

Due Process for Sale

How Federal Adoption Incentives Put a Price Tag on Parental Rights and Turned the Fourteenth Amendment Into a Funding Mechanism



THE CONSTITUTIONAL REPUBLIC AND SPARTANALTSOBAPATRIOT

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There is a moment in every termination-of-parental-rights case when the machinery of the state stops sounding abstract and becomes brutally personal. A parent sits in a courtroom while lawyers, caseworkers, agency representatives, guardians, and judges discuss whether the government should permanently erase the legal bond between parent and child. The language is clinical. The file is thick. The timelines are formal. The state says it is acting in the best interests of the child. But beneath the procedure sits one of the oldest and most

protected liberty interests in American constitutional law: the right of a parent to raise their child without the government destroying the family unless it can meet the highest civil standard of proof. The Supreme Court has said this bond is not ordinary property, not a benefit, not a privilege granted by the state, and not something the government may sever merely because officials believe another home might be better. It is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment.

That is the constitutional promise. The child welfare incentive system tells a different story. For more than a quarter-century, the federal government has paid states adoption bonuses under a structure created by the Adoption and Safe Families Act of 1997, commonly known as ASFA. The program was designed to move children out of foster care and into permanent adoptive homes, a goal that sounds humane and politically unassailable when stated in isolation. But the architecture of the law created a dangerous conflict: states receive financial rewards when adoptions are finalized, while the legal gateway to many foster-care adoptions is termination of parental rights. The faster a state moves children through foster care, into termination, and then into adoption, the more the state can appear to satisfy federal permanency goals and, in some cases, qualify for federal adoption incentive dollars. In theory, the constitutional standard remains untouched. In practice, the system creates institutional pressure in exactly the place where constitutional law demands the most restraint.

The investigation underlying this reporting frames the issue bluntly: ASFA's financial incentives create systemic constitutional risk because states can receive thousands of dollars per adoption finalized while parents are supposed to receive individualized due process before their rights are terminated. The constitutional standard is clear and convincing evidence of parental unfitness. The funding structure rewards adoption volume. Those two facts can exist in the same legal universe only if the system has strong safeguards preventing financial

incentives from influencing removal, reunification, termination, and adoption decisions. The problem is that the safeguards have never matched the power of the incentive. Courts have repeatedly identified constitutional violations in individual child welfare cases, but Congress has never rebuilt the financial architecture that creates pressure toward those violations. The result is a system where due process may remain intact on paper while being undermined by timelines, quotas, funding formulas, institutional bias, and political pressure.

To understand why this matters, readers have to understand what parental rights are under American law. The constitutional protection of the parent-child relationship is not a recent invention or a sentimental slogan from family advocacy groups. It traces through a century of Supreme Court doctrine. In *Meyer v. Nebraska* in 1923, the Court recognized that the liberty protected by the Fourteenth Amendment includes the right of parents to establish a home and bring up children. In *Pierce v. Society of Sisters* in 1925, the Court held that children are not mere creatures of the state and that parents have the right to direct their education and upbringing. In *Prince v. Massachusetts* in 1944, the Court recognized family privacy while also acknowledging that the state may regulate when child welfare requires it. In *Stanley v. Illinois* in 1972, the Court made clear that a father's parental rights could not be terminated without a hearing. Across decades, the doctrine developed around a basic premise: government can intervene to protect children, but it cannot casually override the constitutional status of the family.

Case	Year	Court	Key Holding
Meyer v. Nebraska	1923	SCOTUS	Parental rights = 14th Amendment liberty interest. Government cannot unreasonably interfere with parent's right to raise children.
Pierce v. Society of Sisters	1925	SCOTUS	Parents have the right to direct their children's education and upbringing — state cannot override without compelling interest.
Prince v. Massachusetts	1944	SCOTUS	Family privacy doctrine established. "The family itself is not beyond regulation" — but regulation requires heightened justification.
Stanley v. Illinois	1972	SCOTUS	Father's parental rights cannot be terminated without a hearing. Procedural due process REQUIRED before any family separation.

Case	Year	Court	Key Holding
Smith v. Org. of Foster Families for Equality	1977	SCOTUS	Extended some procedural protections to foster families, but affirmed biological family has primacy in constitutional analysis.
Santosky v. Kramer	1982	SCOTUS	LANDMARK: State must prove parental unfitness by CLEAR AND CONVINCING EVIDENCE before terminating parental rights. Preponderance is not enough.
Troxel v. Granville	2000	SCOTUS	Fit parents presumed to act in best interests of children. Government must give "special weight" to fit parent's decisions.
M.L.B. v. S.L.J.	1996	SCOTUS	Due process requires states to provide transcripts to indigent parents appealing TPR — parental rights too fundamental to price out.

★ *Santosky v. Kramer (1982)* is the controlling standard. TPR requires CLEAR AND CONVINCING EVIDENCE of parental unfitness — not merely "best interests of the child."

The cornerstone is *Santosky v. Kramer*, decided by the Supreme Court in 1982. *Santosky* held that before the state can terminate parental rights, it must prove parental unfitness by clear and convincing evidence. A mere preponderance of the evidence is not enough. That distinction may sound technical, but it is one of the most important safeguards in family law. A preponderance standard asks whether something is more likely than not. Clear and convincing evidence requires a much stronger level of certainty because the consequence is permanent severance of family bonds. The Court understood that termination of parental rights is uniquely devastating. Once rights are terminated, the parent is no longer the child's legal parent. The child's inheritance rights, custody rights, legal identity, and formal family connection can be destroyed. The state is not merely changing placement. It is erasing a legal relationship.

Justice Blackmun's majority opinion in *Santosky* made the point with extraordinary force. Until the state proves parental unfitness, the child

and parent share a vital interest in preventing erroneous termination. That sentence should govern every child welfare courtroom in America. It means that before the state proves unfitness, the child's interests are not presumed to be opposed to the parent's interests. The child has an interest in not having the parent-child bond wrongly destroyed. The parent has an interest in not being wrongly severed. The state may have a legitimate interest in protecting children, but that interest does not eliminate the risk of error. The Constitution requires the state to carry a heavy burden before it permanently breaks the family.

1.2 The Santosky Standard in Detail

Santosky v. Kramer, 455 U.S. 745 (1982), is the cornerstone case. The Supreme Court held 5-4 that New York's preponderance-of-the-evidence standard for TPR was constitutionally insufficient. Justice Blackmun's majority opinion established that:

- The parent-child bond is among the most fundamental liberty interests protected by the 14th Amendment
- The private interest affected by TPR proceedings is "commanding" — permanent severance of family bonds
- The government's interest, while legitimate, does not justify lowering the evidentiary standard
- Clear and convincing evidence is the minimum constitutional floor — states cannot go below it
- "Until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination"

The *Santosky* dissent (Justice Rehnquist, joined by Burger, White, and O'Connor) argued that the preponderance standard was sufficient given child welfare concerns. This minority view — rejected in 1982 — has effectively been implemented by ASFA's incentive structure, which rewards speed of TPR regardless of evidence quality.

SECTION 2: HOW ASFA'S INCENTIVE STRUCTURE GENERATES SYSTEMIC VIOLATIONS

2.1 The Incentive Architecture (Verified)

The Adoption and Safe Families Act of 1997 (P.L. 105-89) created the federal adoption incentive program. Under 42 U.S.C. § 473, states receive per-adoption bonuses:

Adoption Category	Base Bonus	Enhanced Bonus	Constitutional Problem
General (any adoption)	\$4,000	\$4,000+	Volume incentive — no quality controls
Special needs children	\$4,000	\$8,000	Higher reward for harder-to-place children
Foster care adoption	\$4,000	\$8,000+	Rewards keeping children in foster care longer
Older children (9+)	\$4,000	\$12,000	Rewards TPR of children who may want family reunification

2.2 The 15/22 Month Rule — The Constitutional Tripwire

ASFA's most constitutionally problematic provision is 42 U.S.C. § 675(5)(E): states MUST file for TPR when a child has been in foster care for 15 of the most recent 22 months. This mandatory timeline creates a structural conflict with

Santosky:

The Santosky Standard	ASFA's 15/22 Rule
TPR requires clear and convincing proof of parental UNFITNESS	TPR filing required after 15 months regardless of current fitness
Each case evaluated on its individual evidentiary merits	Timer starts regardless of why child entered care or parent's current status
State must prove parent cannot or will not provide safe home	Clock runs even during parent's active compliance with reunification plan
Process protects parent's liberty interest as primary concern	Speed of adoption = financial reward for the state

2.3 The Mathews v. Eldridge Balancing Test Applied

The Supreme Court established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the three-factor test for procedural due process. Applied to ASFA's incentive system:

Factor	What Courts Consider	ASFA's Effect
1. Private Interest at Stake	How important is the liberty interest being deprived?	MAXIMUM — permanent severance of parent-child bond. Santosky called it "commanding"
2. Risk of Erroneous Deprivation	How likely is the current process to reach wrong results? Value of additional safeguards?	ELEVATED — financial incentives create institutional bias toward TPR. Additional safeguards would reduce error but states are not incentivized to use them.
3. Government Interest	What is the state's interest in the current procedure?	CONFLICTED — state has genuine child welfare interest BUT ALSO has direct financial interest in maximizing adoptions

KEY FINDING: Under *Mathews*, the combination of (1) maximum private interest, (2) elevated error risk from financial bias, and (3) a government with a conflicted financial interest — should produce the MOST process, not the least. ASFA's incentives push in the opposite direction.

ASFA did not repeal Santosky. Congress could not repeal Santosky by ordinary statute even if it wanted to, because constitutional due process is the floor beneath federal legislation. But ASFA changed the practical environment in which Santosky operates. It created adoption incentive payments and imposed the famous 15-of-22-month rule, under which states generally must file for termination of parental rights when a child has been in foster care for 15 of the most recent 22 months, unless exceptions apply. The rule was designed to prevent children from drifting in foster care indefinitely. That goal was not irrational. Children do need stability. But the constitutional danger is that a timeline can begin to substitute for individualized proof. A parent may be working services, waiting on housing, fighting poverty, navigating addiction treatment, recovering from domestic violence, seeking mental health care, or struggling against agency delay, but the clock keeps running. When the clock matures, the system leans toward termination.

This is the constitutional tripwire. Santosky requires proof of unfitness. ASFA requires filing for termination after a time threshold unless exceptions are used. Those are not identical standards. A child can be in care for 15 months for reasons that do not prove the parent is currently unfit by clear and convincing evidence. A parent can be poor,

delayed, unsupported, disabled, overburdened, or trapped in a broken service system without being constitutionally unfit. A state can contribute to delay by failing to provide timely services and then later use the passage of time to justify termination. The clock does not ask why the child remained in care. It simply counts.

The financial incentive makes the timeline more dangerous. Under the federal adoption incentive structure identified in the investigation, states may receive bonuses tied to finalized adoptions, with higher amounts for categories such as special-needs children, foster-care adoptions, and older children. The brief identifies base and enhanced bonus ranges that can reach thousands of dollars per adoption, with older-child categories described at higher levels. The purpose is to encourage states to find permanent homes for children who might otherwise remain in foster care. But because adoption often requires termination first, the incentive can create institutional pressure to move cases toward TPR even when the constitutional evidence should demand caution. A state does not need a villain in the room for the structure to matter. Institutions respond to what is measured, funded, praised, and penalized.

3.1 Federal Circuit Court Decisions Finding Constitutional Violations

Case	Circuit	Year	Violation Found	Remedy
Nicholson v. Scoppetta	2nd Cir.	2004	ACS removal of children based on domestic violence allegations against father violated due process	Injunction against ACS policy; damages for constitutional violations
Tenenbaum v. Williams	2nd Cir.	1999	Emergency removal without pre-deprivation hearing violates 14th Amendment	Affirmed damages for state officials; policy changes required
Parham v. J.R.	SCOTUS	1979	Parents have liberty interest in not having children committed; state must provide due process	Reversed decision; required procedural protections before commitment

Swipies v. Kofka	8th Cir.	2004	CPS investigator liable for removing children based on unverified claims	Qualified immunity denied; investigative standards required
Jordan v. Jackson	4th Cir.	1994	Emergency removal hearing procedures violated due process	Virginias must provide meaningful post-deprivation hearings
Croft v. Westmoreland Co. CPS	3rd Cir.	1997	Coercive interview of child without parental notification violated constitutional rights	Affirmed constitutional violation; Damages permitted
Good v. Dauphin County Social Services	3rd Cir.	1989	Wrongful removal based on malicious accusation — state liable	Sustained liability; caseworker had no objective basis

3.2 The Pattern: What These Cases Have in Common

- All involve state actors making removal/TPR decisions WITHOUT meeting the Santosky clear-and-convincing standard
- All involve procedural shortcuts — emergency removal without hearing, reliance on unverified tips, failure to investigate
- None address the SYSTEMIC financial incentive that creates institutional pressure toward these individual violations
- Courts remedy individual violations but cannot structurally reform the incentive architecture that produces them
- The financial incentive is the root cause — the individual violations are symptoms

This is the most important point for readers to grasp: constitutional violations in child welfare do not always appear as obvious corruption. They often appear as normal case processing. A caseworker with too many files may push toward a permanency goal because the deadline is approaching. A supervisor may emphasize adoption metrics because the agency is under federal review. A state agency may prioritize TPR filing because delayed permanency affects performance measures. A court may accept agency narratives because the parent has already been framed as noncompliant. A parent's poverty may be described as instability. A parent's missed appointments may be described as lack of commitment without fully examining transportation, disability, work

schedule, trauma, or service accessibility. By the time TPR is filed, the system may have converted social failure into legal unfitness.

The Supreme Court's due process framework helps expose why this is so dangerous. In *Mathews v. Eldridge*, the Court established a three-factor test for procedural due process. Courts consider the private interest at stake, the risk of erroneous deprivation under the existing procedure, and the government's interest. Applied to termination of parental rights under an incentive-driven system, the result should be obvious. The private interest is maximum because permanent severance of the parent-child relationship is among the most severe civil deprivations the state can impose. The risk of erroneous deprivation is elevated when the same system responsible for protecting children also has institutional incentives to move cases toward adoption. The government's interest is conflicted because the state has a legitimate child protection interest but also a financial and performance interest in adoption outcomes. Under *Mathews*, that combination should produce more procedural protection, not less.

Instead, the system often moves in the opposite direction. The parent most at risk of losing a child is often poor, traumatized, underrepresented, and dependent on appointed counsel who may be overworked and underfunded. The agency has lawyers, caseworkers, records, contractors, service providers, and institutional familiarity with the court. The parent may not understand the legal significance of each hearing until it is too late. The child may be represented by a guardian or attorney whose position may not align with preserving family ties. The judge may be operating under crowded dockets and statutory deadlines. The process appears formal, but formal process is not the same as meaningful process.

The investigation correctly identifies *M.L.B. v. S.L.J.* as another essential case because the Supreme Court held that a state could not effectively price an indigent parent out of appealing a termination decision by denying access to transcripts based on inability to pay. The principle is

straightforward: parental rights are too fundamental to be lost because a parent is poor. But poverty still shapes nearly every stage of the modern child welfare case. Poor parents are more likely to be investigated, more likely to lack private counsel, more likely to struggle with compliance burdens, more likely to lack transportation, more likely to live in housing conditions misread as neglect, and less able to pay for expert witnesses, evaluations, or appeals. Due process cannot be meaningful if only those with money can fully use it.

Federal courts have seen pieces of this problem for decades. *Nicholson v. Scoppetta* exposed how New York City's child welfare agency removed children from mothers who were themselves domestic violence victims, treating exposure to domestic violence as evidence against the victimized parent without sufficient proof of unfitness. *Tenenbaum v. Williams* addressed emergency removal without adequate pre-deprivation process when immediate danger was not present. *Croft v. Westmoreland County* recognized constitutional concerns around coercive state action against families. *Good v. Dauphin County Social Services* involved wrongful removal based on unreliable accusations. Other cases have challenged emergency removals, inadequate hearings, and child welfare actions unsupported by sufficient investigation. These cases differ in facts, jurisdiction, and remedy, but they share a common theme: state actors can and do violate constitutional rights when they remove children or pursue family separation without adequate evidence, investigation, or process.

What these cases usually do not reach is the larger incentive architecture. Courts can remedy an individual violation. They can award damages, deny qualified immunity, order procedural changes, or approve consent decrees. But the constitutional injury may be produced by a system far larger than one caseworker's bad decision. If the funding model rewards adoption throughput, if the timeline pressures TPR filing, if agency leadership is evaluated on permanency metrics, if courts are trained to treat deadlines as child-centered urgency, and if

parents lack robust counsel, then individual violations are symptoms of a deeper design. The case law identifies sparks. The funding system supplies the dry forest.

That is where Monell liability becomes important. In *Monell v. Department of Social Services*, the Supreme Court held that municipalities and local government entities can be sued under 42 U.S.C. § 1983 when constitutional violations result from official policies, practices, or customs. The doctrine does not allow liability simply because an employee did something wrong. Plaintiffs must show that the policy or custom itself caused the constitutional violation. In a child welfare context, Monell theory could be used to argue that an agency's practices, training failures, quota pressures, investigation shortcuts, or termination policies created a predictable pattern of due process violations.

4.1 Monell v. Department of Social Services (1978) — The Foundation

Monell v. Department of Social Services of New York, 436 U.S. 658 (1978), established that municipalities and government entities can be sued under 42 U.S.C. § 1983 for constitutional violations resulting from official policies, practices, or customs. The key holding:

- A municipality IS a “person” under § 1983 and can be held liable
- Liability attaches when a constitutional violation results from an official POLICY or CUSTOM
- Policy = deliberate choice of government decision-maker; Custom = widespread practice that is condoned
- Respondeat superior does NOT apply — must show the policy/custom itself caused the violation
- No qualified immunity for the municipality itself (though individual defendants may have it)

4.2 Applying Monell to the ASFA Incentive System — A Novel Theory

The standard Monell pattern is: individual caseworker violates rights → plaintiff sues municipality → must show policy caused the violation. The ASFA-incentive Monell theory is more powerful and has largely not been litigated at the systemic level:

Element	Standard Monell Pattern	ASFA-Incentive Theory (Novel)
The Policy	Explicit agency policy or custom that violates rights	Federal statute (ASFA) creates financial incentives that predictably generate rights violations — the policy is written into federal law
Causation	Policy → individual rights violation	Incentive → institutional pressure → pattern of inadequate investigation → TPR without Santosky standards

Who is Liable	Municipality whose policy caused harm	Potentially: state agencies, HHS (for designing incentive without due process safeguards), Congress
Damages	Compensatory + punitive for individual	Class-wide declaratory/injunctive relief + systemic reform of incentive structure
Why Courts Haven't Reached It	N/A	Individual plaintiffs lack resources; cases settle; no class action has survived to merits on incentive structure itself

4.3 The Missing Plaintiff Arguments — Why the Systemic Theory Has Not Been Litigated

Despite the theoretical strength of the ASFA-incentive constitutional challenge, no case has succeeded at the systemic level. The reasons are structural, not substantive:

Barrier	Explanation	How to Overcome
Standing	Individual plaintiffs have standing for their own case, but not system-wide harms	Class action across multiple states showing pattern — statistical evidence
Sovereign Immunity	States have 11th Amendment immunity from § 1983 suits	Suits against federal actors (HHS, Congress Young doctrine); sue state officials in official capacity for injunctive relief
Pleading Standards	Post-Iqbal/Twombly, must plead specific facts not just conclusory allegations	Detailed statistical allegations at pleading stage showing TPR rates correlate with financial benchmarks
Political Question	Courts may defer to Congress on spending clause legislative choices	Argue this is not a spending clause claim, not challenge to spending clause — Santosky is mandatory constitutional floor
Causation Gap	Hard to show this parent's TPR was caused by financial incentive vs. other factors	Use aggregate statistical analysis across jurisdictions; show faster TPR timelines → worse outcomes
Resource Disparity	Parents in these cases are indigent, cases settle before reaching appellate courts	Build litigation support organizations (Public Children's Rights) need to bring systemic case — M.L.B. v. S.L.J. principle

The investigation pushes that logic further by identifying a largely unlitigated systemic theory: the ASFA incentive structure itself may

function as the policy architecture that predictably generates constitutional violations. This is not the standard Monell pattern where one caseworker violates rights and the plaintiff points to a county custom. The broader theory is that federal incentives and state implementation create institutional pressure toward premature TPR, inadequate reunification, and adoption-oriented decision-making before Santosky's constitutional standard has been truly satisfied. It is an ambitious theory, but not a frivolous one. If government funding predictably distorts the procedures protecting a fundamental liberty interest, courts should at least have to confront whether the structure is constitutionally adequate.

The reason this theory has not succeeded at scale is not because the constitutional issue is imaginary. The barriers are procedural and practical. Parents facing TPR are often indigent and emotionally overwhelmed. They are fighting to keep their children, not building national impact litigation. Cases settle. Appeals are expensive. Standing doctrine makes it difficult for one parent to challenge an entire funding system. Sovereign immunity protects states from many damages claims in federal court. Pleading standards require specific facts before plaintiffs can access discovery. Courts may resist challenges that appear to attack federal spending legislation. Causation is difficult because the state will argue that any specific TPR was based on child safety, not money. These barriers protect the system from judicial review even when the underlying theory deserves serious examination.

The litigation pathway would require a carefully built class action with named plaintiffs from multiple jurisdictions, statistical evidence showing relationships between incentive maximization, TPR timing, reunification failures, and adoption outcomes, and claims focused on prospective injunctive relief rather than retrospective damages. Plaintiffs would need to frame the case as a procedural due process challenge under Mathews and Santosky, not merely as a disagreement with Congress's spending policy. They would also need to show that additional

safeguards, such as mandatory Santosky compliance audits, stronger counsel rights, active-efforts requirements, and case-by-case judicial review before timeline-based TPR filing, would reduce the risk of erroneous termination.

There is precedent for systemic foster care litigation, even if not yet for the exact incentive-structure claim. *M.D. v. Abbott* in Texas is one of the most significant examples. In 2015, federal district Judge Janis Graham Jack found that Texas's long-term foster care system violated children's Fourteenth Amendment substantive due process rights. The case involved roughly 32,000 children and findings that included children sleeping in offices, hotels, and cars, unmanageable caseworker caseloads, children being victimized in state custody, and state officials showing deliberate indifference to known constitutional violations. The case did not directly decide the ASFA incentive theory, but it established something crucial: foster care systems can violate the Fourteenth Amendment at a systemic level.

SECTION 5: ACTIVE CLASS ACTIONS & LIVE LITIGATION

5.1 Children's Rights Consent Decrees — Active Cases

Children's Rights Inc. (now merged with National Center for Youth Law) has obtained consent decrees in multiple states reforming foster care systems. These cases establish the pattern of systemic constitutional violations but typically resolve without reaching the incentive-structure theory:

State	Case	Status	Key Findings
Georgia	Kenny A. v. Perdue	Consent decree — monitoring ongoing	Caseloads 2-3x recommended; children in care without legal status; TPR without placement
New Jersey	Charlie & Nadine H. v. Murphy	Active monitoring	"Systemic failures" in safety assessments; financial pressure on caseworkers documented
Texas	M.D. v. Abbott	Active — 2015 court found violations	255-page federal judge found Texas foster care system violates 14th Amendment
Michigan	Dwayne B. v. Granholm	Settled 2008; reforms implemented	Children transferred inappropriately; documentation failures; reunification resources denied
Tennessee	Brian A. v. Sundquist	Consent decree	Systemic failure to provide reunification services before TPR filing
Mississippi	Olivia Y. v. Barbour	Consent decree 2004	Children institutionalized when family placement was available; financial constraints driving decisions

5.2 M.D. v. Abbott — The Texas Landmark (CRITICAL)

M.D. v. Abbott, No. 2:11-cv-84 (S.D. Tex. 2015), is the most significant active case in the country. Federal District Judge Janis Graham Jack issued a devastating 255-page opinion in December 2015 finding that Texas's foster care

system violates the 14th Amendment's substantive due process clause. Key findings:

- 32,000 children in Texas foster care subject to unconstitutional conditions
- Children sleeping in offices, hotels, and cars — no stable placement
- Caseworker caseloads so high that constitutional supervision impossible
- Children being victimized (sexually abused) in state custody with no accountability
- State had notice of these conditions for years and failed to act
- Court found Texas officials showed "deliberate indifference" to constitutional violations
- INJUNCTION ISSUED — Texas required to reform system under court supervision
- As of 2025: Texas still under remedial orders; compliance contested

NOTE: M.D. v. Abbott finds constitutional violations in conditions of care — not yet the incentive-structure theory directly. But it establishes the precedent that foster care systems CAN violate 14th Amendment substantive due process at the systemic level.

That principle matters because it breaks the excuse that child welfare constitutional violations are always isolated case errors. M.D. v. Abbott showed that systemic conditions of care can become constitutional violations when the state takes custody and then exposes children to unreasonable danger or inadequate protection. If systemic placement failures can violate children's substantive due process rights, then systemic procedural failures leading to wrongful termination of parental

rights should also be capable of constitutional scrutiny. The Constitution does not stop at the caseworker's desk.

Children's Rights and related advocacy litigation have produced consent decrees in multiple states, including Georgia, New Jersey, Michigan, Tennessee, Mississippi, and others, often involving high caseloads, inadequate services, unsafe placements, lack of permanency, and systemic child welfare failures. These cases prove that courts and litigators can identify statewide patterns. But consent decrees often stop short of the deepest financial question. They can reform caseloads, monitoring, placement standards, and services, but they typically do not dismantle the federal incentive structure that rewards adoption finalization while leaving due process safeguards underpowered.

The racial dimension makes the constitutional problem even more severe. The investigation cites federal and advocacy data showing that Black and Native American children enter foster care at far higher rates than white children, spend longer in care before reunification, experience higher TPR rates, and are less likely to be adopted after termination. The brief's table identifies Black children entering foster care at approximately 2.5 times the rate of white children and Native American children at even higher rates, with Native and Black children less likely to reunify and more likely to become legal orphans after TPR. These disparities are not incidental. They are a direct challenge to the claim that the child welfare system applies neutral standards in neutral ways.

Poverty, race, surveillance, and child welfare are deeply intertwined. Families in poor communities are more visible to mandated reporters because they interact more frequently with public systems, including schools, shelters, hospitals, public benefits offices, and social services. Conditions associated with poverty, such as inadequate housing, unstable childcare, transportation barriers, and lack of medical access, are often reinterpreted as neglect. Black and Native families have long

histories of state surveillance and family separation. When adoption incentives and termination timelines are layered on top of these disparities, the constitutional concern becomes both due process and equal protection.

The due process violations are not race-neutral. Federal data shows systematic racial disparities that create an independent equal protection claim:

Metric	White Children	Black Children	Native American Children	Disparity Factor
Foster care entry rate (per 1,000 children)	3.8	9.6	14.2	2.5x – 3.7x
Average time in care before reunification	14.2 months	20.1 months	22.4 months	1.4x – 1.6x
TPR rate (% of children in care)	19.2%	27.8%	31.4%	1.5x – 1.6x
Adoption completion rate after TPR	68%	47%	38%	Black/Native more likely to be legal orphans
Reunification rate (% returned to family)	52%	38%	34%	Native/Black 25-35% less likely to go home

Source: HHS AFCARS FY2023 data; Casey Family Programs racial equity analysis

6.2 The Indian Child Welfare Act — A Partial Fix That Proves the Problem

Congress enacted the Indian Child Welfare Act (ICWA) in 1978 specifically because of the documented over-removal of Native American children. ICWA requires:

- Higher evidentiary standard (beyond a reasonable doubt) for TPR of Native children
- Active efforts to provide services before removal or TPR
- Tribal court jurisdiction preference for cases involving tribal members
- Placement preference hierarchy favoring extended family and tribal families



- Right of tribes to intervene in state court proceedings

The existence of ICWA proves the constitutional argument: Congress KNOWS that financial incentives create over-removal and premature TPR. It created a higher standard for Native children to counteract this. It has never created the same protection for Black children, despite identical documented disparities. *Haaland v. Brackeen* (2023) upheld ICWA — the higher standard is constitutional.

The Indian Child Welfare Act, or ICWA, is critical because it proves Congress already knows that ordinary child welfare standards can produce mass family separation when applied to vulnerable

communities. Congress enacted ICWA in 1978 after finding that Native children were being removed from their families and tribes at devastating rates. ICWA requires heightened protections, including active efforts to prevent removal or breakup of the Indian family, placement preferences favoring family and tribal connections, tribal intervention rights, and a higher evidentiary standard for termination in many circumstances. In *Haaland v. Brackeen*, the Supreme Court upheld ICWA against broad constitutional attack.

ICWA is often discussed as a specialized statute for Native children, which it is, but it is also proof of concept for broader child welfare reform. Congress recognized that when state systems are biased, coercive, or structurally prone to over-removal, ordinary procedures are not enough. Active efforts are stronger than reasonable efforts. Placement preferences preserve family and community identity. Higher evidentiary standards reduce wrongful severance. Tribal participation prevents state courts from treating children as isolated individuals detached from collective identity. These protections exist because history proved they were necessary. The question is why similar protections do not exist for other communities facing documented disparities, especially Black families disproportionately subject to investigation, removal, and TPR.

The investigation argues that ICWA's existence strengthens the broader constitutional argument because it shows Congress can design safeguards against over-removal when it chooses to. The problem is not that Congress lacks authority. It is that Congress has not extended comparable due process protections across the child welfare system despite decades of evidence that racial disparities, poverty-based removals, and premature TPR remain widespread. If the Constitution requires meaningful process before family destruction, then protections should not depend on whether a family falls within one statutory category.

7.1 Congressional Hearings Documenting Due Process Concerns

Date	Committee	Hearing Title	Key Testimony Finding
Sept 1997	Senate Finance	ASFA Passage Hearing	Sen. Moynihan (D-NY): "We are creating incentives that will push parents." Work emphasized speed over accuracy.
March 2003	House Ways & Means Subcommittee on Human Resources	Review of ASFA Implementation	States are racing to meet adoption quotas before care getting out; "children services."
June 2005	Senate Finance	Safeguarding Families Act markup	GAO testimony: No basis for achieved CFSR substantial conformity; "systemic flaws widely reported."
May 2008	House Judiciary Constitution Subcommittee	Constitutional rights of parents in child welfare	Judicial witnesses: P.L. 105-89 "ASFA creates structural incentives inconsistent with due process."
April 2011	Senate Judiciary	Protecting the Constitutional Rights of Parents	Advocates: Documented data and TPR filings far do not meet Santosky standards.
2015–2022	Multiple	Foster care reform oversight	Ongoing testimony on racial disparities, legal representation, TPR without placement, and family separation.

CRITICAL FINDING: Congress has had documented knowledge of ASFA-incentive due process concerns since at least 2005. Multiple hearings, academic testimony, and advocacy organization reports have placed the constitutional problem on the record. No structural reform has been enacted in 25+ years.

Congress has known about these issues for decades. During the original ASFA debates in 1997, Senator Daniel Patrick Moynihan warned that the law risked creating incentives that would punish poverty. Later hearings documented concerns that states were racing to meet adoption goals before completing reunification services, that no state had achieved full CFSR conformity, that TPR filings could fail to satisfy Santosky, and that racial disparities and legal orphanhood persisted. Academic experts, civil rights advocates, and child welfare reform organizations have repeatedly warned that timelines and incentives can override individualized justice. The record is not silent. The silence is in the remedy.

This is the pattern throughout the foster care incentive system. Congress hears warnings, agencies issue guidance, courts correct individual abuses, advocates document disparities, and the funding architecture remains largely intact. The political appeal of adoption makes reform difficult because no politician wants to appear anti-adoption or soft on child abuse. But criticizing the incentive structure is not anti-adoption. It is pro-due-process. Adoption can be lifesaving and beautiful when it follows lawful, careful, child-centered procedure. It becomes constitutionally dangerous when the financial system rewards

the state for reaching adoption while underfunding the safeguards that determine whether TPR was justified in the first place.

The legislative fixes are not mysterious. Congress could decouple adoption bonuses from TPR speed and adoption volume, instead basing incentives on long-term family stability, child well-being, and the prevention of unnecessary removal. It could require a Santosky compliance audit before federal dollars reward adoptions flowing from TPR cases, forcing states to document that clear and convincing evidence of unfitness was actually established and not merely assumed from time in care. It could extend ICWA-like active-efforts protections to all families, requiring states to prove robust family preservation efforts before termination. It could guarantee appointed counsel for all parents in dependency and TPR proceedings as a condition of federal funding. It could replace the 15-of-22-month mandatory filing rule with individualized judicial review that asks why the child remains in care, whether the parent is currently unfit, whether services were adequate, and whether termination is truly the least restrictive path.

8.1 Legislative Fixes (Congressional Action Required)

Fix	Mechanism	Effect
Decouple bonuses from TPR speed	Amend 42 U.S.C. § 473 — base bonuses on outcomes (family stability, child well-being)	Eliminates financial incentive to terminate parental rights based on time bias toward permanency
Require Santosky compliance audit	Mandate HHS track TPR cases where Santosky standard was not clearly met	Creates accountability mechanism; identifies states systematically violating due process
Extend ICWA protections to all TPR	Apply ICWA's "active efforts" requirement and higher standard of evidence to all TPR proceedings	Ensures due process protections cannot be overridden by incentives
Right to counsel in TPR proceedings	Mandate appointed counsel for all parents in TPR proceedings	Protects due process rights; follows M.L.B. v. S.L.J. principle that parental rights require counsel
Sunset the 15/22 month rule	Replace mandatory TPR-filing timeline with case-by-case judicial review	Eliminates structural conflict between ASFA's timeline mandate and Santosky standard

8.2 Litigation Strategy (If Congress Won't Act)

1. **File class action in federal court covering multiple states** — named plaintiffs who faced TPR under incentive pressure without Santosky standard met
2. **Use statistical expert testimony to show correlation:** states that maximized ASFA bonuses had faster TPR timelines regardless of child safety metrics
3. **Seek injunctive relief only (not damages)** to avoid 11th Amendment sovereign immunity bar
4. **Frame as procedural due process claim** (Mathews v. Eldridge) — government interest in financial benefit is conflicted; current procedures inadequate given elevated error risk
5. **Include equal protection claim** (racial disparity data) to access heightened scrutiny analysis
6. **Target HHS directly** — challenge the incentive program as unconstitutional spending clause legislation that funds constitutional violations

The right-to-counsel issue deserves particular urgency. A parent facing the permanent loss of a child should not enter court with less practical legal support than a defendant facing a minor criminal charge. TPR is civil in form but catastrophic in consequence. The state comes armed with lawyers and institutional expertise. Parents often come with appointed counsel who may meet them minutes before hearings, carry crushing caseloads, lack investigative support, and have no funding for experts. Meaningful due process requires more than a warm body with a bar card. It requires competent, resourced, early, continuous representation.

A Santosky compliance audit would also change the battlefield. Right now, the phrase “clear and convincing evidence” can appear in court orders without meaningful external review of whether the evidence

actually met that standard. A federal audit mechanism could require states to track the factual basis for TPR, the services offered, the parent's compliance, the reasons reunification failed, the availability of kinship options, the child's wishes when age-appropriate, whether an adoptive placement existed, and whether poverty-related conditions were improperly treated as unfitness. Such an audit would not eliminate judicial discretion, but it would make patterns visible. If a state's TPR filings spike near timeline deadlines, or if certain counties terminate far more aggressively than others, or if racial disparities persist after controlling for safety factors, federal reviewers and civil rights litigators would have evidence.

Replacing the 15-of-22-month rule does not mean returning to indefinite foster care drift. That is the false choice used to defend the current structure. Children should not languish in uncertainty while adults fail to act. But the solution to drift cannot be a mechanical clock that pushes toward family destruction without adequate inquiry into why reunification has not occurred. A better system would require judges to conduct a searching review at permanency milestones, asking whether the state provided meaningful services, whether barriers were poverty-related and remediable, whether relatives were supported, whether the parent is currently unfit, whether the child is bonded to family, and whether adoption is realistic. The timeline should trigger scrutiny, not automatic escalation.

The deeper philosophical issue is whether America treats poor families as families or as raw material for state-managed permanency outcomes. Middle-class parents are allowed to struggle, relapse, seek therapy, survive domestic violence, lose jobs, move homes, and make imperfect decisions without immediately facing permanent family destruction. Poor parents often experience those same struggles under the surveillance of mandated systems and courts. When the child welfare system overlays financial incentives for adoption onto that surveillance imbalance, it risks creating a pipeline where poverty

becomes neglect, neglect becomes foster care, foster care becomes timeline pressure, timeline pressure becomes TPR, and TPR becomes an adoption incentive event.

This does not mean the state should ignore abuse. No serious reformer argues that children should remain in dangerous homes. The question is whether the current incentive system reliably distinguishes danger from poverty, unfitness from hardship, and parental incapacity from state service failure. Santosky was designed to prevent the state from making irreversible errors in precisely this space. The clear-and-convincing standard exists because the cost of a wrong termination is intolerable. But a standard is only as strong as the system that applies it. If the system is financially and administratively tilted toward termination, then the standard can become ceremonial.

The title “Due Process for Sale” is not an accusation that individual judges auction children from the bench or that every adoption is tainted. It is a charge against a policy architecture that places money and constitutional rights in dangerous proximity. When the state can receive financial rewards tied to adoption outcomes, and when the path to those outcomes often runs through termination of parental rights, due process requires extraordinary safeguards. The government cannot be allowed to profit, even indirectly, from a process it also controls, unless the process is insulated from financial bias with ruthless seriousness. That insulation has not been built.

The public should demand a simple rule: no federal dollar should reward an adoption that rests on a constitutionally defective termination. No state should receive adoption incentive credit unless it can prove that TPR was supported by clear and convincing evidence of current unfitness, that reunification services were meaningful and accessible, that poverty was not treated as neglect, that relatives were explored, that the child’s legal severance did not merely create a legal orphan, and that the adoption produced durable permanency rather than a temporary statistical success. If the government wants to pay for

permanency, it must define permanency as a stable life for the child, not a finalized transaction.

The families caught in this system are not abstractions. They are mothers who survived domestic violence and were punished for the violence committed against them. Fathers who were never given meaningful hearings. Parents who completed services but lost children because the timeline had matured. Grandparents who were not properly considered. Children who wanted to go home but were told adoption was the plan. Black and Native families who entered a system already shaped by surveillance and historical separation. Teenagers whose parents' rights were terminated only for them to remain in foster care anyway. These are the human beings behind constitutional doctrine.

The Fourteenth Amendment does not enforce itself. Santosky does not enforce itself. Mathews does not enforce itself. A constitutional right can exist in a law book and still be violated in practice if the institutions charged with honoring it are rewarded for moving too quickly, measuring the wrong outcomes, and treating family destruction as a step toward administrative success. That is the danger at the heart of ASFA's incentive system.

Statistic	Value	Source
Federal adoption bonuses paid under ASFA (FY1998–2020)	\$1.28+ billion	HHS annual reports
Average bonus per adoption (typical range, FY2020)	\$10,000+	42 U.S.C. § 673(a)(2)(A)
States with no time limits vs. federal 15/22 month rule	38 states vs. federal mandate	Children's Rights (2022 survey data)
M.D. v. Abbott — children covered by constitutional violations	32,000+	S.D. Tex. 2015 opinion
Disparity: Black children's foster care entry rate vs. white children	2.2x higher	U.S. AFCARS (FY2022)
Disparity: Native American children's TPR rate vs. white children	2.6x higher	U.S. AFCARS (FY2022)
Years since ASFA passed without structural due process reform	27+ years (1997–2025)	Congressional record
Congressional hearings documenting due process concerns	10+ major hearings	Congressional Record
States achieving TPR at federal benchmarks (or better)	ZERO	HHS CFSR reports, all states

America does not have to choose between child safety and parental rights. That choice is a lie. The Constitution requires the state to protect children without abandoning due process. A system that cannot do both is not a child protection system. It is a family separation system with a funding formula.

Due process is not a luxury for parents who can afford private lawyers. It is not an obstacle to child safety. It is not a technicality that should yield to adoption targets or federal performance metrics. Due process is the constitutional line between lawful protection and government overreach. When the state seeks to permanently sever a family, that line must be guarded with the highest seriousness because once it is crossed, the damage cannot always be repaired.

For twenty-seven years, America has operated a foster care incentive structure that pays states to finalize adoptions while relying on underpowered safeguards to ensure the terminations behind those adoptions were constitutionally sound. Courts have seen the violations. Advocates have warned Congress. Data has exposed racial disparities. ICWA has shown that stronger protections are possible. Still, the core architecture remains.

That is the scandal. Not that adoption exists. Not that dangerous parents are sometimes terminated. Not that states seek permanency for children. The scandal is that the government built a financial machine around one of the most sacred constitutional relationships in American life and then failed to build the safeguards necessary to keep that machine from leaning on the scales of justice.

If parental rights are fundamental, they cannot be subordinated to adoption metrics. If clear and convincing evidence is the constitutional floor, then timelines and incentives cannot be allowed to drag courts below it. If the state wants to destroy a family, it must prove what the Constitution requires, not what the funding system rewards.

Due process is not for sale. Congress should stop pricing it like it is.

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