Fails to Keep Pace with Inflation 228
 - IV. MOVING FORWARD: PROPOSALS ADDRESSING THE AFDC LOOK-BACK 229
 - A. De-Link Federal Foster Care from AFDC Income Standards 230
 - B. “Update” the Federal Foster Care Eligibility Standards 233
 - C. Cap or Create a Block Grant For Foster Care Funds 235
- CONCLUSION..... 237

INTRODUCTION

The United States foster care system faces a daunting task—ensuring the safety of the hundreds of thousands of children who interact with it each year. The child welfare system pursues this goal through a

complex system comprised of myriad services,² including temporarily placing children in out-of-home care while parents and caregivers receive services aimed at reducing the reoccurrence of abuse or neglect.³ Unfortunately, the current child welfare funding structure does not adequately support these goals.⁴ Instead, the child welfare system's underlying financial structure has resulted in decreased federal dollars for both pre-removal services and out-of-home care. Consequently, states must choose between removing a child and placing him outside the home with limited federal assistance, or keeping the child at home and offering pre-removal services with no federal assistance at all.

A financial system with the effect of removing children from their homes demands careful consideration, yet Congress has ignored this broken structure for more than eighteen years; inaction that has been a subject of growing controversy on Capitol Hill. Indeed, child welfare professionals, current and former foster youth, and other stakeholders all have protested this incentive for states to remove children from their homes, particularly since congressional funding for out-of-home care has also significantly declined. Until Congress acts, fewer families will be eligible for federal child welfare funds based on a Byzantine eligibility test that is unrelated to the needs of children. This ongoing reduction in the amount of federal monies available to states results in states diverting funds otherwise slated for removal prevention and post-reunification services toward out-of-home placements previously funded by the federal government.

For years, child welfare was primarily a state concern. When the federal government sought to standardize support for children, it did so through the creation of a federal foster care system, Title IV-E,⁵

2. States ensure children's wellbeing through abuse and neglect prevention efforts, the removal of children when "home" is no longer a safe place, and adoption where parental rights have been terminated. See EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 34388, CHILD WELFARE ISSUES IN THE 110TH CONGRESS 1 (2008) [hereinafter STOLTZFUS, ISSUES IN THE 110TH CONGRESS].

3. See EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 42792, 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 1 (2012) [hereinafter STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E].

4. This paper argues that the child welfare system is financed in a way that discourages the use of "front-end" services that seek to cure the circumstances that often lead to the removal of children from their homes. For instance, the system fails to fund removal prevention services (such as housing assistance, addiction counseling, and parenting services) at the same levels it funds out-of-home foster care placements. See *infra*, Part IV.C.

5. Title IV-E is an open-ended entitlement program authorized under the Social Security Act that provides a federal funding stream to assist states in providing foster

which it connected to eligibility for the Aid to Families with Dependent Children (AFDC)⁶ cash welfare program. Under the new program, states could claim partial reimbursement for their child welfare expenditures *only* if the family from which the child was removed was poor enough to qualify for the AFDC program.⁷ When the AFDC program was dismantled and replaced with Temporary Assistance for Needy Families (TANF)⁸ in 1996, Congress considered various eligibility standards to define the population of foster and adoptive children for whom the federal government would assume financial responsibility under the Title IV-E foster care program.⁹ In what some

care services, adoption assistance, and kinship or guardianship assistance to children who meet certain federal eligibility criteria. *See infra* Part III.A.

6. The Aid to Families with Dependent Children (AFDC) program, previously Aid to Dependent Children (ADC), was created by the Social Security Act of 1935, to offer cash aid to families with needy children. Children qualified as needy when their parents were no longer financially capable of caring for them. At AFDC's inception, states set their own income eligibility standards (working within minimal federal guidelines) to determine which families would be eligible for these federal funds. *See generally* Stephen B. Page & Mary B. Larner, *Introduction to the AFDC Program*, FUTURE OF CHILDREN, Spring 1997, at 20.

7. *See* 42 U.S.C. § 672(a)(3)(A) (2006); EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 32849, CHILD WELFARE FINANCING: AN ISSUE OVERVIEW, at Summary (2005) [hereinafter STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW]; Susan Vivian Mangold, *Poor Enough to be Eligible? Child Abuse, Neglect, and the Poverty Requirement*, 81 ST. JOHN'S L. REV. 575, 589 (2007); DELOITTE CONSULTING LLP, LOOKING FORWARD, NOT BACK: MODERNIZING FEDERAL FOSTER CARE 1-2 (2009); THE PEW CHARITABLE TRUSTS, TIME FOR REFORM: FIX THE FOSTER CARE LOOKBACK 3 (2007) [hereinafter THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK].

8. While AFDC guidelines ensured that most of its funds were reserved for only the most needy families, many argued that the program incentivized unemployment since any income earned while working (even short-term) was offset by a reduction in the amount of AFDC dollars a family could receive. Due to this perception, and other problems associated with the program, Congress repealed AFDC in 1996 and replaced it with the more restrictive Temporary Assistance for Needy Families (TANF) program. TANF changed the work participation rules promulgated under AFDC to permit recipients to work while still drawing TANF benefits and established time limits on how long individuals could receive federal support. *See* EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 31508, CHILD WELFARE AND TANF IMPLEMENTATION: RECENT FINDINGS 1 (2002) [hereinafter STOLTZFUS, CHILD WELFARE AND TANF IMPLEMENTATION]; GENE FALK, CONG. RESEARCH SERV., RL 32748, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: A PRIMER ON TANF FINANCING AND FEDERAL REQUIREMENTS 1 (2007); Page, *supra* note 6, at 20.

9. Title IV-E is an open-ended entitlement program, through which the federal government reimburses a percentage of specified state expenditures for *eligible* foster children through a set formula. Congressional failure to set an eligibility standard when it created Title IV-E would have given states nearly limitless access to federal child welfare dollars; therefore Congress was forced to implement *some* eligibility standard. *See* Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, FUTURE OF CHILDREN, no. 1, Spring 1998, at 88, 90; STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 3.

consider an attempt to avoid constructing a more comprehensive standard,¹⁰ Congress linked Title IV-E to its predecessor (Title IV-A)¹¹ by requiring states to “look back” to AFDC income standards promulgated in 1996¹² to determine a child’s eligibility for Title IV-E dollars, thus creating an approach known colloquially as the “AFDC look-back.”¹³ Because of this link, the income eligibility criterion underlying the federal foster care program has been locked in economic stasis since 1996, when Congress abolished the AFDC program, and has not been updated since—not even to adjust for inflation or other economic changes.¹⁴ Therefore, fewer children are eligible for Title IV-E dollars

10. See STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 30 (“The continuation of a link between a newly abolished program and an on-going program likely occurred as a matter of legislative convenience, and because the cost of changing the link was unknown.”).

11. The law creating Title IV-E moved previously authorized federal funding for foster care from Title IV-A of the Social Security Act (then linked to the AFDC cash welfare program) to the new Title IV-E program. The new Title IV-E program, in addition to offering federal funds for foster care, offered support for adoption assistance payments. STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E, *supra* note 3, at 5; see also Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

12. As a result, current law maintains a link between federal child welfare dollars and the income eligibility requirements of the former cash welfare program, AFDC. See STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 1–3; THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 3 (providing a historical overview of the AFDC look-back and its impact on federal child welfare financing). Because of the link to the AFDC program, Title IV-E funds have eligibility requirements that are extremely burdensome to states. These standards include a requirement that the child welfare agency ensure that the legal authority for the removal of a child is acquired through either voluntary placement of the child, or a court order determining that staying in the home “would be contrary to the welfare of the child.” 42 U.S.C. § 672(a)(2)(A)(ii). The child welfare agency must further demonstrate (typically through an income determination process discussed further in Part IV.C of this paper) that the child would have been eligible for welfare assistance under the AFDC cash welfare program as it existed in 1996. See 42 U.S.C. § 672(a)(3). Additionally, the child must also be placed in an *approved* out-of-home placement. See 42 U.S.C. § 671(b)(2) (emphasis added). Finally, there must be a demonstration (typically within 60 days) by the state or child welfare agency that “reasonable efforts” were made to prevent the removal of the child. See 42 U.S.C. § 471(a)(15); Foster Care Maintenance Payments Program Implementation Requirements, 45 C.F.R. § 1356.21(b)(1) (2012).

13. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 3.

14. See *id.* at 1–2; CYNTHIA ANDREWS SCARCELLA ET AL., THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN V: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING 2 (2006), [hereinafter SCARCELLA ET AL., VULNERABLE CHILDREN V] available at http://www.urban.org/UploadedPDF/311314_vulnerable_children.pdf (noting that states must base eligibility for Title IV-E on a program that no longer exists and its income eligibility requirements, which have not been adjusted for inflation since the program’s repeal in 1996); see also JOHN SCIAMANNA, CHILD WELFARE LEAGUE OF AMERICA, TEN YEARS OF LEAVING CHILDREN BEHIND 3

with each passing year,¹⁵ funding to prevent children from entering care has dropped precipitously,¹⁶ and state budgets are stretched to their breaking point as states and localities attempt to meet the growing needs of children and families in their jurisdictions. Congressional reliance on a repealed law and its eighteen-year-old income eligibility criterion is ridiculous, and has appropriately been criticized as inflexible, out of sync with federal child welfare policy goals, and antiquated.¹⁷

(2006) (outlining that due to inflation alone, federal financial support available for children placed in foster care has eroded, forcing states to make up the difference with funds that were previously not used for out-of-home placement purposes); OFFICE OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., APSE ISSUE BRIEF: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD 6 (2005) [hereinafter APSE ISSUE BRIEF] (“[S]ince the so-called ‘look-back’ provision did not index the 1996 income limits for inflation, over time their value will be eroded. Fewer children will be eligible for Title IV-E in the future as income limits for the program remain static while inflation continues to raise both family incomes and the poverty line.”).

15. See THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 2–3; *Bush Administration. Foster Care Flexible Funding Proposal: Hearing Before the Subcomm. on Human Res. of the H. Comm. of Ways & Means*, 108th Cong. 28 (2003) [hereinafter *Flexible Funding Proposal Hearing*] (statement of Elaine M. Ryan, Deputy Executive Director, Pol’y & Gov’t Affairs, Am. Pub. Human Servs. Ass’n) outlining that the federal financial commitment to child welfare has waned over time); Mangold, *supra* note 7, at 593–94 (“Dating the income eligibility to 1996 standards . . . causes several problems for abused and neglected children. First, freezing the eligibility as of July 1996 holds income at decade-old levels. The cost of living increase varies by state, but inflation over [eighteen] years makes the 1996 AFDC eligibility levels require that families be *poorer* in [2013] in order to qualify in [2013] since there has been no adjustment of the levels for inflation since 1996. This makes it more difficult for children to qualify for the foster care reimbursement and *results in fewer federal dollars flowing into states* for foster care services.” (emphasis added)).

16. See *infra* Part IV.A (positing that the current financial structure does not incentivize and may even discourage the use of front-end, post care, and other permanency services).

17. Many consider the method of distributing federal child welfare funds to states counterproductive to the child welfare system’s primary goal of keeping children safely in their homes because it does not adequately fund services that would meet the needs of families *before* their children are removed. Additionally, these parties criticize Congress’s decision to tie current funding to a program that Congress *repealed* and has nothing to do with the welfare of children. They argue that the link is irrational, difficult to administer, and results in the diversion of much needed child welfare dollars away from children. See STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 1 (asserting that the current structure does not grant states the flexibility needed to meet the needs of children and their families; instead, it encourages states to rely heavily on foster care rather than focusing on preventing the removal of a child); THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 2 (analyzing the way the Look-back impacts child welfare policy goals).

This paper joins a growing number of voices¹⁸ to insist that the time has come to de-link federal foster care funding from AFDC income eligibility standards.¹⁹ It calls for reform to correct key weaknesses in the current child welfare financing structure: Title IV-E's complex documentation requirements which cost states billions of dollars per year, variations in state "claiming" practices which result in disparate resources for similarly situated families, the inability of the current child welfare financing structure to support front-end services, and the failure of the structure to keep pace with economic growth and best practices in the child welfare field. This paper is structured as follows: Part II surveys the connection between the AFDC eligibility and federal child welfare funding and tracks the development of the AFDC look-back; Part III outlines the two major sources of dedicated child welfare funding as well as offers and details the spending restrictions and eligibility requirements of the two programs; Part IV discusses the policy and fiscal implications of the AFDC look-back and the current funding levels of Title IV-E and IV-B funding; and Part V considers proposals to address the AFDC look-back. I appreciate that any change in the child welfare funding structure would raise serious technical issues but insist that these difficulties cannot obviate the need for change and conclude that children in foster care cannot wait for a time when reform is congressionally convenient or palatable.

18. Organizations, former foster youth, child welfare experts, and policy makers from across the ideological spectrum agree that the current federal foster care financing structure is unworkable, and have called on Congress to de-link federal child welfare funding from AFDC eligibility standards, particularly the income requirement codified at 42 U.S.C. § 672(a)(3), requiring a child to have been eligible for AFDC based on income limits established in 1996 before he can be eligible for Title IV-E funds. These stakeholders include (in no particular order) The Child Welfare League of America (CWLA), Senator Ben Cardin (D-MD), Maryland Human Resources Secretary Brenda Donald, and Director Ewin McEwen of the Illinois Department of Children and Family Services. See *Look Back Anniversary is a Time to Call for New Direction*, CWLA, <http://childrensmonitor.wordpress.com/2012/07/20/look-back-anniversary-is-a-time-to-call-for-new-direction/> (last visited Jan. 1, 2014); *Flexible Funding Proposal Hearing*, *supra* note 15, at 46; *Hearing on the Implementation of the Fostering Connections to Success and Increasing Adoptions Act: Hearing Before the Subcomm. on Income Security & Family Support of the H. Comm. on Ways & Means*, 111th Cong. 16–18, 26–28 (2009) [hereinafter *Hearing on the Implementation of the Fostering Connections Act*].

19. De-linking is the removal of the link between federal child welfare assistance under Title IV-E of the Social Security Act and the income eligibility rule of the AFDC program (with some arguing for elimination of all of the eligibility requirements housed under AFDC). See STOLTZFUS, *ISSUES IN THE 110TH CONGRESS*, *supra* note 2, at 17.

I.

A PRIMER ON THE “AFDC LOOK-BACK”

The American child welfare system was created to ensure the safety of children through services to prevent the removal of at-risk children, pursue the reunification of families under safe circumstances, and facilitate out-of-home placements for children for whom “home” is no longer a safe place.²⁰ The protection of children was largely a state issue until the federal government’s passage of the Aid to Dependent Children (ADC) program (later renamed AFDC),²¹ which authorized grants to states to provide income assistance to poor children and their families.²² Initially, there were no federal eligibility criteria; instead, states set their own guidelines for accessing the funds,²³ which often denied assistance to children whose homes were considered “unsuitable” or improper.²⁴ However, in 1960, following an incident where nearly 23,000 Louisiana children were expelled from the ADC program due to the “unsuitability” of their homes,²⁵ the

20. See EMILIE STOLTZFUS, CONG. RESEARCH SERV., R 41860, CHILD WELFARE: FUNDING FOR CHILD AND FAMILY SERVICES AUTHORIZED UNDER TITLE IV-B OF THE SOCIAL SECURITY ACT 7 (2011) [hereinafter STOLTZFUS, TITLE IV-B OF THE SOCIAL SECURITY ACT FUNDING] (“The broadest mission of public child welfare agencies is to strengthen all families in ways that ensure children can depend on their parents to keep them safe, give them a stable and permanent home, and, overall enhance their well-being.”); Melinda Atkinson, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183, 185 (2008).

21. See *Brief History of Federal Child Welfare Financing Legislation*, CWLA, <http://www.cwla.org/advocacy/financinghistory.html> (last visited Feb. 27, 2013) (stating that prior to the passage of ADC, foster care was entirely a state responsibility); Courtney, *supra* note 9, at 90 (discussing the transition of federal child welfare grants from the ADC program to the AFDC program).

22. Though the funding provided under the ADC program comprised mostly federal dollars, states were given great latitude in administering the program. Courtney, *supra* note 9, at 90; Mangold, *supra* note 7, at 583–87.

23. Because each state set their own eligibility standards, access to federal child welfare funding varied widely between the states, with some states denying assistance to children whose homes were deemed “unsuitable.” These “suitability” determinations were largely left up to the discretion of individual states, local offices, and individual workers. Mangold, *supra* note 7, at 584.

24. *Id.* at 583–84 (noting that the nebulous standard of suitability often involved an evaluation of the “moral environment of the home,” and that investigations were often a poorly veiled inquiry into the marital status of the mother and the “legitimacy” of the child rather than an actual inquiry into the ability of the parent to provide for the child.); APSE ISSUE BRIEF, *supra* note 14, at 3 (“At the time, some States routinely denied welfare payments to families with children born outside of marriage. These states had declared such homes to be morally ‘unsuitable’ to receive welfare benefits.”).

25. Louisiana enacted legislation to terminate approximately 23,000 children from the ADC rolls because their homes did not meet the suitability requirements enacted

Federal Government intervened and set a national eligibility standard by connecting federal child welfare funding to the AFDC cash welfare program without examining “the implications of [permanently] linking A[F]DC to foster care.”²⁶ In response to protests from states experiencing increasing child welfare costs associated with the federal foster care program,²⁷ Congress expanded funding to the AFDC program to help states defray the cost of making “maintenance payments,”²⁸ thereby ensuring that states were not penalized for their use of out-of-home placements to protect children under their care.²⁹

In 1980, Congress removed federal foster care from the AFDC welfare program³⁰ and established an independent federal foster care program known colloquially as Title IV-E, after the section of the Social Security Act (SSA) under which it is housed.³¹ Title IV-E is an open-ended entitlement, limited only by the number of children eligible for it, that reimburses states for a percentage of their expenditures on maintenance payments, caseworker training, and administrative

by the states. *See supra* notes 23–24 and accompanying text. This suitability was based on the mother’s *moral behavior* and not on conditions that related to the welfare of the child such as the physical condition of the home or the upbringing of the children. Mangold, *supra* note 7, at 585.

26. Mangold, *supra* note 7, at 586.

27. *See Brief History of Federal Child Welfare Financing Legislation*, *supra* note 21.

28. Maintenance payments are payments made by states to reimburse foster parents for the incurred costs of caring for children placed in their care by child welfare agencies. This congressional action made the federal government at least partially responsible for these payments. *See Courtney*, *supra* note 9, at 90.

29. From 1980 to 1996, the federal government shared the cost of foster care services with states. Through this relationship, states could claim reimbursement for a portion of their foster care expenditures on behalf of eligible children removed from their home of origin. APSE ISSUE BRIEF, *supra* note 14, at 3.

30. Courtney, *supra* note 9, at 90 (“In 1980, the U.S. Congress removed the federal foster care payments from Title IV-A, which governed AFDC, and established a separate federal foster care program under Title IV-E of the Social Security Act.”); *see also* Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 BROOK. L. REV. 1333, 1344 (2009) [hereinafter Hatcher, *Collateral Children*].

31. *See* 42 U.S.C. § 672 (2006) (codifying Title IV-E eligibility requirements); Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) (creating Title IV-E with the purpose of decreasing the emphasis on out-of-home placements and encouraging greater efforts to find permanency for each child involved with the child welfare system through seeking reunification with the family of origin or by placing children for adoption); STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 3 (“In 1980, [] Congress established foster care as an independent program, (rather than as a part of the AFDC), but relied on [AFDC] to define the population of foster and adoptive children for whom the federal government would assume . . . specific financial responsibility.”).

costs incurred through use of the funds.³² Despite being enacted to replace the more cumbersome Title IV-A, this visibly independent system retained most of the previous program's complexity, including the link between its funds and AFDC eligibility criteria.³³

In 1996, the landmark Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)³⁴ repealed the AFDC program as part of nationwide welfare reform and replaced it with the TANF block grant.³⁵ Rather than eliminating the use of this repealed program, Congress required states to "look back" to 1996 AFDC income eligibility standards to determine a child's present day eligibility for Title IV-E funds, failing even to adjust the income guidelines to keep pace with the rate of inflation.³⁶ Thereafter, for a child to qualify for Title IV-E funds, his or her family was required to meet income limits

32. Courtney, *supra* note 9, at 90 (outlining that Title IV-E reimburses costs associated with maintenance payments, the cost of casework services to determine a suitable living situation for children, and the cost of training state and local child welfare personnel according to a set formula); *see also* EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 31242, CHILD WELFARE: FEDERAL PROGRAM REQUIREMENTS FOR STATES 19 (2007) [hereinafter STOLTZFUS, FEDERAL PROGRAM REQUIREMENTS]; Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 ARIZ. L. REV. 675, 687–88 (2010) [hereinafter Hatcher, *Fiscal Federalism*]; KERRY DEVOOGHT ET AL., CHILD TRENDS, FEDERAL, STATE, AND LOCAL SPENDING TO ADDRESS CHILD ABUSE AND NEGLECT IN SFYS 2008 AND 2010, at 10 (2012); SCARCELLA ET AL., VULNERABLE CHILDREN V, *supra* note 14, at 14. However, these funds could not (and still may not) be used as a resource for the provision of "services" such as substance abuse counseling, housing assistance, or mental health treatment. *See Hearing to Examine Child Welfare Reform Proposals: Hearing Before the Subcomm. on Human Res. of the H. Comm. of Ways & Means*, 108th Cong. 23–29 (2004) [hereinafter *Hearing to Examine Child Welfare Reform Proposals*].

33. *See* STOLTZFUS, CHILD WELFARE AND TANF IMPLEMENTATION, *supra* note 8, at 3 ("Eligibility for federal foster care assistance remained linked to AFDC, even after Congress established this assistance as an independent program in 1980. . . . [T]hough the 1996 welfare reform law repealed AFDC, it provided that eligibility for federal foster care assistance remains tied to children who are placed in foster families after initially being removed from families receiving (or eligible for) cash aid under AFDC (as it existed on July 16, 1996)."); THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 3; *Brief History of Federal Child Welfare Financing Legislation*, *supra* note 21.

34. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). *See supra* notes 5, 8 (placing in context Congress' decision to repeal the AFDC cash welfare program).

35. *Brief History of Federal Child Welfare Financing Legislation*, *supra* note 21; APSE ISSUE BRIEF, *supra* note 14, at 3; STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E, *supra* note 3, at 12; *See generally* SCARCELLA ET AL., VULNERABLE CHILDREN V, *supra* note 14, at 1.

36. SCARCELLA ET AL., VULNERABLE CHILDREN V, *supra* note 14, at 1–2; Mangold, *supra* note 7, at 589–90.

established eighteen years prior under the defunct AFDC program.³⁷ This note focuses on the AFDC income eligibility requirement at § 672(a)(3) and argues for its immediate elimination for two reasons—the provision did not index the income limits for inflation, meaning their value will be eroded over time, and the provision imposes a large administrative burden on states by requiring them to make case-by-case eligibility determinations for each child that interacts with the child welfare system. This convoluted eligibility structure was threatened when the Ninth Circuit heard *Rosales v. Thompson*³⁸ and read § 672(a) to permit Title IV-E eligibility for children no longer living in the home considered unsafe, but with another relative, to be based on the relative's home rather than the one previously found unsafe.³⁹ Prior to *Rosales*, the Department of Health and Human Services (HHS) determined that states' claims for Title IV-E

37. Current law providing the eligibility requirements for Title IV-E contains two problematic provisions: (1) section 672(a)(1) provides that states shall make foster care maintenance payments on behalf of children who have “been removed from the home of a relative” if “the child, while in the home, would have met the AFDC eligibility requirement of” section 672(a)(3), which are met if the family from which the child was removed would have been eligible to receive aid under the state's AFDC plan as it existed on July 16, 1996; (2) section 672(a)(2) requires that, for a child to be eligible for Title IV-E funds, he must have been removed from his home and placed into foster care. 42 U.S.C. § 672 (2006). *See also* SCARCELLA ET AL., VULNERABLE CHILDREN V, *supra* note 14, at 16 (“Although the look-back date to determine eligibility is July 16, 1996, under the AFDC program states were free to update eligible income levels whenever they chose to do so. Therefore, in some states income standards for AFDC eligibility represent income levels from earlier than 1996.”); ROSEANA BESS ET AL., THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN III: WHAT FACTORS AFFECT STATES' FISCAL DECISIONS? 14 (2006), *available at* http://www.urban.org/uploadedpdf/310596_OP61.pdf (“For example, 1992 need standards are still in place in Utah. This means that when looking at a family's income in 2002 to determine if a child was title IV-E-eligible, the state was actually comparing that income with 1992 need standards, which had *not* been adjusted for inflation.” (emphasis in original)).

38. The court held that if the subject child was no longer living in the home considered unsafe, but was instead living with another relative at the time his or her parental home was found unsafe, then the child's Title IV-E eligibility could be based on the relative's income (rather than the income of the parent from which the child was removed). *California Dep't of Social Servs. v. Thompson*, 321 F.3d 835, 855–56 (9th Cir. 2003) (“*Rosales*”).

39. Officials removed Ms. Rosales' grandson, Anthony, from his mother's custody due to maltreatment. *Id.* at 844. Under his mother's care, Anthony would not have been eligible for AFDC benefits because “the family from which [he] was removed” did not meet the income limitations of the AFDC program. *Id.* However, after removal from his mother's home, Anthony was placed with his grandmother who—due to the demands of caring for Anthony, a special needs child—lost her job and applied for welfare benefits. *Id.* Therefore, Anthony qualified for AFDC in his grandmother's home at the time the removal petition was filed. *Id.*

were to be based on the home from which the child was removed.⁴⁰ Under this interpretation, states in the Ninth Circuit could apply a broader eligibility test to children entering foster care so *almost* any child who lived with a relative at the time of removal could be eligible for Title IV-E funds.⁴¹ However, subsequent passage of the Deficit Reduction Act (DRA)⁴² overturned *Rosales* and eliminated any related growth in the number of children eligible for Title IV-E benefits.⁴³

Presently, child welfare funding remains connected to the defunct AFDC program for historical, rather than programmatic reasons and the federal government offers assistance based largely on parents' income, rather than the need of the child.⁴⁴ Congress has made some attempts to remedy this illogical link; in the historic Fostering Connections to Success and Increasing Adoptions Act of 2008 ("Fostering Connections"),⁴⁵ the government expanded federal support for Title IV-E adoption assistance by removing the link between those pay-

40. *Id.* at 838; STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 32.

41. The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. In 2011, these nine states accounted for 95,435 of the 400,540 children in foster care; meaning that application of this interpretation would, at a minimum, impact the penetration rate of states housing nearly 24% of the children in foster care. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, FOSTER CARE FY2003-FY2011 ENTRIES, EXITS, AND NUMBERS OF CHILDREN IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR (2012), *available at* <http://www.acf.hhs.gov/sites/default/files/cb/entryexit2011.pdf>; Mangold, *supra* note 7, at 580 (defining "penetration rate" as the percentage of children in out-of-home placements who receive federal reimbursements under Title IV-E of the Social Security Act).

42. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006).

43. *Brief History of Federal Child Welfare Financing Legislation*, *supra* note 21; EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 34252, CHILD WELFARE: RECENTLY ENACTED CHANGES IN FEDERAL POLICY 4 (2007) [hereinafter STOLTZFUS, RECENTLY ENACTED CHANGES IN FEDERAL POLICY].

44. APSE ISSUE BRIEF, *supra* note 14, at 6 ("[T]here is no policy reason that the Federal Government should 'care' . . . more about children in imminent danger of maltreatment by parents who are poor than it does about children whose parents have higher incomes. The requirement is particularly peculiar because the AFDC program was eliminated in favor of [TANF] in 1996."); THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 1 (citing HHS for the proposition that there is no legitimate policy reason behind the AFDC Link); Mangold, *supra* note 7, at 583-89 (outlining the historical context of the AFDC Look-back's creation and arguing against any policy rationale); *Hearing to Examine Child Welfare Reform Proposals*, *supra* note 32.

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

ments from income and other AFDC income eligibility standards.⁴⁶ Under Fostering Connections, states pay a portion of adoption subsidies and related costs, but may seek reimbursement for payments made on behalf of all special needs children⁴⁷ who meet the other Title IV-E eligibility requirements.⁴⁸ The resulting expansion of adoption assistance eligibility will continue to be phased in over the next five years, with a priority on older children.⁴⁹ By 2018, regardless of their parent's income, children adopted from foster care who meet the other Title IV-E criteria will be eligible for federal assistance, thereby improving adoption prospects.⁵⁰ Though Congress removed the AFDC eligibility requirements for adoption assistance, foster care payments under Title IV-E remains linked to the 1996 AFDC program.⁵¹

Why Congress would create and maintain such a controversial link between Title IV-E and a flawed program it repealed is uncertain. The Child Welfare League of America (CWLA), echoing congressional testimony by Elaine Ryan,⁵² posits that when Congress made the decision to tie Title IV-E eligibility to the AFDC program, it acted with the understanding that the link would be temporary and that more appropriate eligibility standards would be promulgated at the earliest

46. Rob Green, *The Fostering Connections to Success and Increasing Adoptions Act: Implementations Issues and a Look Ahead at Additional Child Welfare Reforms 9* (Child Trends, Working Paper, 2009); American Bar Association, *Policy Update: Implementing the Fostering Connections to Success and Increasing Adoptions Act of 2008*, 28 CHILD L. PRAC. 174, 175 (2010); EMILIE STOLTZFUS, CONG. RESEARCH SERV., RL 34704, CHILD WELFARE: THE FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008, at 2 (2008) [hereinafter STOLTZFUS, FOSTERING CONNECTIONS].

47. Federal adoption assistance for "special needs" children has been around since 1980; however, virtually all "special needs" children are children adopted out of foster care. STOLTZFUS, FOSTERING CONNECTIONS, *supra* note 46, at 7.

48. Green, *supra* note 46, at 9.

49. STOLTZFUS, FOSTERING CONNECTIONS, *supra* note 46, at 7 (explaining that the gradual de-linking will be phased in over a nine-year period (from FY2010-2018) and will start with older and special needs children, those who have been in foster care for more than five years, etc.); American Bar Association, *supra* note 46, at 174.

50. This proposition relies on research indicating that adoption subsidies play a critical role in a family's decision to adopt a child from foster care and that families are more likely to adopt when they are provided with such subsidies. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 4 (2007) ("Without adoption assistance, many families simply would not be able to afford the special services needed by children with a history of abuse and neglect.").

51. STOLTZFUS, FOSTERING CONNECTIONS, *supra* note 46, at 7.

52. *Flexible Funding Proposal Hearing*, *supra* note 15, at 32 (arguing that in 1996 Congress acknowledged that they would need to address the Title IV-E eligibility criteria at a later date but failed to follow up on the issue).

opportunity.⁵³ This rationale lends *some* logic to Congress's failure to adjust for inflation when it created the link in 1996, but fails to explain Congress's subsequent inaction. Emilie Stoltzfus of the Congressional Research Service (CRS) offers a more shrewd analysis and argues that the link likely occurred as a matter of "legislative convenience" and posits that Congress has failed to act since because the cost of changing the link is unknown.⁵⁴ Whatever the rationale, virtually no one believes that "looking back" to a program repealed more than a decade ago to determine eligibility for current child welfare funding makes any sense.⁵⁵

Requiring states with less fiscal capacity than Washington to shoulder the financial burden for the increasing number of children ineligible for federal foster care funding breeds concerns that span the policy, administrative, and fiscal spectrum. Indeed, as the federal share of Title IV-E funding has decreased, the look-back and its concomitant financial system has forced states to divert funding away from front-end services to make up for the loss of Title IV-E; the result is that fewer funds are available for front-end services, and states increasingly rely on out-of-home placements for children who might be better served in the home.⁵⁶ Additionally, the present structure places a heavy administrative burden on states by virtue of feder-

53. See SCIAMANNA, *supra* note 14, at 2.

54. STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 30 (noting that Congress opted to maintain the status quo, avoiding the cost increase that would accompany expanding the Title IV-E eligibility inquiry all together).

55. See *id.* at 31; *Flexible Funding Proposal Hearing*, *supra* note 15, at 14–15 (statement of Dr. Wade Horn, Assistant Sec'y for Children and Families, U.S. Dep't of Health & Human Servs.) ("[I]t seems kind of absurd to continue to have as an eligibility requirement for Title IV-E—a program that hasn't existed for 6 years called AFDC."); THE ANNIE E. CASEY FOUNDATION, REBUILD THE NATION'S CHILD WELFARE SYSTEM 3 (2009); Letter from the Alliance for Children's Rights et al., to Members of the Congressional Caucus on Foster Youth (Feb. 25, 2012) (on file with author); Shay Bilchik, *Evolving Federal Child Welfare Law and Policy: Where Do We Go From Here?* 24 CHILD. LEGAL RTS. J. 24, 30 (2004) (supporting the immediate de-linking of eligibility for federal foster care dollars from AFDC eligibility standards); STOLTZFUS, ISSUES IN THE 110TH CONGRESS, *supra* note 2, at 16 (outlining bills in the 110th Congress that would expand the population of children eligible for Federal Foster Care dollars under Title IV-E by de-linking).

56. See THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 1; *Flexible Funding Proposal Hearing*, *supra* note 15, at 67–70 (statement of Mary Allen, Children's Defense Fund) (arguing that the funds for prevention and specialized services be put on equal footing with funds for out-of-home care); see also GLORIA HOCHMAN ET AL., THE PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTER CARE: VOICES FROM THE INSIDE 13–14 (2004); *Hearing to Examine Child Welfare Reform Proposals*, *supra* note 32, at 19 (statement of the Hon. William Frenzel, Chairman, Pew Comm'n on Children in Foster Care).

ally required eligibility determinations.⁵⁷ Improvements to this fractured financial structure would free up child welfare personnel,⁵⁸ provide more preventative⁵⁹ and post-care⁶⁰ services for families and children in need, and enable states to quickly guide children to safe and permanent homes.⁶¹

II.

THE STRUCTURE OF CHILD WELFARE FINANCING AFTER THE AFDC LOOK-BACK

Preventing the abuse and neglect of children is an expensive endeavor; our nation spends more than \$25 billion a year on child welfare, with well over \$13 billion coming from federal coffers.⁶² In the absence of adequate federal funding, states must modify their budgets as they bear ultimate responsibility for the children in their jurisdiction.⁶³ States take this responsibility seriously and fund their child welfare systems through a complex amalgam of local, state, and federal dollars,⁶⁴ each of which comes with its own statutory requirements and restrictions.⁶⁵ The most complex requirements are those

57. THE PEW CHARITABLE TRUSTS, *FIX THE FOSTER CARE LOOKBACK*, *supra* note 7, at 1.

58. *See infra* Part IV.C.

59. *See infra* Part IV.A.

60. *See infra* Part IV.B.

61. *See* HOCHMAN ET AL., *supra* note 56, at 4.

62. REBUILD THE NATION'S CHILD WELFARE SYSTEM, *supra* note 55, at 1, 6; *see also* DEVOUGHT ET AL., *supra* note 32, at 9 (reviewing child welfare spending from FY 2008–2010).

63. *See* Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1254–56 (1996) (“The state may remove a child from her home and place her in the foster care system for reasons of neglect, abuse, abandonment, mental or physical illness of the parent, the child’s own behavior problems, or other ‘family problems’ When a child enters foster care, the state takes custody of the child. The state . . . then determines an appropriate placement for the child.”); *Stanley v. Illinois*, 405 U.S. 645 (1972) (explaining that protection of the welfare of minors and the strengthening of family ties are legitimate state interests); *Tylena M. v. Heartshare Children’s Servs.*, 390 F. Supp. 2d 296 (S.D.N.Y. 2005) (explaining that, even when a state or municipality delegates such care, they are not absolved of the requirement the constitution imposes on them to offer children in need of adequate care).

64. SCARCELLA ET AL., *THE COST OF PROTECTING CHILDREN V*, *supra* note 14, at 1 (“Spending on child welfare activities reflects a complex network of state and federal statutory requirements.”); *see also* DEVOUGHT ET AL., *supra* note 32, at 1, 5 (“In carrying out their responsibilities to children, most child welfare agencies use a combination of federal, state, and local funding.”).

65. SCARCELLA ET AL., *THE COST OF PROTECTING CHILDREN V*, *supra* note 14, at 1 (noting that the amount of funding varies from municipality to municipality and is susceptible to state and national events as well as shifting legislative priorities and

attached to federal funding, which constitutes a substantial portion of the total available child welfare funds.⁶⁶ Because of the abundance of federal child welfare funding, each time a child enters foster care, state child welfare agencies scramble for federal funds despite their complex eligibility rules and spending restrictions.

Federal child welfare dollars come from a variety of sources, some of which are dedicated solely to child welfare activities;⁶⁷ in 2010, states spent approximately \$13.6 billion of these federal funds,⁶⁸ most of which were *dedicated*⁶⁹ Title IV-E and Title IV-B expenditures.⁷⁰ Given the volume of funding available under Title IV-E and Title IV-B⁷¹ it is not surprising that these funds have complex eligibility standards and spending restrictions.⁷² Due to this complexity, and because proposals to alter federal child welfare financing have

describing how, to receive Title IV-E, Title IV-B, TANF, SSBG, and Medicaid funding, states must meet enumerated federal requirements); STOLTZFUS, RECENTLY ENACTED CHANGES IN FEDERAL POLICY, *supra* note 43, at 6 (“[T]o be eligible for Adoption Incentives, the state must provide . . . the necessary data to calculate the incentive amounts.”); DEVOOGHT ET AL., *supra* note 32, at 1.

66. STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 3–11 (arguing that, although under the Constitution states traditionally bear the most responsibility for child welfare issues, the federal interest in improving child welfare is longstanding); DEVOOGHT ET AL., *supra* note 32, at 5 (reporting that in 2010, states spent approximately \$13.6 billion in federal funds, \$12.5 billion in state funds, and \$3.3 billion in local funds on child welfare activities).

67. DEVOOGHT ET AL., *supra* note 32, at 8 (stating that dedicated child welfare sources include funds appropriated through Title IV-E and Title IV-B of the Social Security Act, while other sources *permit* funds to be used on child welfare services but are designed for other purposes, including Medicaid, SSBG, and TANF).

68. *Id.* at 5, 8.

69. DEVOOGHT ET AL., *supra* note 32, at 10; STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 4–5 (“States receive some federal funds that are explicitly *dedicated* to child welfare and which must be used . . . for four basic purposes: adoption assistance . . . foster care [administration and maintenance] . . . [child protective and family preservation] services . . . and independent living . . .”).

70. “The principal sources of federal funds dedicated for child welfare activities derive from Titles IV-E and IV-B of the Social Security Act.” DEVOOGHT ET AL., *supra* note 32, at 10. “Title IV-E expenditures accounted for just over half (approximately 52%) of all federal funds spent in SFY 2010, and represent[ed] the largest category of federal expenditures.” *Id.* at 9. Title IV-B expenditures, on the other hand, accounted for approximately 5% of expended federal funds. *Id.* States also used large amounts of funds not dedicated for child welfare services to meet the needs of the children and families they served. SCARCELLA ET AL., THE COST OF PROTECTING CHILDREN V, *supra* note 14, at 3.

71. In FY 2010, Congress authorized \$614 million for the Title IV-B program and upwards of \$7 billion for the Title IV-E program. DEVOOGHT ET AL., *supra* note 32, at 11, 24; *see also supra* note 70.

72. *See* Social Security Act, 42 U.S.C. §§ 671–679(b) (2006); Hatcher, *Fiscal Federalism*, *supra* note 32, at 687–88; SCARCELLA ET AL., THE COST OF PROTECTING CHILDREN V, *supra* note 14, at 1–2 (outlining eligibility standards that still underlie funding for Title IV-E foster care funding).

focused exclusively on dedicated funding under Title IV-B and Title IV-E of the SSA, this paper does not consider smaller funding streams. Sections A and B consider eligibility requirements and spending restrictions associated with Title IV-E and Title IV-B and outlines past spending patterns under these programs, while Section C considers the decreasing federal funds available to states for child welfare services.

A. Available Federal Child Welfare Funds

1. Title IV-E

Title IV-E is an open-ended entitlement program, authorized under the SSA,⁷³ which provides a federal funding stream to support foster care, adoption assistance, and kinship caregiver payments for children who meet the program's eligibility criteria.⁷⁴ Because the program is open-ended, states may seek reimbursement for a percentage⁷⁵ of their expenditures on eligible children in their care, with no ceiling on the amount that may be distributed.⁷⁶ As a result of the Title

73. See *supra* note 37 and accompanying text; 42 U.S.C. §§ 671–679(b). “The Title IV-E program was created in 1980 as part of the Adoption Assistance and Child Welfare Act” STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E, *supra* note 3, at 5.

74. STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E, *supra* note 3, at 1; STOLTZFUS, FEDERAL PROGRAM REQUIREMENTS, *supra* note 32, at 19; Hatcher, *Fiscal Federalism*, *supra* note 32, at 687; SCARCELLA ET AL., VULNERABLE CHILDREN V, *supra* note 14, at 14. While other programs are supported under Title IV-E, this paper focuses primarily on foster care, guardianship and adoption programs because they make up the bulk of Title IV-E spending. DEVOOGHT ET AL., *supra* note 32, at 10. However, due to the Fostering Connections Success Act and its removal of the link between adoption assistance funding and AFDC, the Adoption Assistance Program is only discussed to the extent that it previously interacted with the AFDC look-back and to the informative role it plays in developing alternatives to the financial structure of the child welfare system. See *Fostering Connections to Success and Increasing Adoptions Act of 2008*, Pub. L. No. 110-351, 122 Stat. 3949 (2008).

75. This matching percentage, the Federal Medical Assistance Percentage (FMAP), may be no less than 50% or more than 83% of the expended cost, and the formula (provided in the statute) demands that states with higher per capita income receive lower federal reimbursement rates and vice versa. As a result, if a state has an FMAP of 77%, then for every dollar in foster care maintenance payments it makes on behalf of an eligible child, the federal government reimburses the state 77 cents, etc. See Hatcher, *Fiscal Federalism*, *supra* note 32, at 686, 689; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-323R, SUMMARY OF PROPOSALS TO ADDRESS INCOME ELIGIBILITY REQUIREMENT FOR FEDERAL FOSTER CARE REIMBURSEMENT 4 (2013) (noting that in 2011 the FMAP ranged from 50 to 83% of eligible expenditures for each state); STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E, *supra* note 3, at 7.

76. See SCARCELLA ET AL., VULNERABLE CHILDREN V, *supra* note 14, at 15 (“The number of children eligible for [T]itle IV-E in a given state represents the pool of children for which the state can claim federal reimbursement for a portion of their maintenance payments.”); STOLTZFUS, FEDERAL PROGRAM REQUIREMENTS, *supra* note 32, at 19 n.15.

IV-E program's structure, there are strict restrictions on how the funds may be accessed as set forth in 42 U.S.C. § 672.⁷⁷ Therein, Congress provided that in order for states to be reimbursed for their expenditures, they were first required to: (1) demonstrate that the child's home of removal would have been eligible for AFDC as the program existed in 1996;⁷⁸ (2) demonstrate that "reasonable efforts" were made to keep the biological family together prior to removing the child;⁷⁹ (3) ensure that the child was placed in a qualifying placement;⁸⁰ and (4) make a determination that the child was placed in the care of the state.⁸¹ This final element means that in order to access Title IV-E funds states must first remove children from their home of origin.⁸²

Once eligibility is determined, the Title IV-E program may be used to assess and plan for the provision of services necessary for reunification.⁸³ Inexplicably, Title IV-E funding may not be used to pay for any of the services its funds identify as necessary to enable reunification, nor may Title IV funds be used to provide post-reunification services to ensure the ongoing success of the family.⁸⁴ The program may only reimburse states for spending in three categories: maintenance payments (expenditures that cover the costs of shelter, food, clothing, etc.), administrative costs related to foster care (expenditures that cover the cost of eligibility determinations, casework

77. For statutory eligibility criteria, see *supra* note 37. See also Mangold, *supra* note 7, at 580–81 n.13, 582–83.

78. See 42 U.S.C. § 672(a)(3)(A)(i). This paper focuses on this provision of § 672 because many link the decline in federal foster care support to that requirement and argue that, while a rationale exists for the retention of the other statutory restrictions on Title IV-E, this *particular* link makes no sense. See Mangold, *supra* note 7, at 595–96. See generally THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOK-BACK, *supra* note 7.

79. See 42 U.S.C. § 672(a)(2)(A)(ii).

80. See 42 U.S.C. § 672(a)(2)(C).

81. See 42 U.S.C. § 672; CHERYL VINCENT, CONG. RESEARCH SERV., RL 32836, CHILD WELFARE: AN ANALYSIS OF TITLE IV-E FOSTER CARE ELIGIBILITY REVIEWS 5 (2005); STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 29; Mangold, *supra* note 7, at 580–83.

82. THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 5.

83. STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E, *supra* note 3, at 4. Note that states may file these reimbursement claims only after they have expended a certain percentage of their own funds. The more states use their own funds to pay for Title IV-E services, the more federal matching funds the states can claim. Hatcher, *Fiscal Federalism*, *supra* note 32, at 687.

84. To support those services, states must rely on Title IV-B funds, which as discussed in Part III.B, is extremely limited and is often used for out-of-home care instead. STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E, *supra* note 3, at 4.

salaries, case planning, and other miscellaneous costs), and expenses related to training for staff and foster parents.⁸⁵

Because of the look-back, the share of federal child welfare funds accessed by states through most Title IV-E programs has been in decline for over a decade, with only adoption assistance expenditures increasing.⁸⁶ While this represents good news for the 49,866 children adopted from foster care last year,⁸⁷ the 436,000 children in the foster care system⁸⁸ and the states responsible for their care are not as lucky; each year they lose critical help they need from the federal government due to Congress's ongoing failure to adjust the economic criterion for Title IV-E for inflation. According to analysis by the Pew Commission on Foster Care, this loss translated into a \$1.9 billion reduction of Title IV-E Foster Care funds from 1998 to 2004.⁸⁹ Erwin McEwen, the Director of the Illinois Department of Children and Family Services, offered a more complete picture when he posited that the decrease in Title IV-E funding since 1996 represents an annual loss of over \$226 million.⁹⁰ The CWLA focused their analysis on the number of children eligible for Title IV-E dollars rather than calculating the loss of dollars, since the latter could be attributed to a decrease-

85. DEVOUGHT ET AL., *supra* note 32, at 10; SCARCELLA ET AL., THE COST OF PROTECTING CHILDREN IV, *supra* note 36, at 10; STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 12.

86. STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 9. This sharp increase has been attributed to the passage of Fostering Connections, which de-linked funding for Adoption Assistance from 1996 AFDC eligibility criteria. See *supra* pp. 11–13 and notes 45–51.

87. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2011 ESTIMATES AS OF JULY 2012 3 (2012) [hereinafter AFCARS REPORT: PRELIMINARY FY 2011 ESTIMATES], available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>.

88. From 2007–2011 the mean number of children in foster care was 436,077. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE FY2003–FY2011 ENTRIES, EXITS, AND NUMBERS OF CHILDREN IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR (2012) available at <http://www.acf.hhs.gov/sites/default/files/cb/entryexit2011.pdf>.

89. Pew estimated the loss to states using figures from the National Data Archive on Child Abuse and Neglect (NDACAN) and the data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) from 1998–2005. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 1.

90. *Hearing on the Implementation of the Fostering Connections Act*, *supra* note 18, at 26 (statement of Erwin McEwen, Director, Illinois Dep't of Children & Family Servs.). Mr. McEwen also offered that the decrease in foster care eligibility represented an annual loss of over \$18 million to the State of Illinois. This figure would represent a nearly \$4 billion loss in Title IV-E eligibility in the eighteen years since the program has been linked to AFDC.

ing caseload rather than a reduced penetration rate.⁹¹ The organization found that in 2004 there were approximately 517,000 children in care, and that states claimed 233,122, or 42% of those children as eligible for Title IV-E federal foster care dollars.⁹² Contrast these figures with 1998 data, which indicated that 305,000 state claims were made out of a total of 559,000 kids in foster care, for a national penetration rate of 55%.⁹³ This analysis represents a 13% drop in the number of foster children eligible for Title IV-E funds over a six year period.⁹⁴ This number is estimated to continue to decline by approximately 5000 children per year, for no reason other than a child's ineligibility for an outdated program.⁹⁵ State budgets will struggle to accommodate the cost of maintaining 5000 extra children on its foster care rolls per year simply because families in 2013 do not meet poverty levels established in 1996.

2. Title IV-B Funding

Title IV-B is a discretionary grant authorized under the SSA⁹⁶ that may be used for an array of child welfare services without the burden of eligibility criteria attached to Title IV-E funds.⁹⁷ Though described as “upfront,” since they may be used to support services that prevent the removal of children from their home of origin,⁹⁸ this is a misnomer. While these funds may be used for removal prevention and

91. SCIAMANNA, *supra* note 14, at 6. The percentage of children in out-of-home placements who receive federal maintenance reimbursements under Title IV-E is called the state penetration rate. Mangold, *supra* note 7, at 580.

92. SCIAMANNA, *supra* note 14, at 6.

93. *Id.*

94. *Id.*; see generally THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 1 (explaining eligibility for Title IV-E and Title IV-E funding).

95. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 1.

96. 42 U.S.C. §§ 620–629 (2006).

97. HOCHMAN ET AL., *supra* note 56, at 26 (explaining that Title IV-B may be used to support and strengthen families, to keep children safely with their parents, toward reunification of families, and toward the provision of services to children in guardianship and adoptive homes.); see also STOLTZFUS, FEDERAL PROGRAM REQUIREMENTS, *supra* note 32, at 15 (“The program provides matching grants . . . [for] five broad purposes: (1) to protect and promote the welfare of all children; (2) to prevent the neglect, abuse, or exploitation of children; (3) to support at-risk families through services which allow children, where appropriate to remain safely with their families or return to their families in a timely manner; (4) to promote safety, permanence, and well-being of children in foster care and adoptive families; and (5) to provide training, professional development and support to ensure a well-qualified child welfare workforce.”).

98. EMILIE STOLTZFUS, CONG. RESEARCH SERV., R 41860, CHILD WELFARE: FUNDING FOR SERVICES UNDER TITLE IV-B OF THE SOCIAL SECURITY ACT 1 (2011) [hereinafter STOLTZFUS, FUNDING UNDER TITLE IV-B].

other front-end services, most Title IV-B dollars may also be used to provide foster care or adoption services to children.⁹⁹ Indeed, federal law demands that some of these funds be used on children in foster care.¹⁰⁰ As a result, states spend significant portions of their Title IV-B funds on foster care services¹⁰¹ including child protective services, administrative costs associated with foster care, and out-of-home placement costs.¹⁰² Recent analysis indicates that states use 86.8% of Title IV-B funds on out-of-home care, meaning that the few dollars that could be used for front-end services are not being used for that purpose.¹⁰³

Still, distinctions between how Title IV-B and Title IV-E funds may be used remain: (1) Title IV-B funds *may* be used on a broader range of foster care services than are supported by Title IV-E funds; (2) Title IV-B funds may be used to offer services to any child whereas its counterpart may only be used for children who meet the statutory eligibility requirements of § 672;¹⁰⁴ and (3) Title IV-B funds may be used to provide preventative and post-care services to the families of children at-risk of becoming involved with the child welfare system.¹⁰⁵ Perhaps because the Title IV-B program lacks the eligibility criteria that functions as a brake on Title IV-E spending, the former program has a yearly cap;¹⁰⁶ in 2010, Congress authorized \$614 million for Title IV-B.¹⁰⁷ Those in favor of the current child welfare structure argue that, because states may use Title IV-B funds toward preventative services, a restructuring of Title IV-E (and its accompanying funds) is unnecessary. However, as noted above, the amount of funds allocated to the Title IV-B program are woefully inadequate when contrasted to the need for front-end services, particularly since the program's funds must be reauthorized each year and are susceptible to cuts.¹⁰⁸

99. *Id.*

100. *Id.*

101. *Id.* at 2.

102. THE PEW CHARITABLE TRUSTS, TIME FOR REFORM: INVESTING IN PREVENTION KEEPING CHILDREN SAFE AT HOME 22 (2007) [hereinafter THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION].

103. *Id.*

104. *See supra* pp. 16–17 and notes 37, 77–82 and accompanying text.

105. STOLTZFUS, FUNDING UNDER TITLE IV-B, *supra* note 98, at 2.

106. DEVOOGHT ET AL., *supra* note 32, at 24.

107. *Id.* Contrast this figure with the \$7 billion states received in Title IV-E funding and the approximately \$5.9 billion of Title IV-E Foster Care and Adoption Assistance funding states received. This means that nearly ninety percent of current federal funding can be used by states only after children have been removed from their home.

108. Title IV-B is subject to the yearly appropriations process regardless of how much funding was congressionally authorized. Howard Davidson, *Federal Law and*

B. *Decreasing Federal Child Welfare Funding*

Though in years past, the majority of child welfare dollars have come from the federal government,¹⁰⁹ the government's proportion of Title IV-E funding has been shrinking for over a decade.¹¹⁰ Some argue that this declining support is not attributable to any one factor. Instead they argue that it is the combination of changes in per capita income, a decrease in the total number of children in foster care, and a number of other factors having the ability to direct the distribution of federal foster care funds to the states that has resulted in the declining support.¹¹¹ However, the Congressional Research Service's analysis of Title IV-E claims indicates that changes in these factors alone cannot explain the overall decline in federal funding available to states.¹¹² Instead, the decline in federal support has been linked to the archaic look-back,¹¹³ which has led to complicated and costly systems at the state level to determine each child's eligibility for federal funding.¹¹⁴ Whatever the reason for the decline in the federal government's contribution to foster children, the result is that states must shift money from other areas of their budgets or use non-dedicated federal funds, diverted from front-end services, to make up the difference.

III.

POLICY AND FISCAL IMPLICATIONS OF THE AFDC LOOK-BACK

The financial structure resulting from the link between Title IV-E child welfare funds and AFDC income eligibility requirements has serious policy and fiscal ramifications. Apart from the administrative cost of determining eligibility based on rules of a non-existent pro-

State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?, 42 Fam. L.Q. 481, 484 (2008).

109. See generally DEVOOGHT ET AL., *supra* note 32.

110. STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 9–11 (“The share of all dedicated child welfare funds expended through the Title IV-E Foster Care program has been in decline for close to a decade.”); THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 4–5.

111. STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 6 (arguing that these factors vary according to the program under which the funds are appropriated and distributed).

112. *Id.* at 11.

113. THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 1; see also Mangold, *supra* note 7, at 578 (discussing the recent state action where, due to decreasing federal funding, states are outsourcing income and compliance determinations to maximize their reimbursement rate from the federal government); SCARCELLA ET AL., THE COST OF PROTECTING CHILDREN V, *supra* note 14, at 2.

114. See generally Mangold, *supra* note 7.

gram, decreasing federal support increasingly shifts child welfare costs from the federal government to states, encourages an overreliance on the use of out-of-home placements (as removing a child from his home is one of the eligibility criteria for Title IV-E funds), and could result in the number of Title IV-E eligible children—evenually shrinking to zero due to rising inflation and the program's connection to 1996 income levels.

Though the federal government does not explicitly prescribe how much states must spend on specific child welfare services or which of those services states must prioritize,¹¹⁵ the financial structure and spending restrictions that accompany federal child welfare dollars drive many of the programmatic decisions that states make.¹¹⁶ Since the majority of child welfare funding comes from the federal government,¹¹⁷ states are likely to prioritize those services that the government explicitly or implicitly emphasizes.¹¹⁸ Historically, federal funding has flowed in ways that emphasized foster care as a programmatic option to a greater extent than any other option¹¹⁹ despite the

115. THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 1; HOCHMAN ET AL., *supra* note 56, at 25; *see also* Hatcher, *Fiscal Federalism*, *supra* note 32, at 675–77. Under fiscal federalism, an economic theory that underlies the federal-state partnership, the federal government does not need to mandate how much states should spend or what they should prioritize. Operating on a principle of collaboration between the federal government's financial power and the state's ability to deliver services tailored to regional needs, this theory posits that the federal government need not tell the state it must, for example, spend less on bread and more on milk. Instead, it can simply offer more funding for milk. Similarly, the government need not tell states that they must spend more money on foster care; it need only (and has done so) offer substantial incentives for states to fund out-of-care placement in the form of dedicated entitlements.

116. Income eligibility can often drive placement and caseworker determinations, which is not always in the best interest of the children. *See* Mangold, *supra* note 7, at 592–93; For the proposition that, because the most flexible funds are capped, there is no incentive for states to provide preventative services, *see infra* notes 140–141 and accompanying text. Consequently, few states have developed functional alternatives to non-relative placements.

117. DEVOOGHT ET AL., *supra* note 32, at 10–24; Mangold, *supra* note 7, at 579; SCIAMANNA, *supra* note 14, at 2.

118. *See supra* note 116 and accompanying text.

119. HOCHMAN ET AL., *supra* note 56, at 25; *see also* THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 1 (stating that child welfare stakeholders argue that the current financing structure encourages over-reliance on foster care over other available services); THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 27 (stating that an alternate funding stream would allow states to reduce the reliance on foster care in favor of preventative services); *Improving the Child Welfare System: Hearing Before the Subcomm. on Income Security & Family Support of the H. Comm. of Ways & Means*, 110th Cong. 2 (2008) [hereinafter *Hearing on Improving the Child Welfare System*], available at <http://www.nacac.org/policy/March2008testimony.pdf> (statement of Joe Kroll, Executive Director, North

child welfare system's stated goal of protecting the sacred parent-child relationship.¹²⁰ This is because the federal financing structure, and the federal government's attendant decrease in federal support, redirects available state monies that might otherwise be available to fund innovative alternatives to foster care. Federal funding for the child welfare system should be structured in a way that ensures that foster care is *one of many* programmatic options available to caseworkers and judges, but this paper posits that it should be used as a last resort.

A. *Federal Financial Structure Discourages the Funding of Front-End Services and Fails to Keep Pace with Changes in the Child Welfare Field*

Psychologists contend that a child's psychological development depends on a "secure, uninterrupted relationship with one caregiver" and agree that even brief separation from a caregiver can have damaging effects on the child.¹²¹ To safeguard against these effects, the child welfare system's primary aim is to strengthen and preserve families.¹²² As a part of this design, prior to the removal of a child from her home of origin, states are required by federal law to use "reasonable efforts" to remedy any condition that would bring a family to the attention of the child welfare system in order to qualify for Title IV-E funding.¹²³ However, some question the validity of these "reasonable

Am. Council on Adoptable Children) (arguing that federal funding does not reflect the government's removal prevention priority and that 90% of funding can be used by states only after Title IV-E eligible children have entered care or been adopted); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 5 (discussing whether the federal funding structure for child welfare encourages reliance on foster care since over 90% of the available funding may only be used to support out of home services rather than services that might prevent a child's entrance into foster care in the first place).

120. HOCHMAN ET AL., *supra* note 56, at 3; THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 4-12; THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 4. See generally Hand, *supra* note 63 (explaining that federal funding has led to foster care being emphasized as a programmatic option to a greater extent than any other option).

121. The guiding principle underlying this recommendation is that continuity is important to children because they have "an intense sensitivity to the length of separations." These professionals concluded that foster care, because of its impermanent nature, had little likelihood of promoting the child's emotional well-being. Hand, *supra* note 63, at 1257-58.

122. Hatcher, *Collateral Children*, *supra* note 30, at 1349 ("[A] core mission of the child welfare system continues to be strengthening and preserving families."); see also Hand, *supra* note 63, at 1256 ("[A]dvocates [of the permanency movement] emphasize the importance of providing families in crisis with preventative services to keep the child from entering care at all.").

123. See 42 U.S.C. § 671(a)(15) (2006) (requiring reasonable efforts to safely prevent the removal of children from their biological family); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 11 Stat. 2115 (codified as amended in scattered

efforts,” arguing that they have failed to keep pace with changes in the child welfare community—including the growing role of kinship foster care as a placement option,¹²⁴ increasing demands for preventative and front-end services,¹²⁵ and the field’s mounting emphasis on permanency planning for children in foster care.

“Children and their families are hurt when their state and local governments do not have resources to help reunite them with their families when possible, provide them with safe and loving out-of-home care, or find them a permanent family if they cannot return home.”¹²⁶ Sadly, this is exactly the type of system they face. There are insufficient removal prevention and reunification services in place, despite evidence that such services are effective in improving the outcomes of families who interact with the child welfare system.¹²⁷

sections of 42 U.S.C.); Hand, *supra* note 63, at 1255–58 (“Many states require a showing that the state child welfare agency made ‘reasonable’ efforts to help reunite the biological family before a parent’s rights can be terminated.”); SCARCELLA ET AL., VULNERABLE CHILDREN V, *supra* note 14, at 2; Atkinson, *supra* note 20, at 186 (interpreting the Adoption and Safe Families Act to mandate that reasonable efforts be made to preserve families by preventing a child’s initial removal from the home); 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, 920 (1995).

124. Although a substantial portion of children grow up in the care of family members who are not their parents, “this type of care has [historically] been provided for on an informal basis” See David J. Herring, *Kinship Foster Care: Implications of Behavioral Biology Research*, 56 BUFF. L. REV. 496, 499. However, over the past two decades the child welfare system has increasingly relied on relative caregivers, thereby sweeping Kinship Care into the more formal foster care system. *Id.* “When the state intervenes in a family . . . state actors now regularly look to members of a child’s extended family for immediate placement options.” *Id.* However, it remains unclear whether this exploration of placements with relative caregivers is considered a mandatory part of “reasonable efforts.” What is clear is that the federal government does not require that states notify family members of children that said child must be removed from their parents and placed in care. The result is that many relatives are unaware of the child’s removal and are thus unable to intervene. See Mandelbaum, *supra* note 123, at 920 n.36, 920–21.

125. THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 5.

126. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 4.

127. SCARCELLA ET AL., THE COST OF PROTECTING CHILDREN V, *supra* note 14, at 3 (“[T]he survey found that states were spending little on other services—that is, services to prevent abuse and neglect, services to prevent children from entering foster care, or services to reunify children with their families—relative to their spending on children in out-of-home placements.”); THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 1 (stating that “the majority of dedicated federal funding for child welfare is currently reserved for foster care services and cannot be used for prevention or reunification services or supports” and families are therefore unable to get the services they need to keep their children in the home); Hand, *supra* note 63, at 1258; see also *Federal Foster Care Financing: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means*, 109th Cong. 32–33 (2005) [herein-

Instead, these children (who are disproportionately impoverished and minorities) are removed because of a financial system that diverts money from front-end services toward the provision of out-of-home care.¹²⁸ Improved preventative and family support services for families at risk of intervention are essential to achieving the system's stated goal of ensuring that each child has a safe and permanent family. Unfortunately, funding sources that *could* be used for these purposes represent a meager 11% of child welfare funds,¹²⁹ some of which are instead used to fund foster care services.¹³⁰ The underfunding of these services means that while children's circumstances may differ, the available remedy, more often than not, is foster care instead of front-end services to help families manage crises, learn stronger parenting skills, overcome addiction, seek shelter from domestic violence, or gain access to mental health services.¹³¹

The imbalance between Title IV-E funds, those dedicated primarily to out-of-home care, and their more flexible counterpart, Title IV-B, is stark. In 2006, more than \$6 billion of federal child welfare funding was dedicated toward the provision of out-of-home care, while less than \$650 million of funding was flexible enough to be used to access substance abuse counseling, social supports to keep families intact, or other innovative practices.¹³² This latter allocation is so in-

after *Federal Foster Care Financing Hearing*] (statement of Dr. Wade Horn, Assistant Sec'y for Children & Families, U.S. Dep't of Health & Human Servs.) (stating that of the \$5 billion spent on Title IV-E in FY 2004, no money was spent on preventative services because "[y]ou can't use these funding streams to provide services to these families. . . . [I]n the Title IV-E program, you can pay for referrals to services, but you cannot pay for the services themselves That is why the program is broken.").

128. See THE PEW CHARITABLE TRUSTS, *FIX THE FOSTER CARE LOOKBACK*, *supra* note 7, at 5 (explaining that because the look-back places such a heavy financial burden on states, they are unable to support the entire range of child welfare services and instead direct any excess funds to the provision of foster care); see also Hand, *supra* note 63, at 1267 (discussing a critique of removals and subsequent termination of parental rights as "imbedded with institutional racism and classism").

129. APSE ISSUE BRIEF, *supra* note 14, at 15.

130. *Id.*

131. See HOCHMAN ET AL., *supra* note 56, at 13 (arguing that despite the individual circumstances of each family, they are all treated similarly); see also Bilchik, *supra* note 55, at 26 (arguing that families come to the attention of the child welfare community because they lack basic supports and targeted prevention services and that the child welfare community often waits until tragedy occurs or until families require intensive—and therefore expensive—intervention before they act); Shardé Armstrong, *Forever Moving, Always Yearning For Stability*, INDIANAPOLIS STAR, Apr. 8, 2007, at E3.

132. REBUILD THE NATION'S CHILD WELFARE SYSTEM, *supra* note 55, at 2. In 2010, these figures remained largely unchanged. While states received over \$7 billion in Title IV-E funds, they received roughly \$614 million in the more flexible Title IV-B

sufficient that some states exhaust their Title IV-B funds mere months into each fiscal year and, for the remainder of the year, must clamber to put together the funding for much needed front-end services. While the Social Services Block Grant,¹³³ Medicaid, and TANF may also be used to fund these front-end services, these funding streams are unpredictable, and the available child welfare data does not break out how much these programs spend on child welfare related services.¹³⁴

If more flexible and consistent¹³⁵ child welfare funding were available, states would have the *option* of offering more support for these front-end services, thus preventing the removal of some children from their homes.¹³⁶ Unfortunately, the vast majority of dedicated child welfare funds, Title IV-E funds,¹³⁷ are inflexible and may be accessed only after a child has been removed from his home,¹³⁸ which forces states to remove a child before it can make determinations on the services required to prevent removal.¹³⁹ Since the more flexible funds, Title IV-B, are capped—and because there is no incentive to provide removal prevention—few states have developed substantive alternatives to out-of-home placements. In fact, some argue that in the past, states, attempting to maximize federal dollars, *altered* their state practices to ensure reimbursement by placing AFDC eligible children

funds. These figures represent a substantial decrease in flexible funds since FY 2006, a result antithetical to child welfare stakeholder recommendations. See DEVOOGHT ET AL., *supra* note 32, at 11, 24.

133. SSBG provides funds that may be used for preventative services like “daycare, child protective services, information and referral, and counseling,” as well as other services that seek to prevent the removal of children or seek to remedy neglect, abuse, or the exploitation of children generally. See APSE ISSUE BRIEF, *supra* note 14, at 15.

134. *Id.*

135. Due to the patchwork method of funding child welfare systems with varying types of funding from different sources, funding may change from year to year based on local, state, or federal events. Additionally, much of federal child welfare funding is subject to the yearly appropriations process. DEVOOGHT ET AL., *supra* note 32, at 1.

136. Armstrong, *supra* note 131.

137. Title IV-E expenditures accounted for just over half of all federal child welfare funds spent in 2008 and 2010. In FY 2010, states spent more than \$1.5 billion on foster care maintenance payments, and nearly \$2.1 billion on administration and placement services and caseworker training. DEVOOGHT ET AL., *supra* note 32, at 9, 13.

138. See 42 U.S.C. § 672(a)(1) (indicating that states may only access Title IV-E funds once children have been removed from their families); see also SCARCELLA ET AL., THE COST OF PROTECTING CHILDREN V, *supra* note 14, at 22 (“States can also use TANF funds to support children that child welfare has removed from their parents’ homes and placed with relative or kinship caregivers.”); HOCHMAN ET AL., *supra* note 56, at 26.

139. See *Flexible Funding Proposal Hearing*, *supra* note 15, at 4 (statement of the Hon. Wally Herger, Chairman, Subcomm. on Human Res. of the Comm. on Ways & Means).

in out-of-home care, even when a relative caregiver was available.¹⁴⁰ Thus, income eligibility can influence placement determinations in a way that is not always in the *best* interest of the child.¹⁴¹

B. Federal Financial Structure Discourages the Funding of Post-Care Services

1. Inadequate Funding for Reunification and Post-Reunification Services

Once a child is removed from his family, the system's primary goal transitions from removal prevention to reunification, with foster care functioning as a safe haven for children until their families are stabilized.¹⁴² To that end, federal law¹⁴³ requires states to demonstrate that they have made "reasonable efforts" at reunification once a child has been removed.¹⁴⁴ Accordingly, safely reunifying children with their family of origin is a primary aim of state child welfare agencies¹⁴⁵ that relies on services such as housing support, substance abuse treatment, mental health treatment, and parenting classes.¹⁴⁶ Despite state and federal emphasis on reunification, the number of children returned to their families is decreasing.¹⁴⁷ While there could be a num-

140. Mangold, *supra* note 7, at 592.

141. *Id.* But see SCIAMANNA, *supra* note 14, at 13 (arguing that a caseworker's decision to remove a child from his or her home is a complex one with numerous factors and that explaining the decision only in terms of federal funding is an oversimplification that ignores the day-to-day decisions that child welfare personnel must make). This note does not attempt to argue that *only* federal funding determines where a child may be placed, but instead argues that despite a "best interest of the child" mentality, federal funding has become one of the factors taken into consideration when determining where to place a child.

142. See STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 11.

143. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

144. *Id.*; THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 18 (noting that the safety of children is an important concern in determining whether or not children should be returned home, but federal law recognizes that "children's needs are" often best met "within their families").

145. See *supra* note 144 and accompanying text.

146. See THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 12.

147. See AFCARS REPORT: PRELIMINARY FY 2011 ESTIMATES, *supra* note 87 (finding, in FY 2011, 52% of children who exited foster care (125,908 children) left through reunification); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: Preliminary FY 2010 Estimates as of June 2011, <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport18.pdf> (finding, in FY 2010, 51% of children who exited foster care (128,913 children) left through reunification); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: Preliminary FY 2009 Estimates as of July 2010, http://archive.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report17.htm (finding, in FY 2009, 51% of children

ber of reasons for this decline, including that states are doing a better job at preventing the unwarranted removal of children in the first place, some suggest that it is due to poor reunification supports at the state and federal levels.¹⁴⁸ Given states' inadequate spending on preventative services,¹⁴⁹ the latter rationale seems more likely.

Getting children home is only half of the battle; studies indicate that a large number of children return to foster care after reunification.¹⁵⁰ These "re-entrances" occur for a multitude of reasons, many of which can be linked to the poverty that often produces neglect.¹⁵¹ Despite the number of children re-entering care and a compelling need for post-reunification support to ensure the stability of families, these services remain largely overlooked.¹⁵² Instead, funding for these services, as with removal prevention, remains much more limited than funding for foster care,¹⁵³ and those funds that could be used for this purpose (Title IV-B) are capped.¹⁵⁴ When contrasted with the open-ended entitlement for out-of-home care, the cap on funds which may be used for other services paints an unsavory picture; one in which the federal government offers states little to prevent the removal of chil-

who exited foster care (140,061 children) left through reunification); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: Preliminary FY 2008 Estimates as of October 2009, <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport16.pdf> (finding, in FY 2008, 52% of children who exited foster care (148,340 children) left through reunification); CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: Preliminary FY 2006 Estimates as of January 2008, <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport14.pdf> (finding, in FY 2006, 53% of children who exited foster care (154,103 children) left through reunification). Contrast these figures with the 55% of children who exited foster care to reunification in 2000 and the 53.6% of children exiting through reunification in 2005.

148. See THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 13.

149. See *supra* Part IV.A.

150. See THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 14 (noting that some children who return to foster care after being reunited with their families do so because of additional abuse while others return to foster care due to the lack of available services and supports to help families remain stable and safely parent their children).

151. *Id.* The state often removes children from their home for reasons associated with neglect, much of which could be alleviated by resources that are unaffordable to impoverished communities. CWLA pointed out a number of the reasons for re-entry when it advocated for increasing funding toward housing, childcare services, and other community support services for families. See *Hearing to Examine Child Welfare Reform Proposals*, *supra* note 32, at 51.

152. HOCHMAN ET AL., *supra* note 56, at 15.

153. See Courtney, *supra* note 9, at 89.

154. See *supra* Part III.A.b (noting that Title IV-B funds may be used for an array of services including post-care services to ensure the stability of families).

dren from their homes¹⁵⁵ or to reunify families, and incentivizes the removal of children from their families in favor of out-of-home placements.¹⁵⁶ This bleak portrait need not exist. Studies have found that 30% of America's foster children could safely reside with their birth parents if their parents had access to safe, affordable housing.¹⁵⁷ This is to say nothing of how many children could remain in their homes if their parents had consistent access to the full continuum of child welfare services. Unfortunately for America's children, when they leave foster care, the basis for federal funding disappears and, because states lack funding to provide follow up services, they are left to fend for themselves until they, inevitably, return to foster care.¹⁵⁸

2. *Inadequate Funding for Other Permanency Services*

Congress's failure to adequately fund reunification and post-reunification services has resulted in a serious problem—without a place to call “home,” children languish in the foster care system for years at a time before aging out without a family or safety net.¹⁵⁹ In 2011, more than 21% of foster children had been in care for periods ranging between twenty-four months and five years and another 10% had been in foster care for longer than five years.¹⁶⁰ Even after current and former foster youth testified about the importance of achieving permanency,¹⁶¹ 104,236 children, more than 56% of whom had been

155. Armstrong, *supra* note 131 (arguing that the current child welfare structure has effectively created a foster care system that is permanent rather than temporary, as it was designed and that altering this financial structure would permit states to support those front-end and post-care services that might lead more children to exit care for good). When a child leaves foster care, states' basis for claiming federal reimbursement of its expenditures on that child disappears unless the child exits foster care through adoption. Changes at the federal level would, perhaps, permit states to seek reimbursement of reunification expenditures. *See also* THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 24.

156. *Hearing on Improving the Child Welfare System*, *supra* note 119, at 1.

157. *Id.* at 2.

158. *See supra* note 155.

159. *See supra* note 142 and accompanying text; SCIAMANNA, *supra* note 14, at 12 (noting that the child welfare system is intended to reflect the fact that children are entitled to a permanent place to call home); THE PEW CHARITABLE TRUSTS, INVESTING IN PREVENTION, *supra* note 50, at 14 (positing that the federal government, in assessing permanency, clearly emphasizes the value of guiding children quickly through the foster care system). *See generally* *Children Who Age Out of the Foster Care System: Hearing Before the Subcomm. on Income Security & Family Support of the H. Comm. on Ways & Means*, 110th Cong. (2007) [hereinafter *Hearing on Children Who Age out of the Foster Care System*].

160. AFCARS REPORT: PRELIMINARY FY 2011 ESTIMATES, *supra* note 87.

161. *See generally* *Hearing on Children Who Age Out of the Foster Care System*, *supra* note 159.

in foster care for more than two years and who had moved an average of three or more times, were waiting for a place to call home in 2011.¹⁶² Instead of helping these children find permanent families, the current child welfare funding structure penalizes states working to reduce the number of children on their foster care rosters. How so? As states reduce the number of children in foster care, their Title IV-E funding is concurrently reduced because Title IV-E is based on the number of eligible children in a state's jurisdiction. Additionally, under the traditional Title IV-E structure, states are not permitted to retain the federal dollars they "save" by preventing foster care placements or by reducing the length of a child's stay in care. Instead, they lose any Title IV-E funds they would have otherwise received for the child in question.¹⁶³

Congress addressed some permanency issues through Fostering Connections,¹⁶⁴ which ensured that more families would have access to adoption subsidies by¹⁶⁵ eliminating the link between Title IV-E adoption and kinship caregiver subsidies and AFDC eligibility re-

162. AFCARS REPORT: PRELIMINARY FY 2011 ESTIMATES, *supra* note 87.

163. CYNTHIA ANDREWS SCARCELLA ET AL., THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN IV: HOW CHILD WELFARE FUNDING FARED DURING THE RECESSION (2004) [hereinafter SCARCELLA ET AL., VULNERABLE CHILDREN IV], available at http://www.urban.org/uploadedpdf/411115_VulnerableChildrenIV.pdf. However, note that these limitations are only present in states that still operate under "traditional" Title IV-E structures. Some states that have agreed to receive their Title IV-E funds in block grant form are able to save and reinvest any funds they "save" by reducing the number of children in foster care. *FY 2004 Bush Budget and Children*, CWLA, <https://cwla.org/advocacy/2004bushbudgetchildren.htm> (last visited Feb. 9, 2014).

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

165. STOLTZFUS, FOSTERING CONNECTIONS, *supra* note 46, at 1 (discussing how the bill was designed to ensure the well-being of children in foster care by increasing permanent living arrangements outside of foster care and to support the transition of youth out of care and into independent living, *inter alia*); Green, *supra* note 46, at 2 ("The Fostering Connections to Success and Increasing Adoption Act alters federal policy in five key areas: support for kinship care, supports for older foster youth, ensuring positive educational and health care outcomes for foster children, support and incentives for adoption, and direct access to federal funds for Indian tribes."); SHADI HOUSHYAR, TITLE IV-E WAIVERS: EXPANDING AND MODIFYING CHILD WELFARE DEMONSTRATION WAIVERS TO PROMOTE FLEXIBILITY AND FASTER INNOVATION 2 (2011) (noting that the Fostering Connections Act provided states greater options to place children with relative guardians and to support youth aging out of foster care to the age of 21). Prior to passage of this Act, states had the option of providing state funded subsidies for children not eligible for federal assistance, but their cash strapped programs often provided less benefits than did their federal counterparts. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 4.

quirements.¹⁶⁶ Thereafter, states were permitted to seek reimbursement for these payments on behalf of children who met the other Title IV-E eligibility requirements.¹⁶⁷ However sweeping Fostering Connections is, the bill fails to address a number of issues. In addition to not de-linking some parts of the federal foster care program from 1996 AFDC income standards, the Fostering Connections failed to address the imbalance between federal funds allocated toward out-of-home care and those allocated to the more flexible services discussed above.¹⁶⁸ The elevation of out-of-home care¹⁶⁹ over other options that would permit children to remain in their homes, in the face of increasing evidence about the trauma of removal, is troubling.

C. *Fiscal Implications on the AFDC Look-back*

There are also substantial fiscal concerns surrounding the AFDC look-back: (1) The provision has evolved to include complex documentation requirements that cost states billions of dollars per year with no measurable benefit to the overall welfare of the child; (2) The “claiming” practices surrounding Title IV-E funds vary widely among states, resulting in vastly different outcomes for similarly situated children and families; and (3) The metrics surrounding the AFDC’s income eligibility requirement have failed to adjust for inflation over the past eighteen years, thereby reducing the amount of federal dollars available to states over time.

1. *Title IV-E eligibility determinations result in the loss of billions of dollars*

To receive reimbursement for foster care maintenance payments under Title IV-E, a state must demonstrate that the child for whom the expenditure was made is eligible for Title IV-E, an inquiry that necessarily implicates the 1996 AFDC income eligibility provision.¹⁷⁰ 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, or re-invested toward the provision of front-end services to families in need of support.¹⁷¹ Instead, states must com-

166. American Bar Association, *supra* note 46 (noting that the law amends the SSA to de-link, over time, adoption assistance from AFDC eligibility); Green, *supra* note 46, at 9.

167. Green, *supra* note 46, at 9.

168. *Id.* at 11.

169. *See supra* p. 218 and notes 129–131 and accompanying text.

170. *See* 42 U.S.C. § 672(a)(3), *supra* note 12; Mangold, *supra* note 7, at 595.

171. While states have little control over whether a family is income eligible for Title IV-E funds, they can improve their administrative practices for determining eli-

plete complex and time consuming assessments to determine the income of each family from which it removes a child, while simultaneously documenting expenditures made on behalf of children they believe will be eligible for federal funding as part of mandatory expenditure reports to be filed with the federal government.¹⁷² States have struggled to track the required expenditures per child for this report because there are specific categories that must be tracked, each matched at a different rate.¹⁷³

The federally required eligibility determination is equally cumbersome. Child welfare administrators and caseworkers struggle to amass the documentation required to determine a child's AFDC eligibility, a process known as "claiming."¹⁷⁴ During this process, states (or the parties to whom they delegate the task) review court orders, complete background checks, and manage extensive inquiries around the income and assets of each child's family in compliance with the

gibility to increase their penetration rate and thereby increase the flow of federal dollars into the state. *See* Mangold, *supra* note 7, at 575–77 (discussing how income eligibility criteria force states to focus on the poverty status of the family rather than the welfare of the child and engage in administrative waste as a result); *see also* *Hearing on Improving the Child Welfare System*, *supra* note 119, at 7 ("By linking federal foster care support to the defunct AFDC program, the federal government also wastes precious time and money as child welfare staff spend hours tracking down income data for eligibility purposes."); STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 31 ("Removing all income eligibility rules would have the advantage of eliminating the administrative burden of determining program eligibility . . ."); Hatcher, *Fiscal Federalism*, *supra* note 32, at 689 ("[T]he complexity of the Title IV-E claiming process and resulting administrative burden on states has led many states to turn to revenue maximization consultants for assistance . . .").

172. States report that this process is cumbersome and does little to further the welfare of the children the Title IV-E program is supposed to serve. Much of the complexity stems from the requirement that each eligibility criterion must be evaluated at different times: some are evaluated before a child is removed, some are evaluated at the time a child enters foster care, while others are required to be documented on an ongoing basis. States often criticize the criteria as arbitrary and specifically malign the AFDC link because there is no policy reason that the Federal Government should *provide* more support for children in danger of maltreatment that are removed from poor homes than those removed from wealthy homes. HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD, *supra* note 14, at 5–6; Mangold, *supra* note 7, at 595 (discussing the complexity of the AFDC determination process); Hatcher, *Fiscal Federalism*, *supra* note 32, at 688 (arguing that the eligibility rules and fiscal-matching requirements for Title IV-E funds are burdensome for states and localities due to the multitude of administrative burden each state must meet).

173. APSE ISSUE BRIEF, *supra* note 14, at 5.

174. *Id.*; THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 6; Mangold, *supra* note 7, at 594 (addressing the unique difficulties in making income and asset determinations for the families of abandoned children).

Title IV-E eligibility requirements.¹⁷⁵ Compiling these materials can be quite challenging since many families who come into contact with the child welfare system are geographically mobile with sporadic work histories.¹⁷⁶ As a result, some states are forced to employ dedicated staff to document the eligibility of each child under their supervision, thereby diverting funds that could otherwise be used to provide direct services, for the creation of “eligibility” positions that do not necessarily result in improved services to children.¹⁷⁷ Unfortunately, for some states, even the addition of dedicated staff has been insufficient to handle this unwieldy process; child welfare agencies, anxious to stem the decline of federal funding, are increasingly outsourcing Title IV-E eligibility determinations to revenue maximization consultants in attempts to maximize their reimbursement rate.¹⁷⁸ As payment, these companies take a percentage of the federal funds the state collects and ideally should re-invest into the child welfare system, thereby diverting still more Title IV-E dollars away from the children the program claims to serve.¹⁷⁹

The truly troubling part of this process is that a great deal of state effort and federal funding is being expended on something that has no clear link to improved outcomes for children.¹⁸⁰ In fact, it is more

175. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 6; Hatcher, *Fiscal Federalism*, *supra* note 32, at 689 (noting that after initial Title IV-E eligibility is established, stringent requirements must be met to maintain continued eligibility).

176. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 6.

177. *Id.*

178. Mangold, *supra* note 7, at 578 (“Because of the importance in dollars and cents to capturing as much federal funding as possible, states increasingly outsource their income and compliance determinations to maximize their reimbursement rate.”). Companies contract with states to increase their penetration and compliance rates for Title IV-E eligibility. See Hatcher, *Fiscal Federalism*, *supra* note 32, at 678 (arguing that state reliance on consultants without sufficient oversight may result in more federal funds being awarded to states, but the additional federal funds are often diverted from their intended purpose, namely the provision of child welfare services); see also *id.* at 689 (discussing how the complexity of the Title IV-E claiming process has led many states to outsource the process to revenue maximization consultants for assistance and noting that consultants develop strategies to increase state penetration rates and create spending mechanisms to ensure that states use as few state dollars as possible in claiming the maximum amount of federal dollars).

179. Hatcher, *Fiscal Federalism*, *supra* note 32, at 678; Mangold, *supra* note 7, at 598.

180. See generally Mangold, *supra* note 7; THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7; SCARCELLA ET AL., VULNERABLE CHILDREN IV, *supra* note 36; STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7; *Flexible Funding Proposal Hearing*, *supra* note 15, at 14; Green, *supra* note 46; APSE ISSUE BRIEF, *supra* note 14.

likely that children, having been deprived of direct services due to money spent on administrative costs linked to the AFDC income eligibility determination process, are worse off. Eliminating the look-back would remove states' obligation to make these costly eligibility determinations, relieve states of the tremendous administrative burden of documenting these determinations,¹⁸¹ and re-direct funding from administrative costs to the actual provision of services.

2. *The Look-back Results in Uneven Outcomes for Children*

In her note, *Poor Enough to be Eligible?*, Mangold outlined the process through which some states ensure their compliance with Title IV-E eligibility requirements—namely by hiring dedicated staff members or by outsourcing eligibility determinations.¹⁸² However, some states are unable to take such measures, either due to financial constraints which make outsourcing cost-prohibitive¹⁸³ or because they are simply not as Title IV-E savvy as their counterparts. Whatever the reason, the use of varying claiming practices in states results in wide variations in states' ability to draw down federal funding, resulting in some children being deprived of critical services¹⁸⁴ simply because of the state in which they claim residence.¹⁸⁵ States with more sophisticated claiming processes make far more extensive claims than those

181. See THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 7.

182. See generally Mangold, *supra* note 7; *supra* note 178 and accompanying text.

183. Federal funds are often diverted from their intended purpose as private consultants take up to 25% of the recaptured federal funds as their contingency fee. Hatcher, *Fiscal Federalism*, *supra* note 32, at 678. In Wisconsin, a subcontractor of administrative eligibility determinations took 9% of the funds it collected under a contract in 2002–2003. Mangold, *supra* note 7, at 598.

184. States used varying eligibility requirements for their Aid to Dependent Children (ADC) programs, with some states denying assistance to homes it disapproved of. When the state determined that a home was ineligible for ADC, the child remained in the home, but no funding was offered. However, when one state sought to remove over 20,000 children from its foster care rolls due to the “unsuitability of the home,” the federal government stepped in and normalized the standards underlying eligibility for ADC. Thereafter, federal funding for foster care was connected to the public assistance program in immediate response to the varying procedures among states for determining ADC eligibility that resulted in disparate treatment of similarly situated children. Mangold, *supra* note 7, at 583–89; see also *Federal Foster Care Financing Hearing*, *supra* note 127; APSE ISSUE BRIEF, *supra* note 14, at 8.

185. See Hatcher, *Fiscal Federalism*, *supra* note 32, at 681–84. The “normative framework” of fiscal federalism, a theory founded on the collaboration of the federal government’s financial power and stability and state governments’ ability to deliver services tailored to regional needs, “contemplates that the central government should take the lead role ‘for the macroeconomic stabilization function and for income redistribution in the form of assistance to the poor,’ and that the decentralized local government should take more control of allocation and consumption so that the local

states unable to afford consultants or other administrative costs associated with eligibility determinations.¹⁸⁶ Consequently, while “sophisticated states” may theoretically use the recovered federal funds to fund other child welfare programs,¹⁸⁷ their counterparts may not.

3. *The AFDC Look-back Fails to Keep Pace with Inflation*

Though the AFDC program was repealed in 1996, states are still required to determine eligibility for Title IV-E Foster Care and Adoption Assistance programs using the criteria of the program as they existed on July 16, 1996. States therefore must base a child’s eligibility for federal foster care on standards that have not been adjusted for inflation in eighteen years and were promulgated under a program that no longer exists. This failure to update the standard for inflation means that in order for families to qualify for Title IV-E, they must be poorer in 2013 than they were in 1996.¹⁸⁸ The look-back has set the income limit for Title IV-E eligibility at \$15,911 for a family of four. If this figure were adjusted for inflation, the threshold would be set at \$23,550 in 2013.¹⁸⁹ However, because the figure has not been adjusted, the Title IV-E poverty metric has been artificially depressed “result[ing] in fewer federal dollars flowing into states for foster care services.”¹⁹⁰

needs and preferences are addressed.” *Id.* at 683–84. Arguably, the eligibility standards represent the macroeconomic stabilization function for income redistribution.

186. APSE ISSUE BRIEF, *supra* note 14, at 8.

187. *But see* Hatcher, *Fiscal Federalism*, *supra* note 32, at 678. After states recover reimbursed funds, they use fiscal maneuvers to route the reimbursed federal dollars into their general accounts rather than to increase services to the group for whom the original expenditures were made.

188. *See* Mangold, *supra* note 7, at 593; *see also* STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 1 (stating that the look-back means that “the number of families who meet the static income rules of the defunct AFDC program inevitably declines”).

189. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 75, at 4.

190. *See* Mangold, *supra* note 7, at 593–94; STOLTZFUS, ISSUES IN THE 110TH CONGRESS, *supra* note 2, at 18 (“The overall share of children in the national foster care caseload eligible for Title IV-E foster care support has been in decline.”); SCARCELLA ET AL., VULNERABLE CHILDREN V, *supra* note 14, at 16 (“Because the need standards have not been adjusted for inflation, the number of children who are income-eligible continues to decline.”); APSE ISSUE BRIEF, *supra* note 14, at 6 (noting that, because the look-back provision does not permit adjustment for inflation, over time the value of the 1996 income and asset limits will be further eroded and fewer children will be eligible for Title IV-E in the future as income limits for the program remain static while inflation raises both incomes and the poverty line).

IV.
MOVING FORWARD: PROPOSALS ADDRESSING
THE AFDC LOOK-BACK

When parents of children involved with the child welfare system exceed the income limits for Title IV-E established by the AFDC program, states bear the full cost of providing child welfare services to those children.¹⁹¹ By tying Title IV-E to 1996 income limits without adjusting for inflation, Congress guaranteed that fewer children would be eligible for Title IV-E funds as income limits remain static and inflation continues to raise both family incomes and the poverty line.¹⁹² Because fewer children are eligible for Title IV-E, states face escalating costs and must attempt to fund child welfare services for a higher proportion of the children in foster care without federal assistance. Such a cost shifting structure undermines the congressional goal of sharing equally in the care of maltreated children, which culminated in the creation of the federal and state partnership under Title IV-E of the Social Security Act.¹⁹³ The federal government should share in the cost of providing services to all maltreated children, not just those from “poor” families.¹⁹⁴ This paper joins congressmen, child welfare organizations, and other child welfare stakeholders¹⁹⁵ in calling for the immediate removal of the link between AFDC and Title IV-E foster care reimbursements. To that end, numerous proposals have been promulgated including the elimination of all income eligibility determinations thus making all foster children eligible for Title IV-E foster care reimbursements, with some proponents providing off-setting measures to contain federal costs or the creation of a block grant to increase the flexibility of state spending.

191. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 1.

192. Look-back Elimination Act of 2011, H.R. 2063, 112th Cong. (2011); *Flexible Funding Proposal Hearing*, *supra* note 15, at 28 (arguing that, because of the look-back, the federal financial commitment to providing services to children and families in contact with the child welfare system has slipped over the years: “Just by inflation alone, fewer children are eligible for any reimbursement or services.”); U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 1; DELOITTE CONSULTING LLP, *supra* note 7, at 1–2; THE PEW CHARITABLE TRUSTS, *FIX THE FOSTER CARE LOOKBACK*, *supra* note 7, at 3; Mangold, *supra* note 7, at 593–94.

193. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 6–7.

194. See Mangold, *supra* note 7; THE PEW CHARITABLE TRUSTS, *FIX THE FOSTER CARE LOOKBACK*, *supra* note 7.

195. See *supra* note 18 and accompanying text.

A. *De-Link Federal Foster Care from AFDC Income Standards*

Congress must act immediately to effect comprehensive federal finance reform of the child welfare system¹⁹⁶ and remove the link between AFDC and Title IV-E child welfare funding. Congress made substantial progress in Fostering Connections when it removed the link between adoption assistance payments and AFDC income limits but failed to de-link foster care payments from these requirements.¹⁹⁷ The legislature must complete the work it began in Fostering Connections by eliminating all means testing (income eligibility determinations) from the IV-E eligibility process, either with or without cost containment measures.¹⁹⁸ Such action represents the most straightforward model to address the complications surrounding the look-back; de-linking would permit states to receive federal funds for *every* child in foster care, eliminating the increasing administrative costs of making eligibility determinations on a case-by-case basis.¹⁹⁹ While there is generally little consensus on how to address fiscal problems in the child welfare system, most parties currently agree that federal child welfare reform must begin with the elimination or modification of the AFDC look-back.²⁰⁰

196. This paper, while arguing for the immediate elimination of the AFDC Look-back, recognizes that elimination of the AFDC income requirement alone does not adequately address the disparity between appropriations of preventative funds (such as Title IV-B) and post-removal funds (like Title IV-E). Therefore, this paper argues for elimination of the Look-back as the *first step* in the broader child welfare financing reform.

197. See *supra* notes 45–51 and accompanying text.

198. REBUILD THE NATION'S CHILD WELFARE SYSTEM, *supra* note 55, at 3 (“De-linking can be accomplished either with full cost-neutrality or as part of a broader effort to realign federal funding—either of these approaches would be preferable to the current system.”); THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOK-BACK, *supra* note 7, at 7.

199. Removing all income eligibility rules has the advantage of eliminating the administrative nightmare of determining eligibility, a process, which costs states millions of dollars per year. Furthermore, such action suggests a federal commitment to the protection of all children who are in need of foster care services, no matter their financial background. See THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 8.

200. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 6–7 (discussing how, of the fourteen proposals the Government Accountability Office considered, twelve included the elimination of all means testing (“looking back”) as the first step to widespread child welfare reform). In his Look-back Elimination Act, Congressman Lewis argued that all children should be treated equally by the federal government regardless of their parent's income. He has gone on to note that because of an unnecessary inquiry into the economics of a child's home life, his home state of Georgia finds itself under increasing financial pressure as they struggle to support a rising number of children each year due to decreasing federal assistance. See Look-back Elimination Act of 2009, H.R. 3329, 111th Cong. (2009); Look-back Elimination Act of 2011,

De-linking based plans incentivize the use of front-end services by permitting states to retain the money they “save” by reducing out-of-home placements or through elimination of the eligibility determination process.²⁰¹ The Child Safety, Adoption, and Family Enhancement (CHILD SAFE) Act of 2004 for example, advocates de-linking, but offers states the option of transferring federal dollars that would otherwise have been expended on out-of-home care into a fixed grant comprising flexible funds that may be used on a variety of preventative services²⁰² thereby offering states an incentive to reduce their

H.R. 2063, 112th Cong. (2011); 154 CONG. REC. E1377–78 (daily ed. June 24, 2008) (statement of Rep. John Lewis). Both the House and Senate version of the Leave No Child Behind Act proposed severing the link between foster care maintenance payments and the AFDC income eligibility standards. *See* Leave No Child Behind Act of 2001, S. 940 107th Cong. (2001); Leave No Child Behind Act of 2001, H.R. 1990, 107th Cong. (2001); *see also* Child Safety, Adoption, and Family Enhancement (CHILD SAFE) Act, H.R. 4856, 108th Cong. (2004); THE PARTNERSHIP TO PROTECT CHILDREN AND STRENGTHEN FAMILIES, CHANGES NEEDED IN FEDERAL CHILD WELFARE LAW TO BETTER PROTECT CHILDREN AND ENSURE THEM NURTURING FAMILIES (2007).

201. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 6; *see also* *Hearing to Examine Child Welfare Reform Proposals*, *supra* note 32, at 19, 41 (2004) (transcribing the Pew Commission on Foster Care's recommendation to increase flexibility in how states can use federal child welfare dollars to meet children's needs and the option for states that reduce their use of out-of-home placement to reinvest the federal dollars it “saved” in services to children). The Chairman of the Pew Commission, Mr. Frenzel, argued that previous programs have demonstrated that, when the federal government provides incentives to states to achieve certain goals, states will respond. He argued that there is no reason why such a program wouldn't also work here, and he further stated, addressing the eligibility requirements, that the biggest gain with de-linking is that states don't have to “mess around figuring out who qualifies for Federal money and who doesn't with this Mickey Mouse 1996 law that adds a huge administrative burden to the States.” *Id.* at 41. He concluded that the biggest advantage of de-linking comes in the form of limiting the dollars being diverted from children to Title IV-E eligibility determinations. *Id.*; *see also* *Federal Foster Care Financing Hearing*, *supra* note 127, at 81 (2005) (statement of David Kass, Executive Director of Fight Crime: Invest in Kids) (arguing for Congress to permit states to reinvest funding “saved” by reducing foster care expenditures and to reinvest those funds into prevention services).

202. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 15; The Child Safety, Adoption, and Family Enhancement (CHILD SAFE) Act of 2004, H.R. 4856; 150 CONG. REC. E1417 (daily ed. July 19, 2004) (statement of Rep. Wally Herger). Note that the Pew Commission on Children in Foster Care also recommends that states be permitted to reinvest federal funds that would have been spent on foster care if they *safely* reduce their foster care caseload. *See* THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE, AND WELL-BEING FOR CHILDREN IN FOSTER CARE* (2004). A host of other child welfare stakeholders and organizations also support letting states retain Title IV-funds not used for foster care if they reinvest them into early intervention services. *See* THE PARTNERSHIP TO PROTECT CHILDREN AND STRENGTHEN FAMILIES, *supra* note 200.

reliance on out-of-home care while encouraging renewed investment in early intervention.²⁰³

De-linking is not without its detractors; some argue that such a maneuver would permit unchecked spending by states and leave agencies with little incentive to reduce foster care placements.²⁰⁴ However, such a concern ignores a central characteristic of the Title IV-E program—it is a matching grant.²⁰⁵ Accordingly, any increase in out-of-home placements of children eligible for Title IV-E results in increased costs to states as well; this serves as a sufficient deterrent against state overuse of out-of-home placements. Furthermore, the current child welfare financing structure encourages out-of-home placements by failing to adequately fund front-end services and by causing states to divert preventative funds toward out-of-home care as federal child welfare funds are eroded.

Other critics of de-linking argue that, because less than half of all children are presently eligible for Title IV-E reimbursement, elimination of the eligibility test without additional changes could more than double the cost of the federal foster care program.²⁰⁶ The bipartisan Pew Commission on Foster Care, in its Kids are Waiting Campaign, estimated that without reducing federal reimbursement rates or making other cuts, the federal government could face additional child welfare costs of \$1.6 billion per year if all eligibility criteria were eliminated.²⁰⁷ Many of the promulgated proposals, perhaps anticipating Congressional reticence to increase federal spending, have posited that Congress sever the AFDC link while implementing offsets to con-

203. See *supra* note 24 and accompanying text.

204. See THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 8 (because states currently provide foster care to all maltreated children regardless of their eligibility for federal assistance, increased federal dollars would primarily replace state dollars currently spent on foster care, rather than directly offering states ways to reduce their reliance on foster care, such as through the direct provision of removal prevention and other front-end dollars).

205. STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 7.

206. See STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 31; THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 9 (noting that, because foster care is funded on an open-ended basis, states may seek reimbursement for all eligible children, and that, therefore, doubling the number of eligible children would result in substantial cost to the federal treasury). Aware of the unpalatable idea of increased federal spending in the current economic climate, most de-linking proposals have been coupled with a funding cap or some other cost reduction measure. *Id.*; see also STOLTZFUS, DETAILED OVERVIEW OF TITLE IV-E, *supra* note 3, at 10; DELOITTE CONSULTING LLP, *supra* note 7, at 2.

207. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 8; THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *supra* note 202, at 54.

tain federal costs.²⁰⁸ For example, Casey Family Programs,²⁰⁹ the Pew Commission on Children in Foster Care,²¹⁰ and the SAFE Act²¹¹ each proposed that Congress adjust downward states' federal medical reimbursement rate (FMAP) to compensate for the larger eligibility pool.²¹² With or without cost containing measures, de-linking federal foster care funding from AFDC income eligibility rules would ensure universal eligibility by eliminating income eligibility determinations and reduce state administrative costs arises from such determinations. It is therefore preferable (in any form) to the current financial structure.

B. "Update" the Federal Foster Care Eligibility Standards

In the face of a growing federal deficit, some contend that eligibility determinations must remain a part of the Title IV-E regime in order to control costs to the federal government.²¹³ If policymakers insist that eligibility determinations must remain a part of states obtaining Title IV-E funds, this paper reluctantly echoes sentiments expressed by Senator Ben Cardin and Senator John D. Rockefeller, IV²¹⁴ and demands that the AFDC income standards that currently determine eligibility for Title IV-E be "updated" to reflect economic growth over the past eighteen years.²¹⁵ Such an update could be ac-

208. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 6; THE PEW CHARITABLE TRUSTS, *FIX THE FOSTER CARE LOOKBACK*, *supra* note 7, at 9; DELOITTE CONSULTING LLP, *supra* note 7, at 1; THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, *supra* note 202, at 54 (recommending de-linking in a way that is cost-neutral to the federal government and states, for example, by compensating for the increased eligibility by reducing each state's FMAP by 35%).

209. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 9.

210. *Id.* at 20; *see also* THE PEW CHARITABLE TRUSTS, *FIX THE FOSTER CARE LOOKBACK*, *supra* note 7, at 8; *FOSTERING THE FUTURE: SAFETY, PERMANENCE, AND WELL-BEING FOR CHILDREN IN FOSTER CARE*, *supra* note 202, at 54.

211. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 15.

212. The National Association of Public Child Welfare Administrators and H.R. 3576 suggested that the reimbursement rates be a state specific inquiry, based on state expenses in years past. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 8; Mangold, *supra* note 7, at 579 ("The federal money flowing from the federal government to the states and local child welfare agencies would not necessarily increase in total since the federal government could adjust the percentages of reimbursement to compensate for the larger pool of eligible children once income was eliminated as a requirement."); THE PEW CHARITABLE TRUSTS, *FIX THE FOSTER CARE LOOKBACK*, *supra* note 7, at 8; *see also supra* note 75 (providing an explanation of how the FMAP functions).

213. THE PEW CHARITABLE TRUSTS, *INVESTING IN PREVENTION*, *supra* note 50, at 22.

214. Personal Responsibility and Work Opportunity Reconciliation Act Amendments of 2002, S. 2052, 107th Cong. (2002).

215. *See* Child Protective Services Improvement Act, H.R. 1534, 108th Cong. (2003).

complished by linking Title IV-E to an economic benchmark other than AFDC eligibility, such as federal poverty guidelines underlying Medicaid and TANF.²¹⁶

Unfortunately, updating does not reach far enough to address the lack of available front-end services and, under such a proposal, the child welfare system retains the byzantine eligibility determinations many find offensive under the current child welfare structure. Furthermore, though the plan links Title IV-E eligibility to present day poverty levels, it does not make all children entering foster care eligible for Title IV-E foster care funding,²¹⁷ thus continuing the bad policy of offering less federal support to children from non-poor families based on an erroneous presumption that maltreated children who are poor need federal assistance more than maltreated children who are not.²¹⁸ Because only “poor” children would be eligible under this proposal, the child welfare system would retain the complex eligibility standards and the attendant determination costs that child welfare stakeholders find so objectionable. Accordingly, funds that could otherwise provide direct services to children and their families would continue to be diverted toward an unproductive determination process.²¹⁹ Furthermore, outside of its link to the Child Protective Services Improvement Act,²²⁰ which failed to emerge from committee, this proposal fails to address the discrepancy in funding which may be used toward front-end services and Title IV-E funds, which may only be used for out-of-

216. *Id.* (seeking to have the income eligibility standards linked to a national standard other than the defunct AFDC program and specifically seeking to give states the option to align eligibility for foster care maintenance payments with states’ TANF eligibility for cash assistance); U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 75, at 14; STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 30–31; THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 8; *Federal Foster Care Financing Hearing*, *supra* note 127, at 81 (describing CWLA recommendations that the Title IV-E foster care eligibility link with AFDC be replaced with a link to another federal program, such as Medicaid).

217. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 8.

218. *See generally* Mangold, *supra* note 7; *see also* Look-back Elimination Act of 2011, H.R. 2063, 112th Cong. (2011) (positing that the current financial structure supports unequal treatment of children at risk of maltreatment based on the economic circumstances of their family). Simply updating the standards underlying the AFDC program or de-linking these standards from Title IV-E funding does not alter the fact that 90% of child welfare funding will still be designated for post-removal purposes. *See Hearing on Improving the Child Welfare System*, *supra* note 119, at 32.

219. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 8.

220. Child Protection Services Improvement Act, H.R. 1534. The bill provides states with additional support to keep children safe in permanent families and enables states to keep families together by offering preventative services. *Flexible Funding Proposal Hearing*, *supra* note 15, at 75.

home care.²²¹ Finally, because this proposal requires the adjustment of the income standards underlying Title IV-E eligibility to account for over eighteen years of inflation,²²² the proposal would substantially increase the costs to the federal government. Unfortunately, proponents of updating the underlying income requirements have failed to provide any offsets to contain the growth of these costs.

C. *Cap or Create a Block Grant For Foster Care Funds*

A third category of proposals eschews both updating and de-linking the income requirements currently underlying Title IV-E eligibility as a part of federal child welfare finance reform; instead arguing that federal finance reform should take the form of a block grant.²²³ A block grant option would allow states to use federal funds for a far broader range of services than is currently permitted,²²⁴ address the growing funding gap between front-end and post-removal funding, and relieve states of the administrative burden created by current federal requirements, including the need to determine a child's eligibility for AFDC.²²⁵ As drafted by the Bush Administration's proposed FY 2004 budget,²²⁶ the block grant would permit states to use child welfare funds for removal prevention, reunification, and out-of-home placements.²²⁷ States would be permitted a choice between the current Title IV-E program and a five-year capped, flexible allocation of funds equivalent to the Title IV-E funds the state would otherwise receive.²²⁸ Funding would be cost neutral to the federal government since the grant would be based on historic expenditure levels; though many block grant proponents also argue for an inflation adjustment

221. Simply updating the standards underlying the AFDC program or de-linking these standards from Title IV-E funding does not alter the fact that 90% of child welfare funding will still be designated for post-removal purposes. *See Hearing on Improving the Child Welfare System*, *supra* note 119, at 1.

222. THE PEW CHARITABLE TRUSTS, *FIX THE FOSTER CARE LOOKBACK*, *supra* note 7, at 8.

223. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 24 (reporting that the Heritage Foundation proposes that Congress should not add to the patchwork system of child welfare funding, and instead argues that Congress should consolidate all federal child welfare funding streams, thereby permitting states to use the funds on those services which are needed most by the children and families state child welfare agencies encounter).

224. *Id.*; STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 33.

225. APSE ISSUE BRIEF, *supra* note 14, at 19.

226. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, *BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004* (2003).

227. *FY 2004 Bush Budget and Children*, *supra* note 163; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 24.

228. *FY 2004 Bush Budget and Children*, *supra* note 163.

provision to “correct for” the reduction of federal funds caused by the AFDC look-back.²²⁹

There are encouraging results from demonstrations where states were permitted to use federal foster care funds in methods consistent with this proposal; either toward children who otherwise would have been Title IV-E ineligible or toward front-end or post-care services.²³⁰ In these demonstrations, localities were provided with a fixed allotment of Title IV-E funds that could be used to prevent unnecessary removals, facilitate reunification of families, or otherwise ensure that children already in foster care achieve permanency.²³¹ States who took part in these demonstrations found that the increased flexibility of federal child welfare dollars “contributed to declines in the probability of out-of-home placements” and improved the likelihood that at-risk children could remain in their home-of-origin and avoid the trauma inherent in removal.²³²

However, for opponents to the block grant, this proposal’s reliance on historic expenditures represents an obvious drawback, as such reliance locks in eroded levels of federal financial support. Opponents argue that relying on states historic penetration rates without adjusting for inflation results in an artificially deflated allocation of federal funds that stems from Title IV-E’s link with AFDC stagnant income eligibility criteria.²³³ Opponents posit that, by retaining these eroded levels, block grants fail to address concerns that the federal government has failed to share equally in its “partnership” with states to protect children and assist families in need.²³⁴

Opponents further argue that a cap or block grant would effectively permit Congress to back out of its commitment to protect vulnerable children since caseloads could rise at any time and states

229. STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 33. Because current child welfare funding relies on an AFDC economic metric that has not been updated for inflation or other economic factors in eighteen years, the amount of funding a state *should* be receiving is not accurately represented by the amount of Title IV-E funds it received in the past.

230. APSE ISSUE BRIEF, *supra* note 14, at 16. These demonstration projects have generated evidence about the effects of allowing states to use funds more flexibly. Though most of the states tested a specific alternative use for foster care funds, such as guardianship subsidies or improved interventions for parents with substance abuse problems with four states testing broader systems of flexible funding. These demonstrations are operating in Indiana, North Carolina, Ohio, and Oregon.

231. *Id.*

232. *Id.* at 17.

233. *Id.* at 33–34.

234. *See generally* The Alliance for Children’s Rights, *supra* note 55.

would be woefully under-funded with little chance for federal aid.²³⁵ This is a very real concern; historically Congress has failed to maintain its commitment to block grants and has instead effectuated substantial cuts to these grants through the appropriations process.²³⁶ In response to this concern, proponents of block grants or caps propose that states be granted access to the TANF Contingency Fund, under which states could withdraw funds to address unexpected increases in child welfare populations.²³⁷ However, the TANF Contingency Fund contains approximately \$614 million, an insufficient figure for states if the U.S. foster care population were to suddenly swell.²³⁸ This, coupled with the perceived difficulty in accessing the contingency funds,²³⁹ has led block grant opponents to argue that the only way to ensure that states will not be unfairly penalized if the foster care population increases unexpectedly is to keep Title IV-E an open-ended entitlement while simultaneously removing its link from AFDC's income criteria.²⁴⁰

CONCLUSION

With each passing year, AFDC income standards drift further from a valid metric of the child welfare services needed for children and their families. Instead, precious resources are wasted as states attempt to comply with archaic and byzantine eligibility requirements through billions of dollars in expenditures. Despite consensus across

235. STOLTZFUS, 2005 CHILD WELFARE ISSUE OVERVIEW, *supra* note 7, at 33; THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 8; *see also Federal Foster Care Financing Hearing*, *supra* note 127, at 5–6 (statement of Congressman Jim McDermott) (arguing that capping foster care funds shifts the financial burden from the federal government to the states and that if Congress is serious about improving outcomes for foster children, it needs to put forth dollars to prevent these children from entering care in the first place, or to guide them quickly to a permanent home).

236. *Federal Foster Care Financing Hearing*, *supra* note 127, at 5–6. This is not an invalid point; historically the SSBG program has struggled with this very issue. Within fifteen years of SSBG being converted from an entitlement program to a flexible grant, Congress sheared off nearly 40% of the program's funding. The program faces ongoing budget cuts, despite being a key budget resource for child welfare funding.

237. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 75, at 25.

238. *Flexible Funding Proposal Hearing*, *supra* note 15, at 22. Note that the original fund provided \$2 billion for economic downturns, but that funding was depleted during the economic downturn. Presently, states rely on a \$614 million appropriation for the contingency fund. FALK, *supra* note 8, at 5.

239. To draw upon contingency funds, a state must both meet a test of economic need and expend a certain amount of its own funds. FALK, *supra* note 8, at 5.

240. THE PEW CHARITABLE TRUSTS, FIX THE FOSTER CARE LOOKBACK, *supra* note 7, at 8.

the ideological spectrum that the look-back is damaging to long-standing child welfare goals, Congress has failed to act. Indeed, despite the submission of a range of proposals to remove the link to Capitol Hill, not one has emerged from committee. Instead, the look-back has endured and the number of children who suffer the injustices of multiple moves, disorganized education, and age out of foster care without a family grows each year. Sadly, foster children and their families are not the only victims of this fractured child welfare system; society as a whole suffers when these children become young adults and “age out” of foster care into homelessness, imprisonment, unemployment, and early parenthood.²⁴¹

For each day since 1996 that Congress has failed to reform the fractured financial structure underlying child welfare, more children have been removed from their families, more brothers and sisters denied the opportunity to grow up together, and more young people have languished in care before aging out without a permanent family. If we fail to adjust this standard, inflation will erode the financial supports to children in the child welfare system, and make a mockery of the federal commitment to protect children. Already, an entire generation of children has been subject to the ill-conceived policies underlying the AFDC look-back; America’s children cannot wait another day for federal finance reform of the child welfare system, they have waited long enough.

241. See generally Atkinson, *supra* note 20; *Hearing on Children Who Age out of the Foster Care System*, *supra* note 159.