THE QUIET "WELFARE" REVOLUTION: RESURRECTING THE FOOD STAMP PROGRAM IN THE WAKE OF THE 1996 WELFARE LAW

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Cash-assistance programs have long been a focus of both liberal and conservative efforts to make symbolic statements. In this regard, the 1996 dismantlement of federal entitlement to cash assistance was nothing new. Although the 1996 welfare law also made deep cuts to in-kind programs, such as food stamps, these programs had less symbolic significance and hence were less often the target of public attacks. This lower political profile gave the Food Stamp Program room to find positive ways to adapt to the key themes that drove the enactment of the 1996 welfare law.

In the 1996 welfare law's wake, the Food Stamp Program might have emulated the transformation of cash-assistance programs. Alternatively, it might have adopted a defensive posture. Instead, its supporters transformed it from an adjunct to discredited cash welfare programs into a stable support for low-wage workers. This both helped meet a crucial need of low-income families and improved the program's political appeal. It also demonstrated that the goals of promoting work, devolving authority to states, and safeguarding program integrity can be achieved in positive ways.

The new Food Stamp Program promotes work through incentives more than sanctions. Its incentive structure changed to encourage states to improve access for low-wage workers, and states received flexibility to make those kinds of innovations rather than ones that would destabilize the program's national benefit structure. Additionally, enforcement efforts deemphasized minor accounting issues having little bearing on the program's integrity. Ultimately, these efforts were so successful that President Bush and conservative Republican senators pushed substantial benefit increases through Congress. This success may be a model for the survival and expansion of other programs.

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Public-benefits law has long been a complex fusion of expressive and functional elements. When a broad swath of policymakers and the general public focus on public benefits, they tend to set policy in order to make symbolic statements about their vision of a moral society. These symbolic rules, however, often prove inefficient and unadministrable. As a result, once the political spotlight shifts to other issues, administrators and the handful of legislators with consistent interest in the well-being of low-income people often craft a very different kind of rule to make programs work.

During the nineteenth century, the poorhouse expressed society's conviction that poverty was the result of moral failings and could be remedied through moral correction. Functionally, the cost and administrative burden of maintaining poorhouses was unsustainable, so that the vast majority of low-income people receiving public aid did so in their own homes. Similarly, work-relief programs expressed society's belief in the moral importance of labor and the sense that giving people something for nothing was morally corrupting. Practically, the cost and administrative burden of organizing work projects persuaded even the most conservative government agencies that it was far better just to cut checks. This pattern has been played out repeatedly over time, most recently in the wake of the Family Support Act of 1988 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Both pieces of legislation were intended to produce large-scale work programs, but in each case liberal and conservative states alike blanched at the cost and

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2 KATZ, supra note 1, at 3.
3 Id. at 224-32.
4 Id. at 232-34.
largely opted for much narrower programs. Similarly, contemporary worries about crime and degradation among a supposed "underclass" have led to a host of restrictions on cash-assistance programs, even though few of the street criminals that were the source of those worries are likely to receive welfare.10

A genuine understanding of public-benefits law depends on grasping the interaction between its symbolic and functional elements. We must learn to appreciate the symbolic meaning created through public-benefits policy and the extent to which those symbolic policies constrain the choices of administrators and pragmatic legislators. On the other hand, we must not allow the more ostentatious symbolic policies to distract us from policies made for functional reasons that may have as much or more impact on the lives of low-income people. A great deal of scholarship on public-benefit programs has focused overwhelmingly on their expressive sides.11 An entirely different body of writing, for a largely separate audience, has focused on the operation of these programs.12 Only occasionally have scholars successfully

8 By fiscal year 1994, only 43.5% of adult AFDC recipients were participating in JOBS activities. 1996 GREEN BOOK, supra note 7, at 425–27. Of these, however, only 4.3% were engaged in workfare, on-the-job training, or supported work activities. Id. at 420–21. This resulted in large part from states' reluctance to pay for expensive work programs, even at JOBS's generous matching rate. Only twenty states spent the full amount of federal funds provided to them in 1994, with even fewer states doing so in earlier years. Id. at 418–19.

9 See KEN AULETTA, THE UNDERCLASS 31–43 (1982) (arguing that pathological "culture of poverty" among "underclass" is aggravated in part by that class's supposed "welfare dependency").

10 See KATZ, supra note 1, at 276–77 (arguing that "underclass" category "obscures more than it reveals" in light of "widespread and transient character" of poverty and welfare participation in America).


12 See, e.g., ALAN M. HERSHEY, U.S. DEP'T OF AGRIC., REPORT ON STATE CENSUS: AUTOMATED CERTIFICATION SYSTEMS (Mathematica Policy Res., Inc. ed., 1987) (discussing extent of states' reliance on computers in Food Stamp Program); Karen Czapanisky, Lawyering After Welfare Reform, MD. BAR J., Mar.–Apr. 1999, at 38–41 (discussing scope of advocacy possible within PRWORA's constraints). This is not to say, of course, that the implementation of broad policy concepts under less than ideal circumstances do not raise significant theoretical issues. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 244–49 (1971) (describing a theory of partial compliance where conditions preclude achieve-
charted the complex interactions between the making of expressive and functional policies in public-benefit programs.  

The processes of creating expressive and functional policy differ fundamentally, both in the actors typically involved and in the kinds of considerations given weight. The number, variety, and power of actors involved in making expressive policy is much greater, but their involvement is much more episodic.  

Making functional policy is a complex process, and the expertise required necessarily limits participation to the small group of people with sufficient interests in the program's functional policies to make it worth their while to master its complexities. These groups then must interact with one another.

The temporary coalitions that make expressive policy and the permanent ones that craft functional policy tend to be suspicious of one another and eager to limit one another's influence. This suspicion and blocking behavior often occurs without regard to ideology: Populists of the left, right, and center rail against entrenched interest groups, and elites of all stripes tend to look down on those lacking their expertise.  

A considerable amount of political activity on each

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14 See generally JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1995) (focusing on most senior political decisionmakers and seeking to explain when they will become involved in particular issue).

15 These divisions and suspicions between the larger political community, which makes expressive policy through legislation and high-profile executive actions, and the narrower community of groups with full-time involvement in a program's functional policymaking, is consistent with both public-interest and public-choice theories of regulation. See, e.g., JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 7–10 (1990) (describing and contrasting two theories). Two political communities of such different size and composition are quite likely to have different conceptions of the public interest. Alternatively, the incentive structures that senior officials making expressive policy confront will naturally differ from those influencing career policymakers and the interest groups that collaborate with them in setting functional policy. Most obviously, senior political officials and private groups with broader political agendas have interests in gaining immediate media attention and in the consequences choices have for policy debates in other areas. Those permanently involved with the program, by contrast, can expect to be around when imprudent policies years later create the kinds of problems that attract investigative journalists. They also know that they will have to expend political and economic resources dealing with any administrative problems that a policy creates.
side therefore is aimed at constraining the other group’s presumed desire to subvert “good” public policy.\textsuperscript{16}

In addition, expressive policy debates are far more concerned with abstract values; most of the players lack the expertise or interest to develop mechanisms by which those values can be translated into reality or to realize the costs of attempting to do so. Arguments about efficiency rarely have much impact when the broader political process has set about creating expressive policy. By contrast, the career program administrators and their allies on congressional committees and among groups permanently involved with the program have an interest in having the program be perceived as “working” and therefore may desire efficient functional policies. Thus, for example, after the broader political process has imposed a rule banning a particular kind of conduct outright, the community charged with making the program work commonly tries to insert enough flexibility to avoid the inefficiencies associated with eliminating every last bit of noncompliance.\textsuperscript{17}

\textsuperscript{16} The transitory coalitions making expressive policy statements often seek, through rigid statutory standards or other means, to hobble administrative agencies’ ability to soften the rules it is enacting. See, e.g., 42 U.S.C. § 616 (2000) (requiring Department of Health and Human Services (HHS) to reduce administrative staff overseeing implementation of welfare programs). Conversely, groups with ongoing involvement in a program may seek to cloak their work in sufficiently technical terms to discourage meddling from other political actors or may seek to devise procedural constraints on interventions they regard as imprudent. For example, over the last thirty years a technically sophisticated elite has crafted the congressional budget process in part to restrain transient majorities’ impulses for grandiose—and unaffordable—symbolic gestures. See 2 U.S.C. §§ 621–655 (2000) (establishing elaborate system of sequential steps that must be taken to pass budget legislation, deviation from which often requires supermajority); Aaron Wildavsky & Naomi Caiden, The New Politics of the Budgetary Process 45–49 (3d ed. 1997) (arguing that congressional budgetary rules favor incremental change rather than broad, expressive policy shifts).

\textsuperscript{17} Scholars have taken an ambivalent approach to program administrators and the interest groups with which they work to shape programs’ functional policies. On the one hand, scholars—and passionate champions of particular expressive policies—may become dominated by those whom they are charged with regulating. See, e.g., Roger G. Noll, Reforming Regulation 40–42 (1971) (providing basic public-choice explanation for capture theory). On the other hand, these groups are far more likely to have the sophistication to appreciate economic arguments for improving the efficiency of the administrative process. They have the capacity to analyze economic data and apply it to policy formulation. See, e.g., Susan Rose-Ackerman, Rethinking the Progressive Agenda: The Reform of the American Regulatory State 34–40 (1992) (advocating this “policy analysis” approach to regulation). They understand the program’s operation well enough to see the incentives it creates and to be able to design modifications of those incentives as alternatives to command-and-control regulation. See, e.g., id.; Cass R. Sunstein, Free Markets and Social Justice 322–26 (1997) (describing inefficiencies resulting from poorly designed regulatory edicts). They also are far more likely than politicians to appreciate the need to balance competing programmatic priorities and to accept substantial rather than absolute fulfillment of those priorities. See, e.g., Stephen G. Breyer,
This schism between the political communities making expressive and functional policy can confront some political actors with difficult decisions: Should they align themselves with ideologically like-minded groups in the larger political community? Or should they make common cause with program administrators and others in the narrow community surrounding the program? Where those actors are fundamentally antagonistic to the program, such as an industry whose very existence is antithetical to the regulatory system, building a common cause with the other permanent players may be impossible, and resort to higher-level policymakers may be the only option. But where a group feels that stability best serves its interests, it may prefer to strengthen its ties with other permanent players even if that means warning off its allies in the broader political arena. A strong, non-ideological community in support of a program may develop if all major players with ongoing interests come to regard further expressive policymaking as disruptive and reach an implicit agreement that they will address problems through negotiation. This community's solidarity may inhibit further expressive policymaking.

In recent decades, when seeking to create expressive public-benefits policy, politicians on both the left and right have focused on family cash-assistance programs, initially Aid to Families with Dependent Children (AFDC) and now state programs funded by Temporary Assistance to Needy Families (TANF) block grants. This left relatively little scope for functional considerations to shape policy and relatively little opportunity for meaningful policymaking outside of the

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**Breaking the Vicious Cycle: Toward Effective Risk Regulation** 18–23 (1993) (describing perils of regulatory tunnel vision). Their willingness to proceed in these directions, of course, depends on a host of factors specific to the program at issue.

18 A group fully content with the current regime naturally will oppose changes. Yet even if the group has unmet needs, it may judge that any new expressive policy is likely to be more harmful than helpful. It also may feel that new expressive policies advancing its agenda could fuel a backlash or undermine the program's long-term political stability. Finally, it may have a formal or informal agreement with other permanent players that each will seek to dissuade its ideological allies in the broader political community from attempting to force change in the program. Failing to restrain its ideological allies could cause other members to unleash theirs and could weaken ties within the community so that it cannot get help resolving its functional problems.

19 A fair amount of expressive political activity is fomented by one of the regular participants in the program's ongoing functional policymaking process. Even where others initiate an effort, they are likely to rely upon the expertise of members of the program's regular community to shape their proposals and to respond to criticism. In addition, political efforts to impose expressive policy often spring from some functional problem with a program. A healthy, cooperative community of interest groups surrounding a program can resolve those problems before they catch the attention of more senior political actors.


public eye. This inhibited the formation of a cooperative community of groups with ongoing functional concerns about the program.22

With cash assistance operating as a symbolic lightning rod, other programs have developed in relative obscurity along more pragmatic lines. Time and again, activists and politicians on the left and right have deadlocked over cash assistance as a matter of supposedly inviolate principles even as they quietly reached pragmatic accommodations through sweeping changes in other programs. The stigma of “welfare” kept President Johnson from proposing significant improvements to AFDC as part of his War on Poverty,23 but not from supporting the Food Stamp Act of 1964 or the Medicare and Medicaid Act of 1965.24 President Nixon’s Family Assistance Plan (FAP) died with each side clutching its principles: Conservatives opposed FAP because it federalized and increased cash-assistance grants; the welfare rights movement opposed FAP because its grant levels were too low and it contained too many work requirements.25 At the same time, Congress enacted Nixon initiatives to make food stamps available nationwide and to raise and federalize cash-assistance payments to the aged, the blind, and persons with disabilities, creating the Supplemental Security Income (SSI) program.26

A similar left-right impasse killed President Carter’s welfare reform proposal in 1977,27 but the same year, former Democratic presidential nominee George McGovern and future Republican presi-

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22 Thus, for example, the American Public Human Services Association (APHSA) brings together state food-stamp directors, state Medicaid directors, and the administrators of many other state programs several times a year. It had no affiliate for state AFDC directors and provided them no regular forum for sharing their functional concerns. See infra note 50.

23 KATZ, supra note 1, at 254–55. To be sure, President Johnson proposed some liberalizations of AFDC in 1967, but this was more than three years after the launch of the War on Poverty and after mid-term elections and the continuing Vietnam War had undermined his political ability to win passage of legislation. See CHARLES NOBLE, WELFARE AS WE KNEW IT 93–97 (1997) (contrasting these proposals with pressure to rein in social liberalism after 1966 elections); see also LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 93 (1997) (contrasting these proposals with pressure to rein in social liberalism after 1966 elections); see also LAWRENCE M. MEAD, THE NEW POLITICS OF POVERTY: THE NONWORKING POOR IN AMERICA 186 (1992) (suggesting that President Johnson’s 1967 AFDC proposals were seriously out of step with rest of his social agenda).

24 TRATTNER, supra note 1, at 326–29.


26 TRATTNER, supra note 1, at 348–49.

27 Compare KATZ, supra note 1, at 269 (claiming Carter plan would have deformed structure of welfare system) with TRATTNER, supra note 1, at 356–58 (defending Carter plan).
dential nominee Bob Dole built a coalition in favor of legislation that vastly expanded the Food Stamp Program, particularly for low-income workers.\textsuperscript{28} Indeed, in the same period, when ideological differences were sharply limiting the scope of the Family Support Act of 1988, an early incarnation of "welfare reform," Congress rebounded from enacting substantial cuts in means-tested programs in 1981-82 to enact large Medicaid expansions every year from 1984 to 1990,\textsuperscript{29} substantial food-stamp increases in 1985,\textsuperscript{30} 1987,\textsuperscript{31} and 1988,\textsuperscript{32} and significant liberalizations in the SSI and Social Security disability programs in 1984 and subsequent years.\textsuperscript{33}

Concessions made on Medicaid, food stamps, housing assistance, or SSI policy lacked the symbolic importance that similar movement would have had in the AFDC. The lower visibility of in-kind programs\textsuperscript{34} and those serving the elderly or people with disabilities reduced the political risks of reaching agreement and made quiet accommodations among interest groups more feasible.\textsuperscript{35} In the shadow of ideological gridlock over AFDC cash assistance, these in-kind programs adapted through both bipartisan and partisan measures.


\textsuperscript{33} 1990 GREEN BOOK, supra note 7, at 64-69 (1990) (describing changes in Social Security disability insurance program that also applied to SSI disability).

\textsuperscript{34} "In-kind" programs provide recipients with goods or services rather than cash that the recipients may spend as they see fit. AFDC and SSI are cash-assistance programs. Medicaid, housing assistance, and childcare subsidy programs provide in-kind aid. States have spent TANF block-grant funds on both cash assistance and in-kind benefits, although rapidly falling cash-assistance caseloads have tipped the balance increasingly toward in-kind aid. The Food Stamp Program is in-kind, but since its benefits are denominated in dollars, it is among the easiest to analogize to cash assistance.

\textsuperscript{35} In addition, institutional factors peculiar to the Food Stamp Program discouraged the kind of ideological extremism that polarized policy development in AFDC. With jurisdiction over food stamps lodged in the extremely conservative agriculture committees, liberal adventurism was obviously off the agenda. On the other hand, because the economic justifications of the agricultural subsidy programs dear to their constituencies' hearts rested on shaky ground, the committees were constrained from any conservative adventurism of their own: If they cut too deeply into the food-stamp benefit structure, they could expect swift and effective retaliation from legislators with liberal or fiscally conservative urban and suburban constituencies.
as attitudes toward low-income people, and the programs serving them, fluctuated over time.36

The political impasse over cash assistance allowed functional problems to fester and tensions to grow to the point that they annihilated AFDC when they were released after the election of 1994. In other programs, comparable problems had been addressed—and tensions relieved—by legislative and administrative changes over the years. For this reason, and because changes in programs other than AFDC had far less symbolic value, the convulsions of the mid-1990s—particularly those caused by PRWORA—affect these programs, but not as sharply.37

36 For example, the decision to cut food stamps deeply in OBRA 1981, §§ 101-117, 95 Stat. 357, 357-66, was essentially a partisan one by President Reagan, the Republican-controlled Senate, and a House of Representatives effectively controlled by a coalition of Republicans and conservative “Boll Weevil” Democrats. It resulted in elimination of most households above the poverty line from the program, 7 U.S.C. § 2014(c)(2) (2000), redefining food stamps as a program for those in extreme hardship. See Tom Joe & Cheryl Rogers, By the Few for the Few 53–57 (1985) (discussing Omnibus Budget Reconciliation Act of 1981, which also made many other reductions in food stamps and other means-tested programs). Once the Democrats regained effective control of the House, they negotiated a trade with the still-Republican Senate in the Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (codified in scattered sections of 7 U.S.C.), that restored some of the benefit cuts Republicans had made in 1981 and 1982 in exchange for expanded work requirements. The broadly bipartisan Stewart B. McKinney Homeless Assistance Act of 1987, Pub. L. No. 100-77, 101 Stat. 482 (codified in scattered sections of titles 7, 28, and 42 U.S.C), responded to widely shared concerns that some of the program’s rules were contributing to homelessness by requiring some households to choose between paying shelter and food costs. And in the entirely partisan Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 673 (codified in scattered sections of numerous titles of the U.S.C.), Democrats expanded on the theme of the McKinney Act to further insulate low-income families from “heat or eat” dilemmas.

The disproportionate attention paid to cash assistance obscured the declining functional importance of AFDC. Inflation had been eating away at AFDC's eligibility limits and benefit levels; by 1996, food stamps, SSI, the Earned Income Tax Credit (EITC), and Medicaid each provided more benefits to low-income people than did AFDC. Food stamps, the EITC, Medicaid, and probably Housing and Urban Development (HUD) rental subsidies also served more people that year than did AFDC. Even on a per person basis, the maximum AFDC benefit for a family of three in the median state was only slightly higher than the food-stamp maximum; in some areas (including much of the South), the average AFDC recipient received more benefits from food stamps than from AFDC. For those receiving both housing subsidies and AFDC payments, housing subsidies were often greater.

38 See STAFF OF THE COMM. ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 2000 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 214 tbl.3-1, 404 tbl.7-15, 813 tbl.13-14, 870 tbl.15-4, 912 tbl.15-15 (2000) [hereinafter 2000 GREEN BOOK]. Total federal and state spending under Title IV-A of the Social Security Act in 1996 was $28.139 billion, slightly more than the $27.336 billion federal and state governments spent on the Food Stamp Program that year. The author's calculations are based on unpublished data provided by the Congressional Budget Office. Excluding the costs of administration and the JOBS program (which did not provide direct services to recipients), food-stamp benefits appear to have been marginally higher.

39 Id. at 376 tbl.7-4, 813 tbl.13-14, 888 tbl.15-9, 914 tbl.15-14. Although data is unavailable on the total number of individuals in HUD-subsidized rental housing, some 5,035,000 households received such subsidies in 1996. Id. at 949. This exceeds the 4,552,000 families receiving AFDC in an average month of that year. Id. at 376.


41 1996 GREEN BOOK, supra note 7, at 923. The overwhelming attention paid to cash assistance cannot readily be explained in terms of the flexibility that cash gives a family in allocating its resources. See Martha B. Coven, The Freedom to Spend: The Case for Cash-Based Public Assistance, 86 MINN. L. REV. 847, 849-51 (2002) (arguing that in-kind assistance denies recipients important choices). AFDC grant levels were so low that the bare minimum costs of food and housing typically consumed them completely. In January 1995, when the legislation that became PRWORA was introduced, the median state (Illinois) paid a family of three with no income $377 per month, barely 37% of the Census Bureau's poverty threshold. 2000 GREEN BOOK, supra note 38, at 383 tbl.7-7, 1284 tbl.H-2. Indeed, the concept of a federal entitlement was a hazy one as applied to AFDC: Federal law controlled many non-financial eligibility rules (often to the detriment of low-income families) but left states free to deny any safety net to families well below half the poverty line—families that clearly faced destitution without aid. In 1995, a family of three in the median state would have been ineligible for AFDC if its unearned income (such as child support) exceeded 37% of poverty or if its earned income exceeded 45% of poverty under most...
Thus, the common practice of studying cash-assistance policy almost exclusively is likely to yield a severely distorted picture of public-benefits law. Nowhere else are the functional and pragmatic aspects of public-benefits law more thoroughly subordinated to its expressive and ideological side. Because of both sides’ unwillingness to compromise, in no other program had policy formation been more stagnant before the mid-1990s and, because of the pent-up tensions circumstances. *Id.* Most children in two-parent families were ineligible without regard to need.


43 Writing in 1990, Theodore Marmor, Jerry Mashaw, and Philip Harvey argued that “fundamental change [of the public welfare system] is virtually never on the political agenda—much less likely to be accomplished.” Theodore R. Marmor et al., *America’s Misunderstood Welfare State: Persistent Myths, Enduring Realities* 229 (1990). They attributed the existing public welfare system’s durability to several factors:

First, the programs already in place fit fairly well with our political ideology. Junking them in favor of radically different programs would make sense, therefore, only if we experienced some major upheaval in our basic beliefs. And a major shift in beliefs would probably occur only as a result of equally major shifts in our economic, political, or social circumstances. . . . Second, incrementalism is strongly reinforced by pluralist politics. Programs develop multiple constituencies that must be appeased whenever changes are, in fact, made. Because radical revamping upsets expectations, indeed destroys or transfers economic assets, interest-group politics almost ensures that change
that paralysis had allowed to fester, no program became as politically volatile once the 1994 election destroyed the left’s ability to block the right’s expressive policymaking agenda. Every other program shows a greater emphasis on functional concerns. These other programs’ patterns of political change gave rise to fundamentally different patterns of advocacy and conflict; scholars and many advocates largely ignored these differences as they focused their work on AFDC.

AFDC, however, could only be repealed once. Many members of both parties had come to treat that repeal as a symbolic or expressive imperative. With that goal accomplished, it was far from clear which of the several widely disparate groups that came together to enact that legislation ultimately would prevail in having its vision shape the future of social welfare policy. Was PRWORA about diverting resources from low-income people to fund tax cuts, as some economic conservatives believed? Was it about transferring resources and discretion to the states, as the governors argued? Did it inaugurate an era of moralistic micromanagement of the lives of low-income people, as social conservatives seemed to assume? Or, was the only real consensus around the importance of work and revulsion to a program (AFDC) that seemed to compete with, rather than support, work? The answer to these questions would have to be decided in the context of other means-tested programs. These programs, though less charged, have far more functional importance to low-income people than do the repetitive debates and marginal tinkering in TANF reauthorization that has consumed the attention of scholars and many activists.44

will be “balanced.” Constituency resistance is, of course, much-lamented by the reform-minded. But stability also has value.

Id. at 229–30; see also Weaver, supra note 42, at 52–53 (articulating similar public-choice explanations for longevity of AFDC program with few friends anywhere on political spectrum). Some scholars have sought to supplement these theories with institutional explanations under which liberals and conservatives each held sufficient power at one or another point in the policymaking process to block the other’s proposals, but not enough to enact their own. Id. at 51–52; see also Edelman, supra note 42, at 108–12 (finding this dynamic at work in the defeat of President Nixon’s 1971 welfare reform proposal).

44 The reauthorization legislation scheduled to be considered in 2002 brought forth a host of books and articles from scholars and activists. Each sought to encapsulate the most important developments in public welfare policy and to identify the key issues Congress would face as it moved forward. Overwhelmingly, these analyses focused on TANF and, to a lesser extent, on childcare programs that may be funded through TANF or a companion block grant. The Urban Institute’s volume was typical in describing the 1996 welfare law largely in terms of TANF and in devoting ten of its twelve chapters largely or exclusively to issues relating to TANF and childcare. Welfare Reform: The Next Act, supra note 42, at xii–xiii. Scholars at the Brookings Institution shared the assumption that TANF is at the heart of public welfare policy. In one Brookings volume, fifteen of nineteen chapters focus primarily on TANF and childcare. See The New World of Welfare (Rebecca M.
The upheaval of the mid-1990s also presented advocates of the surviving programs with a difficult dilemma. Should their primary goal be the mere preservation of these programs, without much regard to their effectiveness? Should they seek to reposition the programs to serve more politically popular groups at the expense of some of the most vulnerable, including the families that would be losing cash assistance? Or was there a way to have these programs continue to serve as a meaningful safety net for those in the greatest need? In other words, could the goals of both structural survival and functionality be accommodated, and in either case would the programs have to sell their souls by abandoning those that needed them most?

The first and most crucial test of the new regime of public-benefits law inevitably involved the Food Stamp Program. The Food Stamp Program had been identified most closely with AFDC and reviled more widely than any other program. And the Food Stamp Program was second only to AFDC as a target of criticism by both conservatives and state officials, the two groups whose coalition formed the nucleus of the movement that won enactment of PRWORA. The Food Stamp Program had come within a few votes on the Senate floor of being block granted in PRWORA, and par-

Blank & Ron Haskins eds., 2002). Another group of scholars gave these programs most of eighteen out of twenty-three chapters. See Welfare Reform and Beyond: The Future of the Safety Net (Isabel V. Sawhill et al. eds., 2002).

45 See, e.g., Reforming the Present Welfare System: Hearing Before the Subcomm. on Dep't Operations, Nutrition, & Foreign Agric. of the House Agric. Comm., 104th Cong. 505 (1995) (statement of Heritage Foundation's Robert Rector) (arguing that Food Stamp Program "is very much a part of the welfare system" and hence worthy of condemnation).


47 A block grant is a fixed sum of money provided by one level of government to another for accomplishing some broadly defined purpose. If the recipient government can reduce its costs, it typically may keep or redirect the excess funds in the block grant. Conversely, if the recipient government runs out of funds, it—and the intended beneficiaries of the program—bear the burden of the shortfall. Thus, block grants have both devolutionary and fiscal elements: State or local governments receive increased flexibility and some ability to profit from any savings they extract from a program in exchange for providing political cover for an expenditure cap. See David A. Super, The Political Economy of Entitlement, 104 COLUM. L. REV. 633, 672-82 (2004) (describing inefficiencies of block grants and other caps on public-benefit programs). The difficulties of describing in detail the function that a block-granted program performs, or the likely consequences of reducing its funding, tend to cause these programs to shrink over time. See id. at 695–703, 710–11. The Food Stamp Program would be particularly vulnerable to the capping function of a block grant because its expenditures vary in response to the economic cycle more than any other program except unemployment compensation. Thus, a food-stamp block
ticipation in the program was dropping faster than at any time in its history—at times almost as fast as the cash-assistance rolls. Indeed, the Food Stamp Program was so badly weakened that its final collapse would not necessarily have sealed the fate of other, stronger means-tested programs. On the other hand, its revival from such a dire condition could provide strong evidence of a viable future course for other programs.

The Food Stamp Program did not collapse. Rather than attempting to defy the dominant policy themes of the day—more emphasis on work, greater state flexibility, and closer scrutiny of public expenditures on aid to low-income people—anti-hunger advocates managed to accommodate these demands in ways that strengthened rather than dismantled the program. In so doing, they saved

grant would have left states with huge surpluses during booms but forced draconian benefit cuts during recessions.

48 See infra Part I.A.2.
49 See infra Part I.B.1.
50 As much of this article describes the judgments and actions of the Food Stamp Program's supporters, some initial discussion is in order about the composition of this group. More specifically, the author's own involvement in these events, and resulting biases, should be made more explicit.

In short, the Food Stamp Program has benefited from the efforts of a shifting coalition whose active members at any given time may be drawn from several communities. One is the community of non-profit organizations that define themselves as primarily concerned with hunger and food-assistance issues; these include both secular organizations such as the Food Research and Action Center (FRAC) (for which the author worked as staff attorney and legal director from 1987 to 1992), America's Second Harvest, and RESULTS, as well as religiously oriented groups such as Bread for the World, the Interfaith Working Group on Food Assistance, and MAZON: A Jewish Response to Hunger, among others. Religious groups with broader missions, such as Catholic Charities U.S.A., the U.S. Catholic Conference, United Jewish Communities, and several protestant denominations, also have worked extensively to strengthen the Food Stamp Program. Groups with broader anti-poverty agendas, such as the Center on Law and Social Policy (CLASP), the Coalition for Human Needs, the Children's Defense Fund (CDF), and a broad range of civil-rights and consumer groups, also have become involved in some important food-stamp issues where they have felt their particular competence could be helpful. Some unions have worked on selected issues, although organized labor as a whole has shown much less interest in food stamps since Congress made most strikers ineligible for food stamps in 1980. See 7 U.S.C. § 2015(d)(3) (2000). Although farm and commodity groups have championed the preservation of the Food Stamp Program, they also have frequently competed with it for resources within the agriculture committees. See infra note 480.

Although this Article applies the terms “food-stamp supporters” and “anti-hunger advocates” exclusively to non-governmental entities, many political and career officials in federal and state agencies have been ardent champions of food-stamp claimants, individually, through their agencies, or through trade associations such as the American Public Human Services Association’s American Association of Food Stamp Directors. So, too, have several members of Congress of both parties as well as several key congressional staff members, again on a bipartisan basis. Also, although the focus of this Article is on advocacy, the program's vitality is secured in no small part by the research of organizations that do not engage in advocacy. Although some of their research may be relied upon to sup-
what in many respects is the best-designed means-tested program in
the United States. It provides a uniform benefit structure that does
not depend upon states’ capacity to contribute, it serves needy people
largely without regard to age, health, or family composition,\textsuperscript{51} and it has no cap that prevents it from responding to increased need in
recessions or discretionary appropriation for benefits that could
prompt wasteful spending during times of falling need.\textsuperscript{52}

By the late 1990s, an aggressive effort was underway to expand
the program’s benefits to low-income working families—an important
achievement not only in its own right but also because it allowed for
the inclusion of other, less politically popular groups of low-income
people in the program. Working within the themes of reform by
reaching out to the \textit{working} poor strengthened the program’s image
politically. As a result, in the six years from 1996 to 2002, the Food
Stamp Program shed its skin, transforming from a political pariah to
the beneficiary of a multi-billion dollar benefit expansion proposed by
George W. Bush (at the same time he was attacking a host of other
means-tested programs).

\textsuperscript{51}As discussed in Part II.A.2, \textit{infra}, this is no longer completely true since PRWORA
thirty-six months for many childless adults); 8 U.S.C. § 1612(a) (2000) (limiting legal immi-
grants’ eligibility for food stamps with some exceptions based on age, health, and family
relationships).

\textsuperscript{52}On the importance of operating programs as “responsive entitlements,” i.e., control-
ling spending with eligibility rules and benefit formulas rather than explicit controls on
spending, see Super, \textit{supra} note 47, at 672–78, 682–86.
This Article argues that the restructuring of the Food Stamp Program in PRWORA's wake provides a model for advocates and scholars seeking to resurrect an affirmative anti-poverty agenda in this country. The key to this success was the choice by the program's advocates to subordinate their traditional agenda of expanding benefits to the effort to rebuild the community that had shaped the program's functional policies over the years and helped protect it from expressive excesses. Also crucial was the program's partial shift from a command-and-control to an incentive-based approach to regulation.\footnote{See David A. Super, Offering an Invisible Hand: The Rise of the Personal Choice Model for Rationing Public Benefits, 113 Yale L.J. 815, 883–88, 890–91 (2004) (arguing that manipulation of administrators' incentives is crucial to future of public-benefits advocacy); see also Breyer, supra note 17 (advocating this shift in economic regulation); Rose-Ackerman, supra note 17 (same).}

As illustrated by the success of efforts to save and ultimately strengthen the Food Stamp Program, the anti-welfare revolution of 1996, while extraordinarily powerful, left behind a relatively narrow expressive legacy susceptible to a wide range of interpretations. The resurgence of a program as battered as food stamps discredits the theory that PRWORA signals a lasting acceptance of the right-wing critique of means-tested programs. Moreover, the rejection of states' demands for broad discretion over the conditions on which claimants could receive food stamps shows that changes in federal-state roles were far more limited and contingent than commonly is assumed. In light of these successes, this Article argues that means-tested programs can and should be restructured to include a greater emphasis on supporting work without abandoning their basic missions or the people who depend on them.

Part I analyzes the Food Stamp Program's myriad weaknesses after 1996. It finds that the program suffered from a dearth of political support—an image dangerously similar to that of the discredited AFDC program—as well as the hostility of many of the components of the coalition that brought down AFDC. It also shows that the program's effectiveness was declining due to narrowed eligibility, shrunken benefits, and rapidly falling caseloads. Then, Part I contrasts the several plausible strategies that various interest groups advanced for restructuring the program.

Part II describes the Food Stamp Program's transformation from its origins as an adjunct to AFDC into a support for low-income working families. This required three types of changes.\footnote{See Super, supra note 53, at 825–32 (describing interchangeable roles of these three sets of limits on program participation).} First, some
substantive rules designed to limit eligibility to only the most destitute
needed revision or repeal to allow low-wage workers to qualify.
Second, the program’s procedures needed to be modified to accom-
modate the special problems of low-wage workers and to prevent
denials and terminations of eligible claimants. Finally, low-wage
workers needed to be induced to apply for and take the steps neces-
sary to continue to receive food stamps. Had any one of these steps
failed, the program likely would have withered or collapsed.

Part III evaluates the result of this transformation, examining the
extent to which it has been successful based on three important cri-
teria: (1) whether the program’s chances for survival have been
increased; (2) whether it has become more accessible to politically
popular claimants; and, (3) whether any progress in these two areas
has been purchased at the cost of sacrificing needy, but politically
unpopular, claimants. If the Food Stamp Program could regain a mea-
sure of political stability while continuing to help those in the greatest
need, then advocates for other besieged programs plausibly could con-
sider similar affirmative strategies for strengthening those programs as
well, rather than purely defensive ones for limiting the damage they
suffer. And if the Food Stamp Program could survive without aban-
doning its most vulnerable constituents, other, less stigmatized pro-
grams likely can do so too.

Part IV offers some concluding remarks on the applicability of
the lessons learned in the Food Stamp Program to other programs. In
particular, it suggests that scholars and activists have overestimated
the scope of the issues that the 1996 welfare revolution decided.
Although promoting work, state flexibility, and careful stewardship of
public resources have become fundamental themes of public-benefit
program design, programs have many alternative means for imple-
menting these principles. Creative advocacy can harness these principl-
es to strengthen rather than undermine means-tested programs.

I

THE FOOD STAMP PROGRAM AFTER THE 1996
WELFARE LAW

PRWORA was a watershed in public-benefits law. It trans-
formed the substance and structure of several of the most important
means-tested programs and, most dramatically, the political environ-
ment in which these programs exist. The law sailed to enactment on
the strength of a political “perfect storm” that united fiscal conserva-
tives, tax-cutters, social conservatives, libertarians, governors, and
state legislators. This unprecedented coalition could not, and did not,
hold together. Since PRWORA passed, scholars and activists have set themselves to the task of making sense of what it left behind—distinguishing fundamental from incidental changes and drawing enduring lessons for public-benefit programs.

This Part undertakes that task with particular emphasis on the Food Stamp Program. Part I.A examines the political weakness of the Food Stamp Program after 1996—its association with the now-repudiated concept of "welfare" and the near collapse of its active political support. Part I.B describes the program’s parallel functional ailments. Even though the Food Stamp Program remained on the books, it was doing progressively less well at fulfilling its basic mission. Finally, Part I.C considers the strategies open to the program’s supporters as they sought to save it in this new and hostile environment. It was the choice among these possible strategies, as much as the chosen strategy’s execution, that salvaged the program for the benefit of the low-income families who lost AFDC’s protection in 1996.

A. The Political Weakness of the Food Stamp Program

The political position of the Food Stamp Program after 1996 can be assessed on several levels. Most broadly, it faced a fundamental challenge to its legitimacy: If PRWORA really did “end welfare as we know it,” how could the continued existence of the Food Stamp Program be justified? Put more polemically, how, if at all, could it be distinguished from the reviled “welfare”? On a more practical level, what political dynamic had allowed it to escape AFDC’s fate, and how much could it count on that dynamic for continued protection? Finally, how had the major constituencies with interests in the Food Stamp Program emerged from the battle over PRWORA? What were each of those groups’ agendas, and what capacity did each of them have to impose those agendas on the political system? This Section first considers the conceptual problem of distinguishing food stamps from “welfare.” It then proceeds to examine what lessons can be learned from the program’s survival in 1996, the implications of PRWORA’s major themes for the Food Stamp Program, and finally the limitations on the policy-making methods available to those seeking to defend the program.

1. Distinguishing Food Stamps from “Welfare”

Though the public supports “aid to the poor” and substantial majorities may be willing to accept a tax increase if the money would

55 See BILL CLINTON & AL GORE, PUTTING PEOPLE FIRST: HOW WE CAN ALL CHANGE AMERICA 164–65 (1992) (promising to “end welfare as we know it”).
go to help the poor and hungry, the overwhelming majority of the public nevertheless disapproves of "welfare."56 As a result, most politicians, interest groups, and foundations have been leery of supporting any program regarded as "welfare." Any such program will therefore pay higher rents57 for political and financial support than programs regarded as serving some more broadly endorsed public purpose. Given this mood, food stamps' survival depended in large part on identifying which signals cause the public to regard a program as "welfare" and shedding as many of those signals as possible.

"Welfare," however, is a notoriously difficult term to define. No federal programs, and few if any state programs, go by that name. Certain cash-assistance programs historically have been perceived as the epitome of welfare: AFDC, which provided monthly cash-assistance payments to low-income families, and state and local general assistance (GA) or general relief programs that provide monthly cash payments to low-income individuals living alone and to homes whose family arrangements failed to meet AFDC's specifications. But virtually every redistributive public spending program may be, and has been, tarred with the brush of "welfare" by its opponents.58

Absent an explicit, generally accepted definition of "welfare," we may begin by identifying those aspects of AFDC that attracted the most hostility in the course of the ultimately successful campaign to eliminate it. After all, it seems likely that the more characteristics a program shares with AFDC, the greater is the likelihood that it will be regarded as "welfare" (and hence the greater its political vulnerability).

First, at least as far as most people believed, AFDC eligibility did not depend upon an individual's work effort.59 In actuality, persons

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57 For example, weak programs' supporters will have to accept periodic raids from their "friends" seeking funds for other activities in the hope of receiving support against more severe threats. Similarly, to secure support for an expansion, they will have to package it along with even larger increases for other programs with stronger constituencies (e.g., farm price supports to buoy food-stamp legislation, funds for the construction industry to win support for housing programs, or increases in reimbursements for powerful healthcare-provider constituencies for Medicaid expansions). For a broader effort to apply public-choice theory to social welfare legislation, see generally JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

58 To take one example, the Heritage Foundation has included Medicare—an in-kind, non-means-tested program—in its figure for total U.S. "welfare" spending since the Great Society. See KATZ, supra note 1, at 317-18.

qualified for AFDC based on the extent of their financial hardship (as well as their family composition and compliance with a host of procedural requirements). In most cases, whether someone had been employed for twenty years or had never held a paying job in her or his life had no bearing on eligibility or benefit levels.  

Second, AFDC served only the worst-off, freeing large numbers of people in higher income communities to criticize it openly without fear that a friend or neighbor might have relied on it even in an economic downturn. This situation arose because AFDC's financial eligibility requirements were extremely stringent. Indeed, few middle-income families did, or could, include AFDC in their plans for dealing with even the most extreme possible financial crises.  

Third, AFDC provided almost all of its assistance in the form of cash. As such, it both symbolically and practically served as an alternative to wages, an arrangement more likely than in-kind benefits to breed resentment in employed taxpayers. The image that cash benefits conjured was of “welfare queens” who made a career of receiving AFDC benefits in lieu of gainful employment. This was far from the reality: Most families that received AFDC benefits did so for only a very short span of time. A sizeable share of beneficiaries on the rolls at any given time, however, was composed of the minority that received benefits for several years. These long-term recipients, in

60 See ELLWOOD, supra note 25, at 121–22 (arguing that unemployment compensation has greater public support than AFDC because of its link to past work). In fact, AFDC benefit levels were so low in most states that many recipients paid far more in taxes during even relatively short, ill-paying stints of employment than they drew in benefits. But because these taxes were not earmarked to pay for the AFDC benefits they might receive, because those that had not had private employment qualified on the same basis, and because the work of parents raising children tends not to be thought of in economic terms, AFDC was not regarded as an earned benefit. The peculiarly American custom of considering a benefit to be social insurance when, but only when, it is financed through a dedicated funding stream and a segregated trust fund, makes little economic sense and has repeatedly led to bizarre fiscal policy choices.  

61 In every state, the income-eligibility limit in 1996 for a family of three was below the federal poverty level. 1996 GREEN BOOK, supra note 7, at 450–53. In all but six states, this limit was less than full-time minimum-wage employment. Id. In more than half of the states, a family of three became ineligible for AFDC before its earnings reached half of the minimum wage.  

62 Families could not receive AFDC benefits if their assets exceeded their state's resource limit, which could not exceed $1000. Coverage and Conditions of Eligibility in Financial Assistance Programs, 45 C.F.R. § 233.20(a)(3)(i)(B) (1996). Since the family's equity in a car counted as a resource to the extent it exceeded $1,500, that alone could disqualify most middle-class families from AFDC. § 233.20(a)(3)(i)(B)(2).  

63 Financial Assistance to Individuals, 45 C.F.R. § 234.11(a).  

64 KATZ, supra note 1, at 137–45 (describing conservative villification of welfare benefit recipients).  


66 Id. at 29.
turn, became the constant target of the critics’ attacks: Because cash is fungible, these critics easily could convince the public that recipients were spending benefits on luxuries or illegal narcotics, notwithstanding the fact that in most of the country AFDC benefit levels fell well short of what was needed to purchase basic necessities. Were recipients in fact spending their benefits on luxuries or drugs, they would have lost their homes. Nonetheless, the slander stuck.

Fourth, AFDC served few people employed outside the home. The percentage of AFDC recipients with paid employment was never very high, but by the time of its demise, that percentage had been further cut by two sets of public policies: President Reagan’s 1981 budget (which systematically removed the working poor from AFDC); and, because AFDC’s benefit levels almost universally failed to keep up with inflation, its real-income eligibility limits knocked most families off the rolls after four months of employment. That most of its recipient families were unemployed only served to further discredit AFDC as a program serving only the “undeserving poor” and fostering a “culture of dependency.”

Fifth, AFDC was seen to create perverse incentives. All one need to do to qualify, its conservative critics charged, was quit work and not get married. The program’s formal eligibility rules seemed to bear out this charge, though these incentives’ actual behavioral


68 This unpopular characteristic of AFDC was, in fact, one unavoidable consequence of a deliberate policy choice. Federal regulations mandated cash benefits because they were thought to be less paternalistic than the alternative. 45 C.F.R. § 234.11(a) (1996); Rebecca M. Blank, It Takes a Nation 99 (1997); see Coven, supra note 41 (continuing and updating these arguments against paternalism). But by 1996, paternalism was exactly what the public seemed to want when dispensing aid to low-income families.


70 Mead, supra note 23, at 115–16.

71 For the program’s first quarter century, two-parent families could participate only if the primary wage-earner was incapacitated. See 1996 Green Book, supra note 7, at 394–95; Trattner, supra note 1, at 320. Families with two healthy parents became eligible on a limited basis in 1961 with the creation of the AFDC-UP (unemployed parent) category, but this fell far short of removing AFDC’s strong bias against two-parent families. 42 U.S.C. § 607 (1994) (repealed 1996). First, AFDC-UP applied only when one parent had a relatively substantial work history in the recent past. § 607(b)(1)(C). Among the long-term unemployed, therefore, eligibility remained limited to single-parent families. Moreover, two-parent families with a parent employed much more than half-time remained inel-
effects were far from clear. Nevertheless, critics moved from these two perverse incentives to blaming AFDC for a host of society's ills. For example, AFDC was said to encourage poor families to have more children than they could afford on their own. Critics offered little empirical evidence that poor families in fact behaved as predicted, and the behavior they anticipated would have been remarkably irrational. In virtually every state, an AFDC recipient family was worse off for each additional child it had; that is, a family fell further below the poverty line, even with benefits, than it had been before the addition of the child.

Sixth, AFDC was publicly administered and thus associated in the public imagination with the cost and waste of bureaucracies. Most members of the public come into contact with only one agency that applies a means test: the Internal Revenue Service. This is not good company for an agency to keep in the public imagination.

Finally, AFDC was perceived to be riddled with fraud. This perception was in part the result of some of the factors already discussed and was certainly related to the public's general mistrust of

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72 Jill Quadagno, The Color of Welfare: How Racism Undermined the War on Poverty 176-77 (1994); see Marmor et al., supra note 43, at 219-20 (noting that "incentives do not translate directly into behaviors" and might be shown not to affect behavior at all).

73 Edelman, supra note 42, at 131.

74 Indeed, the average family size for AFDC recipients declined steadily from 4.0 in 1970 to 2.8 in 1995. 1996 Green Book, supra note 7, at 386.

75 The author arrived at this result by comparing the maximum AFDC grants in January 1996 for family sizes one through six, id. at 439-40, with the 1996 poverty income guidelines HHS published for those family sizes. In over forty states, every family from one to five would find itself living at a lower percentage of the poverty line if it had an additional child and received the maximum permissible increase in the state's AFDC grant. In a handful of states, the results are ambiguous: A family of a certain size may move to a slightly higher percentage of the poverty line with an additional child, while most families would slide deeper into poverty with another child. (One-person families are those in which either the child or her or his caretaker was ineligible for AFDC.)

76 Blank, supra note 68, at 100.

means-tested benefits. Financial eligibility criteria are inherently difficult to administer and susceptible to greater manipulation than, say, a formula based solely on the number of quarters an individual has worked. Additionally, the belief that welfare agencies fail to control fraud reflects the broad public mistrust of bureaucracies. Benefits programs, in fact, make greater systematic efforts to detect and publicly disclose occurrences of fraud than most other agencies. Conversely, the existence of these internal audits may have contributed to the impression that fraud was more prevalent in AFDC, or in means-tested programs generally, than in other government programs. Moreover, when it occurs, welfare fraud is relatively easy to document and to report—and makes good headlines. Perceptions of welfare fraud also are fed by, and feed, the low regard in which the public holds welfare recipients, whether because they are poor, out of work, or members of marginal groups.

In sum, then, a "welfare" program may be distinguished as a program that possesses, or is seen to possess, some combination of the following characteristics: It (1) provides ongoing cash assistance on

78 Eligibility criteria based on earnings records are far from trouble-free. Many migrant and seasonal farm laborers do not receive work-based public benefits such as Social Security—or receive far less than they deserve under the statutory formula—because growers and labor contractors fail to submit FICA taxes withheld from their paychecks. The prevalence of this kind of fraud (unlike welfare fraud) is not widely understood by the general public.

79 Institutional factors also may tend to exaggerate the public's perception of welfare fraud. Agencies charged with investigating welfare fraud have strong incentives to secure continued or increased funding by painting a grim picture. In addition, because the amounts of money involved in welfare fraud generally pale in comparison with the damage done by other crimes, prosecutors may be reluctant to expend scarce resources on prosecutions. For example, in 2002 the average fraud claim established was $1,082. STATE ADMIN. BRANCH, U.S. DEPT. OF AGRIC., FOOD STAMP PROGRAM STATE ACTIVITY REPORT FISCAL YEAR 2002, at 33 (2003) [hereinafter 2002 STATE ACTIVITY REPORT]. Agencies may respond by allowing known cases of welfare fraud to continue until the aggregate amount lost is large enough to provide the potential for a sufficiently lurid headline to entice the prosecutor to act.

80 Several writers have noted that race and gender are inescapable factors in explaining the public's attitude toward AFDC and the families that received it. See generally MEAD, supra note 23; DOROTHY K. NEWMAN ET AL., PROTEST, POLITICS, AND PROSPERITY: BLACK AMERICANS AND WHITE INSTITUTIONS, 1940–75 (1978); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971). Although these impulses manifest themselves in many ways, including a greater inclination toward paternalistic policies and assumptions that welfare recipients' lack of paid employment reflects sloth rather than social barriers, they also may predispose some members of the public to believe that AFDC recipients are more likely to be committing fraud or otherwise "getting over on" the program. For what it is worth, in 1996 the percentage of white food-stamp recipients was modestly higher than the percentage of white AFDC recipients. 1996 GREEN BOOK, supra note 7, at 474 (finding that 37.4% of AFDC recipients in 1994 were white); CODY, supra note 40, at 58 (finding that 40.9% of food-stamp recipients were white).
the basis of need; (2) based on eligibility criteria that take no account of, or penalize, employment; (3) to an unpopular and unemployed population that seems foreign to much of the middle-class; (4) through a public bureaucracy; (5) administered in a manner that seems to encourage fraud and behavior abhorrent to middle-American values. That AFDC itself may not have actually possessed some or any of these characteristics does not undercut these perceptions’ power to both shape public opinion and drain its political support.81

The Food Stamp Program and its public image lacked some of these characteristics, but not enough to be terribly secure. Food stamps generally are not distributed in cash,82 although they are denominated in dollars and interchangeable with cash when spent on food.83 The program had far fewer perverse incentives than did AFDC,84 but while many more of its recipients were wage-earners than were AFDC’s recipients, its core in 1996 was still composed of unemployed AFDC recipients.85 Moreover, it was publicly administered, did not limit eligibility to claimants with current or past employment, and served few middle-class families.86 Significant portions of its rules were borrowed from AFDC and designed with AFDC recipi-

81 In one public opinion poll, sixty-six percent of those asked said that “too little” was spent on “assistance to the poor,” while forty-four percent of the same group said that “too much” was spent on “welfare.” Robin Toner, New Politics of Welfare Focuses on its Flaws, N.Y. TIMES, July 5, 1992, at 1L.


83 The program’s critics have argued for reducing or eliminating restrictions on cashing out food stamps. E.g., Douglas Besharov & Peter Germanis, Am. Enter. Inst., Food Stamps After Welfare Reform 78 (1998). Doing so would make food stamps more like “welfare.”

84 The Food Stamp Program may, however, be said to provide a disincentive to work in the same way an income tax does: It reduces household benefits $.24–$.36 for every additional dollar earned. Ohls & Beebout, supra note 50, at 43–44 (deriving marginal tax rates in Food Stamp Program); see 7 U.S.C. § 2017(a) (2000) (reducing allotment by percentage of household income); § 2014(e)(1), (6) (providing deductions calculated based on fractions of income, thus reducing implicit marginal tax rate for households with earnings, but increasing it for some households with high shelter costs).

85 In fiscal year 1996, some 22.5% of food-stamp households had earned income, while 31.4% were AFDC recipients without paid employment. Cody, supra note 40, at 36, 40.

86 A fair number of formerly middle-income families probably meet the Food Stamp Program’s income-eligibility limits when their breadwinners lose their jobs. Many, however, may have savings or other assets that prevent them from meeting the program’s resource-eligibility limits. Most others probably are not income-eligible for long enough to make applying for food stamps seem worth enduring the stigma. See Nancy E. Wemmerus, U.S. Dep’t of Agric., How Vehicles Affect Food Stamp Program Eligibility 37 (Mathematica Policy Res., Inc. ed., 1993). Studies of food-stamp entrants during recessions have found that their backgrounds appear little different from those coming onto the program at other times. U.S. Dep’t of Agric., Recent Trends in Food Stamp Program Participation 57–62 (Mathematica Policy Res., Inc. ed., 1990).
ents in mind. The program also was the subject of periodic media stories alleging widespread fraud. Indeed, food stamps had one significant disadvantage with which even AFDC did not have to contend—its visibility. Middle-income voters could not tell whether a dollar they saw spent in the store originally came from an AFDC check, but they could see food stamps being transacted and often felt an impulse to pass judgment on recipients’ purchases. Perhaps as a result, some polls found that the public classified food stamps as “welfare” more often than it did AFDC.

2. How the Food Stamp Program Survived 1996

The climate of 1996 seemed to forecast the end for the Food Stamp Program. Earlier efforts to eliminate the Food Stamp Program entirely had foundered by the summer of 1995 in the face of determined opposition from the chairman of the Senate Agriculture Committee and the three most senior Republicans on the House Agriculture Committee. But, by 1996, the program was in peril


88 See, e.g., Ann Landers, Don’t Pass Judgment on Food-Stamp Recipients, CHI. TRIB., May 31, 1993, at 2D (letters from food-stamp recipients describing judgmental attitudes of grocery clerks toward their purchases, including birthday cake for terminally ill child).


90 House Agriculture Chairman Pat Roberts (R-KS) and Representatives Bill Emerson (R-MO) and Steve Gunderson (R-WI), the second- and third-ranking Republicans on the committee, wrote privately to the House Republican Leadership, arguing that preserving the Food Stamp Program as a federal entitlement to aid families that cash-assistance changes might hurt would help deflect criticism of the Republican welfare bill. See supra note 50. Initially, Majority Leader Dick Armey (R-TX) rejected this plea and demanded that the Agriculture Committee adhere to the Contract with America, which had proposed to convert the Food Stamp Program to a block grant. Id. When Republicans on another House committee ran into a political firestorm for block granting child-nutrition programs, Speaker Newt Gingrich overruled Armey on the condition that the Agriculture Committee cut the Food Stamp Program enough not only to achieve the savings originally demanded of the Agriculture Committee, but also those that their beleaguered colleagues were unable to extract from child-nutrition programs. Id.

Senate Agriculture Chairman Richard Lugar (R-IN) initially directed his staff to write a food-stamp block-grant bill. Id. Other Republicans quietly complained, and a conservative former senior official from the Reagan and Bush administrations testified against a food-stamp block grant. Reforming the Present Welfare System: Hearing Before the Subcomm. on Dep’t Operations, Nutrition, & Foreign Agric. of the House Agric. Comm.,
again. Nearly every major Republican welfare bill that year contained an option for states to block-grant food stamps. This option’s passage almost certainly would have spelled the end of the program within a few years. Yet at the last possible moment, just before the welfare bill went to conference committee at the end of July 1996, the Senate struck that provision from the bill by the slender margin of fifty-three

104th Cong. 607 (1995) (written statement of Anna Kondratas, Senior Fellow, Hudson Institute) (arguing against “tarring . . . with the brush of AFDC failure” food stamps and other anti-poverty programs). An alternative way of achieving the savings required of his committee appeared when a liberal former USDA official from the Carter administration testified that cutting the Food Stamp Program was preferable to block granting it and identified several specific budget cuts that could be made. Reforming the Present Welfare System: Hearing Before the Senate Comm. on Agric., Nutrition, & Forestry 104th Cong. 12-13 (1995) (statement of Robert Greenstein, Ctr. on Budget & Policy Priorities). This prompted Senator Richard Lugar to launch an in-depth personal study of the issue. He emerged from this inquiry a determined opponent of food-assistance block grants and succeeded in persuading the Senate Republican caucus to allow him to proceed with spending cuts in the existing program rather than a block grant. He was aided in this effort by moderate senators and those from states that would lose the most money under likely block-grant distribution formulas. See supra note 50.

91 States would have had strong incentives to accept the block grant in lieu of the federal program. Because the legislation would have set the block grants at roughly the amounts states received at the peak of food-stamp participation during the slack economy of the early 1990s, H.R. 3336, 104th Cong. § 852 (1996), almost every state initially would have had surplus funds when need declined during the economic boom. Only a handful received more in federal food-stamp dollars in 2000 than they did in 1995, the year whose spending levels the block grant would reflect. Indeed, about half the states received at least twenty-five percent less in 2000 than they did in 1995. Thus, virtually all states would have reaped a handsome financial advantage by electing the block grant, rather than seeing federal food-stamp spending decline sharply in their states as participation dropped from 1994 to 2000.

Technically, the legislation would have required states to spend most of these funds to provide food assistance and, hence, not to transfer them directly to their treasuries. In practice, however, the state could accomplish the same thing by increasing the percentage of families’ total benefit package made up of food aid. For example, a family that previously had received $367 in cash assistance and $133 in food stamps might instead receive $250 each of cash and food stamps. The increased food-stamp allotment would help spend down the state’s surplus food-stamp block-grant funds while diverting the $117 savings from cutting cash aid to other budgetary priorities: education, corrections, tax cuts, etc. See Gen. Accounting Office, Welfare Reform: Challenges in Maintaining a Federal-State Fiscal Partnership 16-26 (2001) (identifying state manipulations of TANF’s financial flexibility to shift funds to activities far removed from TANF’s purposes).

The legislation’s other restrictions on the availability of the optional block grant would have been unlikely to have prevented the Food Stamp Program’s evisceration. For example, the block grant would not have been available to states that did not have statewide electronic benefit transfer (EBT) systems to deliver food-assistance benefits. H.R. 4, 104th Cong. § 556(b) (1995) (House bill as engrossed). PRWORA, however, required all states to have such systems by October 1, 2002. 7 U.S.C. § 2016(i)(1)(A) (2000). By September 2001, over forty states had statewide EBT systems in operation. If the optional block grant had been enacted, one reasonably can assume that some states might have accelerated their implementation of EBT to enable themselves to access the higher block-grant funding level.
to forty-five.92 The process by which the Food Stamp Program evaded destruction is complex.

Food stamps' survival cannot be explained solely in terms of the Agriculture Committee's affinity for the program. Newt Gingrich's ascendancy, first to Minority Leader and then to Speaker of the House, marked a sharp shift in power throughout Congress from Republican leaders on committees to the leadership of the caucus as a whole. A parallel if less pronounced change occurred among Senate Republicans. Thus, the fact that top Republicans on both agriculture committees opposed a food-stamp block grant need not have been the final word; had the chairman of the Senate Finance Committee tried to save AFDC, for example, he would have been brushed aside in an instant. That Gingrich permitted the agriculture committees' leaders to reject a mandatory food-stamp block grant—and to jettison a state-option block grant in the final conference committee—must be explained in terms of the different political positions of the two programs.

The divergent paths of AFDC and food stamps can, in fact, be explained by the interest group theories that have been dismissed in the wake of the ideological revolution that propelled PRWORA.93 AFDC collapsed because of at least four factors that did not apply with the same force to food stamps. First, AFDC had become intolerable for symbolic and functional reasons to a wide array of groups, including many that had not previously been engaged in social welfare issues.94 Second, the value of the AFDC entitlement to its remaining supporters had been eroded both by declining eligibility and benefit levels and by the waivers the first Bush and Clinton administrations had granted. These waivers allowed states to disregard the modest protections for claimants that the federal AFDC statute offered and eliminated any semblance of a national program.95 Get-

93 Kent Weaver argues that the same interest group and institutional dynamics that long had governed public welfare policymaking remained in force through the mid-1990s but produced different results because, in part, enough interest groups and officials had shifted their preferences. Weaver, supra note 42, at 364-85.
94 For a comprehensive analysis, see generally Michaels, supra note 11, in which Michaels argues that PRWORA's structural changes undermined its substantive goal of promoting work. Perhaps even more importantly, AFDC had such symbolic value to the broader political community that too small a range of policymaking was left to functional considerations to allow a community of satisfied stakeholders to develop. See supra notes 17-19 and accompanying text.
95 Section 1115 of the Social Security Act, 42 U.S.C. § 1315 (2000), permitted HHS to waive central provisions of the AFDC statute to allow states to conduct demonstration projects. This section effectively granted HHS the power to reshape claimants' rights to its and the states' liking. Administrations of both parties demanded only that waivers be
ting anyone to fight for AFDC was difficult when that program had lost most of its identifiable content. Third, because AFDC eligibility limits (and hence spending levels) were largely within the control of states, the program's supporters lacked the means to buy off swing constituencies with significant budgetary concessions, while its opponents could offer substantial rewards from the proceeds of liquidating the program. Finally, control of several chokepoints in the legislative process had changed hands.

The Food Stamp Program, on the other hand, had some characteristics working in its favor. First, as a program that traditionally had carried less symbolic weight and been able to adapt to changing attitudes about program design, the Food Stamp Program had a somewhat smaller and less determined cadre of opponents. Second, its structure remained more or less intact, giving its potential supporters a clearer rallying point: The Food Stamp Program's survival would provide clearly defined benefits to a clearly defined eligible population. Third, its eligibility rules and benefit structure were sufficiently federalized to allow food-stamp supporters to offer up sufficient potential federal savings to trade for the votes of legislators more interested in reducing the deficit or funding tax cuts than in social policy. Finally, food-stamp supporters could more credibly threaten "cost neutral" to the federal government. This limited waivers to proposals that reduced federal costs and those that offset liberalizations with cuts. Thus, while waivers could include time limits and other eligibility conditions that eroded the value of the AFDC entitlement, they could not expand net benefits. See Katz, supra note 42, at 90-103 (describing acceleration of waiver process in first Bush and Clinton administrations).

96 Thus, for example, advocates fighting for the Food Stamp Program's survival knew that it would serve households with gross incomes up to 130% of the poverty line, that the only eligibility conditions would be those imposed by current or pending legislation, and that it would provide benefits based on a given (albeit quite spartan) diet. In other words, the program was a functional entitlement with clearly defined eligibility conditions. See Super, supra note 47, at 701-03 (arguing that programs whose benefits are specified qualitatively tend to be more politically robust). By contrast, because states were free to make radical changes in AFDC's eligibility and benefit structures, AFDC's supporters had no fixed, stable program to rally behind.

97 These votes were bought at a heavy price: PRWORA cut food stamps by an estimated $27.7 billion over six years, about half of all savings in the legislation. See David A. Super & Sharon Parrott, Ctr. on Budget & Policy Priorities, The Depth of the Food Stamp Cuts in the Final Welfare Law (1996). The level of food-stamp savings was ratcheted up steadily throughout the eighteen-month legislative process as both Republicans and Democrats used the program's resources to fund increases in childcare and other substantive or political priorities. (The author's analysis of the Congressional Budget Office's cost estimates for House Republican, Senate Republican, bipartisan, and Democratic welfare proposals in 1995 and 1996 adjusted for changed CBO baselines and differing estimating periods.) Some critics of the program may well have concluded that it was politically easier to raid it this way than to convert it into a block grant. By contrast, control of AFDC's eligibility and benefit levels already was devolved so completely to states that few federal savings were possible within the existing program structure. Thus,
to obstruct hostile legislation. Although President Clinton's campaign promise to "end welfare as we know it" made it difficult for him to threaten a veto in defense of AFDC, he faced no such difficulty in opposing a food-stamp block grant. And because of the Agriculture Committee's long tradition of bipartisanship, the new Republican chairmen coming to power in the House and Senate had far more personal investment in, and loyalty to, the Food Stamp Program than their counterparts on the Ways and Means Committee and the Finance Committee had to AFDC.98

All of these factors taken together account for the thin margin by which the program was rescued from dissolution.99 They did not, however, promise lasting immunity from the general trend. Indeed, opponents of block granting food stamps relied heavily on arguments that Congress should not bite off too much at once.100 With AFDC gone, food stamps seemed next on the list. And, within a few years, conservative advocacy groups began to call for the "next stage of welfare reform," routinely denouncing food stamps as another "welfare" program.101 Unless food-stamp supporters could craft a new identity

ironically, AFDC was block granted to the states in part because states already controlled it so thoroughly.

98 Agricultural interests also played a part in defeating the food-stamp block grant, although only indirectly. For the most part, they did not vocally oppose cutting food stamps or replacing the program with a block grant. Indeed, some groups, such as the wholesale grocers, supported block granting. Reforming the Present Welfare System: Hearing Before the Subcomm. on Dep't Operations, Nutrition, & Foreign Agric. of the House Agric. Comm., 104th Cong. 530-31 (1995) (statement of John Block, President, National-American Wholesale Grocers' Association) (calling food-stamp block grant "common sense"). But see id. at 533-36, 540 (testimony of William C. Ferriera, President, Apricot Producers of California) (not discussing food stamps in his statement to committee but expressing opposition to block grant when asked). They did, however, oppose allowing states to distribute block-grant benefits in cash. Id. at 530-33 (statements of John Block and Food Marketing Institute's Timothy M. Hammonds). This limited the fungibility of prospective food-stamp block-grant funds and hence their value to governors. Some Republican governors continued to work for a food-stamp block grant, but their vigor faded noticeably when it became clear their budgets would not be receiving an infusion of cash. See supra note 50.

99 Far from "turning a program over to the states," a block grant in effect replaces the program with transfer payments to states, which states then may or may not use for the same purposes as the original program. See supra note 91.


for the program that would attract a stable coalition in its defense, its demise still seemed inevitable.

3. Demands on the Food Stamp Program after 1996

PRWORA's three major themes—prioritizing work, devolution of authority to states, and skepticism about public expenditures for low-income people—all provided grounds on which the Food Stamp Program could be attacked. Unless all three could be neutralized or co-opted, the program would be vulnerable and hard-pressed to find influential allies ready to rally to its defense.

First, the program was vulnerable because it served the unemployed: In only twenty to twenty-five percent of participating households was a recipient employed. This was so, in part, because a significant fraction of food-stamp recipients are elderly or persons with disabilities. For that reason, food stamps never would be able to achieve as high a percentage of claimants with employment as would a program limited to people with fewer barriers to employment. Moreover, studies show that large numbers of food-stamp recipients at any one time have turned to the program only as a stopgap measure after losing their jobs and leave it within a few months after finding a new one. But these mitigating factors are known only to a minority of policymakers and specialists, and, as a result, the percentage of employed recipients struck many as quite low.

Second, there long has been a perception that the Food Stamp Program is subject to widespread abuse and mismanagement. A series of media accounts in the early 1990s suggested that food-stamp benefits were being exchanged readily for cash and contraband.


104 Most of these stories involved undercover agents offering food stamps in payment for cash, drugs, weapons, or other things of value. From these exchanges, audiences were asked to infer that food-stamp benefits are trafficked widely. In fact, these transactions merely demonstrate that food stamps have value, a point no one seriously could dispute. These anecdotes did not establish that households receiving monthly food-stamp allotments—as opposed to undercover agents with benefits provided explicitly for sting operations—are exchanging food stamps improperly. A study by the FNS estimated that trafficking was quite rare and appeared to be declining. Theodore F. Macaluso, Food & Nutrition Serv., U.S. Dep’t of Agric., The Extent of Trafficking in the Food Stamp Program: 1999–2002, at 5 (2003), available at http://www.fns.usda.gov/oane/MENU/Published/FSP/FILES/ProgramIntegrity/Trafficking1999-2002.pdf. Those sorts of nuances, of course, do not make for exciting news stories. Accusations of this kind have recurred periodically throughout the program's history. Hearing Before the Senate Comm. on Agric., Nutrition, & Forestry, 99th Cong. 105–06 (1984).
task force of the House Budget Committee revived this charge in a hearing in 2000. Media accounts also sensationalized food-stamp error rates, creating the often false impression that those errors represent fraud. Nevertheless, such an impression is, of course, helpful to the program's critics.

Third, the program was harmed further by a set of performance measures that tended to accentuate its shortcomings. The most widely circulated and available measure of states' food-stamp administration was the quality control (QC) payment error rate. Although the Food and Nutrition Service (FNS) prepared a balanced set of objectives for the Food Stamp Program in response to the Government Performance and Results Act (GPRA), only those relating to program integrity—the QC error rate, collections of overissuances, benefit issuance procedures, and the like—were readily measurable. Addition-

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105 Hearings Before the Task Force on Welfare of the House Comm. on the Budget, 106th Cong. 1–2 (2000). As states turned their attention to implementing the new TANF cash-assistance and work programs, food-stamp administration slackened, see infra note 158 and accompanying text, and error rates rose, see Quality Control Branch, U.S. Dep't of Agric., Food Stamp Program Quality Control Annual Report Fiscal Year 1999, at 13 (2000) (indicating that national combined error rate rose in post-PRWORA years); Quality Control Branch, U.S. Dep't of Agric., Food Stamp Program Quality Control Annual Report Fiscal Year 1995, at 11 (1996) (showing higher combined error rates throughout most of 1980s).

106 See, e.g., Tom Diemer, Food Stamp Fraud Could Cost Ohio $29.2 Million, Plain Dealer (Cleveland), Dec. 5, 1992, at 13A (describing state's quality control (QC) error rate, which provides no data on fraud); John Kennedy, HRS Announces Proposal to Combat Welfare Fraud, Orlando Sentinel, June 28, 1994, at B1 (same); Jim Lynch, State Fumbled Food Stamps: Washington Ranks Worst Among States for Errors and Fraud, Seattle Times, Aug. 10, 1998, at A1 (same); Sharen Trembath, Editorial, Cut Food Stamp Fraud to Help Reduce the Budget, Buffalo News, Jan. 28, 1993, at 2 (same). But see 2002 State Activity Report, supra note 79, at 32 (showing that only three percent of food-stamp overissuances established that year represented fraud, with remainder attributable to innocent agency and household errors). Indeed, a substantial proportion of food-stamp errors represent losses to eligible households, not to the federal government. Dorothy Rosenbaum & David A. Super, Ctr. on Budget & Policy Priorities, Understanding Food Stamp Quality Control (2001). More broadly, a study commissioned by FNS found that the overwhelming majority of food-stamp overissuances are inadvertent and go to poor households that remain well below the poverty level. Memo No. 088 from Carole Trippe & Catherine Palermo, Mathematica Policy Research, Inc. to Jenny Genser, FNS (May 11, 2000). These nuances tend to be omitted from media accounts.

107 See infra Part II.B.1.a.


ally, the U.S. Department of Agriculture's (USDA) Office of Inspector General (OIG) refused to give FNS a clean audit report for several years while demanding that it improve its collection of overissuances owed by claimants.110

Finally, in the mid- and late 1990s, the states began to criticize the program harshly for its inflexibility and heavy-handedness.111 States' anger stemmed in part from a comparison with TANF, next to which the Food Stamp Program's detailed federal standards appeared restrictive and anachronistic.112 The USDA exacerbated states' resentment by intensifying the pressure on them to achieve extremely low—unrealistically low—QC error rates.113 States could not attack QC directly: state bureaucrats complaining about being held to high standards of care with federal funds were unlikely to win much sympathy. Accordingly, they reframed their complaint as an appeal on behalf of low-wage workers. States demanded that the federal government lighten the burdens low-wage workers must bear to obtain food stamps and argued that the surest way to do so was to place greater control in the hands of the states.114

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110 See supra note 50. At OIG's insistence, FNS launched major error reduction and claims collection efforts. Only after OIG was satisfied with the intensity of these efforts, at the beginning of 1998, did it begin giving FNS "clean" audits. Hearings Before the Task Force on Welfare of the House Comm. on the Budget, 106th Cong. 51 (2000), http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_house_hearings&docid=f:65618.pdf.

111 See infra notes 114, 197.

112 Under 42 U.S.C. § 617 (2000), HHS may not issue regulations on any subject without specific statutory authorization. The TANF statute contains no procedural requirements concerning the availability of cash assistance; indeed, it does not even require states to operate cash-assistance programs. Similarly, it leaves states largely free to determine when to apply means tests and how to construct those tests. By contrast, the Food Stamp Program has detailed procedural rules, see Certification of Eligible Households, 7 C.F.R. §§ 273.2, 273.12-273.18, 273.21 (2003), as well as detailed financial-eligibility requirements, §§ 273.1, 273.8-273.11, 273.21. This difference is largely inevitable given the programs' different means of controlling federal expenditures. State liberality in TANF poses no threat of a run on the federal treasury because the statute has a rigid cap on how much federal money each state may claim. 42 U.S.C. § 603(a)(1) (2000). In the Food Stamp Program, by contrast, the federal government pays all benefit costs, 7 U.S.C. §§ 2019, 2024(d) (2000), and therefore can control its costs only by providing clear rules for when benefits are payable. Providing all of the benefit funding for the program, Congress and FNS reasonably have felt entitled to set procedural rules to ensure that the program reaches its intended audience.

113 See supra note 50. During her first appearance at the American Association of Food Stamp Directors' annual conference in 1997, USDA Undersecretary Shirley Watkins departed from her prepared remarks to tell a stunned audience (including the author) that she wanted them to achieve a zero error rate. Embarrassed FNS career staffers tried to contain the damage, but these remarks led several food-stamp directors to express despair that the federal government would not provide a constructive partner for states. Id.

114 The states circulated materials describing horrific processes that working families must navigate to get food stamps. LARRY GOOLSBY & ELAINE RYAN, AM. PUB. HUMAN
4. The Paucity of Tools for Reforming the Food Stamp Program

In meeting these challenges, the most salient political constraint the program’s supporters faced was a deeply hostile Congress. While Congress had acquiesced grudgingly in food stamps’ survival, it showed no interest in taking affirmative steps to improve the program. Given Congress’s hostility to public assistance generally, one of the main vehicles by which the Food Stamp Program had adapted in the past—legislation—was largely unavailable. At best, the program’s supporters could hope for little more than a few food-stamp provisions smuggled into general legislation.

For slightly more complicated reasons, litigation, too, was no longer a major option for the program’s supporters. Congress had slashed funding for legal services programs and restricted their ability to bring class action suits or otherwise challenge “welfare reform.”

Many of the advocates who did not receive federal funding—and were in theory free to challenge new legislation—were not lawyers; those who were generally had devoted all their resources to legislative and administrative advocacy relating to the state design of new TANF-funded programs. In addition, the utility of litigation under a

SERV. ASS’N, ISSUE BRIEF: WHY THE FOOD STAMP PROGRAM NO LONGER MEETS THE NEEDS OF THE WORKING POOR (1999). These materials were somewhat misleading in that almost all of the hurdles they described were in fact within states’ discretion. States had imposed these burdensome procedures voluntarily, under no compulsion from federal law other than the pressures resulting from food-stamp QC. For example, they complained that “recipients must approach their employers as often as monthly to have them complete paperwork certifying their employment and wage levels.” Id. at 2. No federal regulation requires this; indeed, federal rules required states to accept any verification the household provides, such as a wage stub or the word of a coworker, that reasonably supports the claimant’s statements. 7 C.F.R. § 273.2(f)(4)(i), (5)(i) (1999). Readers tended to assume, however, that these must be federal requirements since few would expect states to issue broadsides against their own policy choices.

A few members introduced bills proposing food-stamp benefit restorations and these attracted a few cosponsors. None of these bills, however, received so much as a hearing. The relatively few hearings congressional committees did hold in the years following PRWORA’s enactment generally concerned accusations of continuing problems in the program, such as prisoners allegedly receiving food stamps.

Prohibition, 45 C.F.R. § 1617.3 (2003) (prohibiting initiation of or participation in any class action); Prohibition, 45 C.F.R. § 1639.3 (2001) (prohibiting initiation of or participation in legal challenges, rulemaking or lobbying aimed at “reform[ing] a Federal or State welfare system”). The latter rule, though not the former, was later held unconstitutional, but in the years immediately following PRWORA’s enactment, legal services programs could not bring even non-class lawsuits that challenged “welfare reform.” Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001).

Among the best and most tenacious advocates in the country for low-income people are six of these small “legal services spin-offs”—the Sargent Shriver National Center for Poverty Law in Illinois, the Maine Equal Justice Project, the Center for Civil Justice (CCI) in Michigan, the South Carolina Appleseed Legal Justice Center, the Tennessee Justice Center, and the Virginia Poverty Law Center—and three larger non-LSC programs—
statute depends in significant part on the probability that the legislature will leave that statute in place if the litigation prevails. After the wrenching changes of 1996, it was unclear if the Food Stamp Act had enough political support to weather successful litigation with no legislative response. Finally, many of the obstacles claimants faced in obtaining food stamps were embedded in federal law or within states’ now-expanded discretion.

Moreover, even regulatory action was not an option, at least at first. President Clinton, following Vice President Gore’s “Reinventing Government” initiative, ordered cabinet departments to reduce the length of their regulations by an arbitrary fifty percent.\(^{118}\) With USDA’s resources devoted to protecting the farm-oriented parts of the department, and FNS giving priority to its child-nutrition division,\(^{119}\) the impact of this order fell squarely on the friendless Food Stamp Program. Moreover, the Clinton administration had committed itself to huge reductions in the number of federal employees; for the same reasons, much of this burden, too, fell on the Food Stamp Program.\(^{120}\) More generally, FNS faced a thoroughly ossified regula-
tory clearance process. The numerous USDA offices whose approval FNS required in order to publish proposed or final regulations\(^{121}\) had

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Names Shirley Robinson Watkins to be Under Secretary for Food, Nutrition, and Consumer Services at the U.S. Department of Agriculture (May 19, 1997) (describing background of chief political overseer of FNS in school food service); Shirley R. Watkins, Remarks at Hunger Action Coalition 20th Anniversary Luncheon, Detroit, MI (Nov. 6, 1997) (making brief comments about food stamps before focusing on child-nutrition programs and recovering food from restaurants) (on file with *New York University Law Review*). The Food Stamp Program was asked to bear a disproportionate share of staffing reductions. *See supra* note 50. Indeed, even within the Food Stamp Program, the burden of staffing cuts was particularly detrimental to formulating a creative response to PRWORA. FNS was in the midst of the gargantuan task of converting from food-stamp coupons to electronic benefits, a task that PRWORA accelerated. *See supra* note 91. As this process played itself out across fifty-three state-level jurisdictions, it presented a range of policy, engineering, economic, and political problems that demanded the attention of many of the Food Stamp Program's best staff members. *See, e.g., Office of Inspector Gen., U.S. Dep't of Agric., Electronic Benefits Transfer System: State of New York* (2001) (finding FNS monitoring satisfactory but expressing anxiety about state's work). http://www.usda.gov/oig/webdocs/27099-16-Hy.pdf; Office of Inspector Gen., U.S. Dep't of Agric., Food and Nutrition Service Strategic Monitoring of the Dakota EBT System Development Phase IV (2000) (finding that FNS needed to monitor EBT projects more closely). http://www.usda.gov/oig/webdocs/27801-6-K.C.PDF. Pressure to show improvement in measures of program integrity ensured that the Compliance Branch and the Program Accountability Division would retain adequate staff. Finally, PRWORA's explicit preference for regional offices over national staff within ACF made it difficult for FNS's national office to shift the burden of staffing reductions to the regions. This left the Food Stamp Program's national policymaking functions critically understaffed at the worst possible time. *See supra* note 50.

\(^{121}\) The clearance process for proposed and final regulations built up over time through the accretion of numerous separate clearance requirements, each of which in isolation makes good sense. Those governing agencies' relationships with the White House and the Office of Management and Budget (OMB) generally are subject to published rules. *See, e.g., Exec. Order No. 13,083, 63 Fed. Reg. 27,651 (May 14, 1998); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993); Exec. Order No. 12,857, 58 Fed. Reg. 42,181 (Aug. 4, 1993).* Those requiring review by other agencies within a department, on the other hand, often are not published or widely understood.

Once a proposed draft or final regulation receives clearance from several levels within FNS, it requires approval from several USDA offices: the Office of General Counsel (for legality), the Office of Budget and Policy Analysis (OBPA) (for review on the merits of the policy, on the adequacy of the required cost-benefit and other impact analyses, and sometimes for budgetary implications), the Office of the Inspector General (for review of the impact on efforts to enforce program integrity), the Office of the Chief Economist, the Office of the Chief Information Officer, the Office of Civil Rights (for review of the impact on protected classes), and the Office of the Secretary, as well as any other entities whose input the Secretary's office might seek. None of these entities saw food stamps at the heart of their primary missions; persuading them to take the time to review a draft regulation typically requires pressure from a senior political official with responsibility for nutrition programs. Since the criteria on which these entities conduct their reviews also are quite subjective, political pressure may be needed to dissuade them from nitpicking on policy issues they may not fully understand; otherwise, FNS career staff may have to rewrite the draft rule several times and send it back through internal and departmental clearance. Once FNS obtains departmental clearance, the rule goes to OMB for clearance both by OMB's budget staff and by its Office of Information and Regulatory Affairs (OIRA).
no deadline for action and sometimes held up regulations for months or years. They, as well as OMB, were free to reject draft regulations for myriad reasons, requiring FNS to repeat much of the process. To force the career staff at each step of the clearance process to give prompt, favorable action on draft regulations, FNS's food-stamp staff needed to attract the attention of political officials whose primary focus was on farm and child-nutrition programs. FNS career staff similarly required the support of political appointees to persuade OMB to approve any administrative action that would increase federal costs. The food-stamp staff's frequent inability to obtain political help with the clearance process delayed the issuance of final regulations many years. Unless a new item could be added to a regulation already in an advanced stage of that process, FNS generally was incapable of issuing final regulations quickly enough to affect the dramatic transformations underway in the program. Indeed, OMB largely prevented FNS from even issuing administrative waivers to reduce the burdens of its existing regulations where doing so would increase costs.

This inability to issue or modify regulations limited the exercise of federal power. Congress further undermined the federal agencies' authority by vastly expanding state discretion in the Food Stamp Program through PRWORA. This, and the rest of the upheavals of 1996, persuaded states that power had shifted decisively in their direc-

Here again, FNS career staff has little leverage without—and often even with—the active involvement of USDA political officials.

122 Exec. Order No. 12,857, 58 Fed. Reg. 42,181 (Aug. 4, 1993), established a policy against increasing the costs of government programs by administrative action. Absent political guidance to the contrary, OMB budget examiners assumed that they were to enforce this standard strictly, requiring offsetting savings for initiatives with even the smallest costs.

123 Thus, for example, the first major proposed regulation implementing PRWORA's food-stamp certification policy changes did not appear until December 17, 1999, more than three years after PRWORA's enactment.

124 See supra note 50. For example, in the early 1990s, FNS tried to relax temporal targeting, see infra notes 180–189 and accompanying text, by allowing states waivers to have households submit reports on their circumstances only once a quarter. After FNS granted five waivers, OMB prohibited it from issuing any more because some changes that would reduce households' benefit levels would not be acted upon for another month or two under this procedure. Similarly, OMB prevented FNS from issuing waivers reducing the number of changes in income that households had to report unless states required those households to reapply for food stamps every three months.


tion; they became intolerant of federal policies limiting their authority even in areas long recognized as being within FNS's authority.\textsuperscript{127} Finally, FNS was chastened by Congress's strictness with Health and Human Services (HHS) in PRWORA.\textsuperscript{128}

B. The Food Stamp Program's Declining Effectiveness in Meeting the Needs of Low-Income People

As weak as the Food Stamp Program was politically, its functional breakdown was even more dramatic. This breakdown had practical consequences on low-income claimants and further complicated the political task of saving the program. Subsection 1 analyzes the extent and causes of the dramatic decline in food-stamp participation that began in 1994 and accelerated in the years following the passage of PRWORA. Subsection 2 considers the political consequences of this meteoric drop.

1. The Extent and Distribution of Declining Food Stamp Participation

After climbing to within a whisker of 28 million participants during the recession of the early 1990s, food-stamp participation went into free fall beginning in March 1994. Over the next five years, the number of food-stamp recipients shrank twice as fast as the number of people living in poverty, bottoming out at less than 17 million people.\textsuperscript{129} Studies by the Congressional Budget Office (CBO),\textsuperscript{130} economists on the President's Council of Economic Advisors,\textsuperscript{131} pri-

\textsuperscript{127} See, e.g., infra notes 187–193 and accompanying text.

\textsuperscript{128} PRWORA required HHS to cut the staff of the Administration for Children and Families (ACF), the agency that oversaw AFDC, by twenty-five percent, 42 U.S.C. § 616 (2000), and prohibited HHS from issuing policy without express congressional mandate, 42 U.S.C. § 617.

\textsuperscript{129} JOSEPH LLOBRERA, CTR. ON BUDGET & POLICY PRIORITIES, FOOD STAMP CASELOADS ARE RISING I (2003), http://www.cbpp.org/1-15-02fa.pdf. From calendar years 1994 to 1999, the number of children living in poverty fell by 3.5 million, or 21.4%, while the number receiving food stamps dropped 5.2 million, or 36.3%. CTR. ON BUDGET & POLICY PRIORITIES, CHILD POVERTY AND FOOD STAMP PARTICIPATION: CALENDAR YEARS 1994 to 1999 (2000). Since significant numbers of poor children are ineligible for food stamps, one would expect these ratios to be reversed.


\textsuperscript{131} See, e.g., COUNCIL OF ECON. ADVISORS, THE EFFECTS OF WELFARE POLICY AND THE ECONOMIC EXPANSION ON WELFARE CASELOADS: AN UPDATE (1999) (attributing between 35 and 45% of caseload decline to unknown factors, 35% to TANF, and between 26 and 36% to improvements in labor market), http://clinton4.nara.gov/WH/EOP/CEA/html/welfare; Rebecca M. Blank, What Causes Public Assistance Caseloads to Grow?, 36 J.
vate research organizations funded by USDA, and USDA’s own Economic Research Service all found that the improving economy accounted for between twenty-five and forty percent of this decline, and eligibility changes in the 1996 welfare law accounted for roughly twenty percent. But a large portion of this decline could not be explained. Indeed, even after adjusting for economic changes, this decline in food-stamp participation was shrinking the program by an additional amount greater than the $27.7 billion PRWORA had cut from the program: In other words, this decline in participation, unexplained by legislative or economic changes, more than doubled PRWORA’s cuts.


At a Senate hearing in 1998, researchers from Mathematica Policy Research and Abt Associates testified that the combined effect of improvements in the economy and restrictions in food-stamp eligibility fell well short of explaining the large declines in food-stamp participation; this is a point CBO also has made. Mathematica indicated that the economy and the eligibility changes appear to explain only about half of the decline. Statement of Harold Beebout, Mathematica Policy Research, before the Senate Comm. on Agric., Nutrition & Forestry (Apr. 23, 1998), http://agriculture.senate.gov/Hearings/Hearings_1998/hea98423.htm; see also Statement of Chris Hamilton, Abt Associates, before the Senate Comm. on Agric., Nutrition & Forestry (April 23, 1998) (arguing that additional factors must be considered “to know how many potentially eligible households will participate”), http://agriculture.senate.gov/Hearings/Hearings_1998/hea98423.htm. Whatever the correct proportion, it is clear that a substantial portion of the decline is due to other developments, and Mathematica and Abt both testified that the food-stamp participation rate—the proportion of eligible households that actually receive food stamps—has fallen. See also Shailagh Murray, Drop in Food-Stamp Rolls is Mysterious and Worrisome, Wall St. J., Aug. 2, 1999, at 20. A USDA study found that over two-thirds of the decline in the food-stamp caseload from 1994 to 1997 was among families with children. Park Wilde et al., U.S. Dep’t of Agric., The Decline in Food Stamp Program Participation in the 1990’s, at 13 (Mathematica Policy Res., Inc. ed., 2000), http://www.ers.usda.gov/publications/FANRR7/fanrr7.pdf. This study confirmed that new welfare policies together with macroeconomic variables explained roughly sixty percent of the decline. Id. at 17–18.

Robert Kornfeld, Econ. Research Serv., Explaining Recent Trends in Food Stamp Caseloads: Final Report xii tbl.ES-2 (2002) (finding that economic trends account for 18.8% of caseload decline and TANF policies account for additional 20.5%).

CBO estimated that PRWORA’s cuts would reduce food-stamp spending by $27.7 billion over six years below what the program would have spent without those cuts (counting one food-stamp cut that was duplicated in PRWORA and the agriculture appropriations act that passed almost simultaneously). Even after revising CBO’s spending projections downward to adjust for the better-than-expected economy, actual spending fell below these post-PRWORA projections by more than the amount by which the post-PRWORA projections fell below CBO’s projections of what the program would have spent without the food-stamp cuts. Thus, for example, in March 1996, CBO projected that the Food Stamp Program would spend $29.97 billion in fiscal year 2000. In March 1997, after PRWORA, CBO estimated that the program would spend $25.44 billion in 2000, a drop of $4.53 billion. Adjusting that 1997 estimate for the improved economy suggests that CBO would have forecast $24.36 billion in food-stamp spending had it known in March 1997 what actual unemployment would be in 2000. In fact, the program spent $16.85 billion in...
The decline was not universally shared. It was differentiated geographically, with some states' food-stamp caseloads falling by more than half and others showing declines so modest that they likely represented little more than legislated eligibility changes and the improving economy. Yet this differentiation was not regional and did not appear to match up with either benefit levels or caseload reductions in cash-assistance programs. The states with the largest declines in food-stamp participation, Texas, Arizona, Ohio, Wisconsin, Indiana, and Mississippi, included states with relatively high cash-assistance benefit levels and two of the states with the lowest grants. They included states that had been extremely aggressive in their efforts to reduce cash-assistance caseloads and those in which cash-assistance participation had declined substantially less than the national average. Some of these states have large immigrant populations; in others, immigrants denied benefits under the 1996 law formed a negligible part of the food-stamp caseload. Conversely, states with much more moderate declines in participation ran the gamut of cash-assistance grant levels, caseload reduction efforts, and immigrant populations.

2000, falling $7.51 billion short of the post-PRWORA projections even after economic factors are removed. Over the six years for which CBO estimated PRWORA's effects, actual spending fell $32.3 billion below CBO's 1997 baseline adjusted for reduced unemployment; together, PRWORA and these non-economic participation effects cut food-stamp spending by $60 billion over six years. The author obtained a similar result by comparing the unexplained spending decline with the OMB's estimate of PRWORA's food-stamp cuts (obtained from FNS research officials that assisted OMB with these projections) similarly adjusted for the improved economy.


136 Although participation declines occurred in both urban and rural areas, participation rates declined only in urban areas. Sheena McConnell & James Ohls, Food Stamp Participation Rate Down in Urban Areas But Not in Rural, 24 Food Rev. 8 (2001). Thus, people left the program in rural areas because they were no longer eligible but left in urban areas while continuing to meet the program's requirements.

137 See M. Robin Dion & LaDonna Pavetti, Mathematica Policy Res., Inc., Access to and Participation in Medicaid and the Food Stamp Program: A Review of the Recent Literature 3 (2000) (comparing declines in food-stamp and cash-assistance caseloads during part of this period); Sheila R. Zedlewski & Sarah Braunen, Urban Inst., Are the Steep Declines in Food Stamp Participation Linked to Falling Welfare Caseloads? (1999) (finding that former cash-assistance recipients are significantly more likely to have left Food Stamp Program than those that never received cash assistance).
The decline in food-stamp participation also varied among types of households. Eligible members of households that also contained immigrant members declined sharply: Participation by U.S. citizen children in households containing one or more legal permanent resident adults fell by seventy-four percent from 1994 to 1998—one million children—even though these children's eligibility generally was unaffected by the 1996 legislation. Working-poor household participation also dropped, even as large numbers of families were moving from welfare to work. Indeed, the Urban Institute found that, among working poor families, those moving from welfare to work were more likely to leave the Food Stamp Program than those that had never received cash assistance.

The one common factor among most of the states with the sharpest declines in food-stamp participation was that they had been under particularly serious pressure from the food-stamp QC system. Indeed, from 1994 to 1999, participation by working families with children fell 36% in states whose error rates declined by at least 5%.

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138 See Randy Rosso, U.S. Dep't of Agric., Trends in Food Stamp Participation Rates: 1994 to 1999, at 27–33 (Mathematica Policy Res., Inc. ed., 2001). For example, the participation rate among low-wage workers fell from 57.1% in fiscal year 1994 to 42.9% in fiscal year 1999, a faster rate of decline than the national average. Id. at 27. The participation rate among U.S. citizen children living with non-citizen adults plummeted from 80.3% in 1994 to 38.7% in 1997 before rebounding slightly to 45.5% in 1999. Id. at 30.


while participation declined just 2% in the rest of the country.\textsuperscript{143} Most of these states' error rates were high enough several years running to have incurred serious fiscal sanctions.\textsuperscript{144} Some, such as Texas and Mississippi, on the other hand, had committed themselves to crash error-reduction programs in order to qualify for the enhanced administrative funding available to states with ultra-low error rates.\textsuperscript{145} It was common for states seeking rapid reductions in their error rates to force households—particularly working households—to reapply frequently, certifying them for only three months each time they applied.\textsuperscript{146} States sharply increasing their reliance on short certification periods accounted for virtually all of the decline in participation by working families with children nationwide.\textsuperscript{147} These states also subjected households to a more intensive eligibility-verification process\textsuperscript{148} and sometimes stigmatized food-stamp receipt in other ways.\textsuperscript{149}

\textsuperscript{143} These percentages are based on calculations performed by the author and his then-research assistant, Daniel Tenny, from food-stamp quality control data. It is not true, however, that low error rates correlated with high drops in participation. The author found no significant differences among states with rising, flat, or moderately falling error rates; only crash programs seemed to trigger sharp drops in participation. Arkansas, for example, frequently received bonuses for low error rates throughout this period yet saw its participation drop by just ten percent from 1994 to 1999, less than a third the national average rate.

\textsuperscript{144} Author's compilation of data reported in Food Stamp Quality Control reports published annually by FNS for federal fiscal years 1985 through 2001.

\textsuperscript{145} 7 U.S.C. § 2025(c)(1)(A) (2000) (provision subsequently eliminated in 2002 that granted increased federal matching funds for administrative costs of states with payment error rates below six percent); see, e.g., Miss. Dep't of Human Servs., Mississippi: The Road to Enhanced Funding (2001) (establishing receipt of enhanced food-stamp administrative funding as major priority for state); Tex. Dep't of Human Servs., Summary of Activities Responsible for Reducing State Payment Error Rate (1997) (same).

\textsuperscript{146} In 1999, households with earned income and those with immigrant members each had reported error rates of 14% compared with about 9% for the program as a whole. These groups, particularly the far more numerous working households, therefore tended to bear the brunt of states' error-reduction campaigns.

\textsuperscript{147} States that increased the fractions of their working families with children required to reapply at least once every three months by fifty or more percentage points between 1994 and 1999 saw a 29% drop in participation by those households compared with just a 0.6% drop in the rest of the country. These calculations, performed by the author and his then-research assistant, Daniel Tenny, are based on food-stamp QC data. Overall food-stamp participation rates in states with such a rapid increase in reliance on short certification periods between 1994 and 1999 fell from 77 to 54%; in the rest of the country, participation rates fell much more modestly, from 73 to 59%, over this period. The author calculated these percentages based on data from FNS's Keydata, supra note 50, and Schirm & Castner, Reaching Those in Need: State Food Stamp Participation Rates in 1999, supra note 135, at 2.

\textsuperscript{148} See, e.g., Tex. Dep't of Human Servs., supra note 145, at 1, 3 (describing statewide initiatives to require three-month certification periods and intensive verification process as necessary to qualify for enhanced administrative funding); see also Ctr. on Budget & Policy Priorities, Preventing Potential Quality Control Liabilities from Derailing the Administration's Food Stamp Agenda 4-5 (1999) (describing inten-
Losses of food-stamp benefits offset much of the employment gains of low-income single-mother families in the mid-1990s. A number of studies found that eligible households not receiving food stamps were suffering significant hardship, with many working families relying on food pantries. This both disproved any suggestion that these families were declining food stamps because they did not need assistance and added urgency to efforts to address this problem. Difficulty obtaining sufficient food affected low-income people of all races and backgrounds but was particularly evident among Black and Hispanic families and those with immigrant members.

Ohio reinvested some of its food-stamp QC penalties by putting signs on buses and in movie theaters suggesting that welfare fraud was widespread, with the stated object of prompting more citizen reports. Jerry Kuntzman, Ohio's Reinvestment Plans, Remarks at the AAFSD Conference (Oct. 28, 2002); see also infra note 164 (describing some of these practices).


Randi Capps, Urban Inst., Hardship among Children of Immigrants: Findings from the 1999 National Survey of America's Families 2-3 (2001) (finding that thirty-seven percent of children of immigrants lived in families with concerns about
2. The Political Consequences of Caseload Decline

These precipitous declines also had significant political consequences for both advocates and opponents of food stamps. As the program's coverage declined sharply, its advocates could have reacted in either of two ways: They could have rallied to its cause to try to reverse the decline, or they could have despaired of fixing it and shifted their energies to other areas. The precipitous decline in food-stamp participation produced both results. Also, among those program supporters that remained engaged, the alarming rise in numbers of eligible people going unserved could have prompted some to take political risks and antagonize other interest groups—such as program administrators—with whom they might otherwise prefer to build a political coalition in support of the program. Alternatively, it could have caused them to seek a broader coalition in support of the program.

The program's critics also had a choice of responses: They could have seen a smaller, but still objectionable, program as less of a concern than a large one, or they could have argued that declining participation was evidence that the program was so flawed that even its intended beneficiaries wanted no part of it. Here again, the post-1996 history of food stamps contains examples of both kinds of reactions.

But by wounding the Food Stamps Program without killing it, opponents caused a new, unforeseen effect. The sharp decline in food-stamp participation shrunk the program's budget; this had two consequences, both of which contributed to the survival of the program. First, it made the program a less attractive target for raids, since its budget held less potential for plunder than it once had. Thus, the program's committed opponents had less to offer other groups in exchange for their support of further food-stamp cuts. Second, it made improvements more likely because expanding the program's costs by any given fraction would cost less in absolute terms if it was an increase off of a smaller base. This difference between the fractional and the absolute cost of reforms helps explain the success in later years of supporters' efforts to simplify and open food stamps to more working families.

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footnotes:
1. This difference between the fractional and the absolute cost of reforms helps explain the success in later years of supporters’ efforts to simplify and open food stamps to more working families.

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155 Thus, for example, funding a change in program rules that would cause a ten percent increase in the cost of a $25 billion program would require $2.5 billion in tax increases, cuts to other programs, or deficit spending. That same rule change, increasing costs by ten percent, would require $1 billion less in offsets or deficit spending if made to a program that had shrunk to $15 billion.
Ultimately, the most important political implication of the decline in food-stamp participation was its symbolic and practical impact on the benefits received by low-wage workers, including those that had recently departed from cash-assistance programs. If the program no longer could serve large segments of its most politically appealing constituency, it could not long survive.

C. Competing Strategies for Food Stamp Supporters and Opponents

With the final passage of PRWORA, the political dynamic that had existed since the 1994 election had played itself out in the public-benefits realm. These issues inevitably would recede from public consciousness. Strategies that might have worked in the glare of publicity rapidly became obsolete. The lack of publicity presented both challenges to the program's critics, who had dominated the preceding twenty-one months, and opportunities for its supporters, who had spent this period in desperate, and largely losing, defensive struggles.

1. Strategies for the Dissolution of the Food Stamp Program

Some important conservative activists suggested that the total dismantlement of the Food Stamp Program was unfinished business to which Congress must return.\textsuperscript{156} PRWORA had taught them that, rather than terminating funding outright, the more politically effective route was to leave funding in place and attack programmatic structure. Conservatives had tried that approach with food stamps in 1995 and 1996, however, and failed. Making the strategy work would require a series of surgical strikes: Those strengths which had allowed programs to survive 1995 and 1996 would have to be identified and specifically undermined.\textsuperscript{157}

\textsuperscript{156} See Besharov & Germanis, supra note 83; Robert Rector, Editorial, Food Stamp Program is Outdated, PHILA. INQUIRER, Aug. 29, 2003, at A23. Besharov made this argument at some length in his keynote address to the American Association of Food Stamp Directors’ annual meeting. See supra note 50.

\textsuperscript{157} See, e.g., Besharov & Germanis, supra note 83 (proposing broad use of demonstration project waivers and Simplified Food Stamp Program, 7 U.S.C. § 2035 (2000), to change Food Stamp Program in ways similar to what PRWORA accomplished with cash-assistance programs). Professor Besharov made this strategy more explicit in the keynote address to an annual meeting of the American Association of Food Stamp Directors. He explained that if states bombarded FNS with a sufficient number of waiver requests and Simplified Food Stamp Program proposals, the national benefit structure would dissolve and the program could be replaced with one or more block grants. See supra note 50.

In analyzing conservatives' alternatives after PRWORA, two simplistic explanations of their failure to demolish food stamps in 1995 and 1996 should be dispensed with. First, President Clinton's occasional veto threats probably were not crucial to the program's survival. Food stamps had much more going for it. To be sure, his veto threat may have played a role in the disappearance of the optional food-stamp block grant in the final House-Senate conference committee. That veto threat did not, however, come out of
Had these activists been able to enlist state officials in attacking the Food Stamp Program with anything like the fury they had turned on AFDC, they might well have succeeded. Governors and welfare commissioners, however, were too preoccupied with transforming their cash-assistance programs to pay much attention to a program like food stamps, whose benefit dollars did not flow through their budgets. Nonetheless, the intense pressure that FNS placed on states to reduce their error rates risked rousing the states from their distraction.

2. Alternative Models of Reform: Backwards, Defense, or Forward

After PRWORA, the Food Stamp Program's supporters could have gone in any of at least three possible directions. First, they could have adopted a backward-looking strategy, striving to preserve the program's former role as adjunct to AFDC by establishing similar relationships with the new TANF state programs. This approach had nowhere. From his campaign in 1992 until just a few days before he announced he would sign the welfare bill, President Clinton laid down several principles for a welfare bill and threatened to block any bill that did not meet those terms. Ultimately, Congress called his bluff on most of those issues, and the President backed down. Ctr. on Budget & Policy Priorities, The Welfare Bill and Past Administration Positions (1996) (cataloging Clinton administration positions on five central issues in welfare bill that Congress had ignored); Ctr. on Budget & Policy Priorities, The Conference on the Welfare Bill (1996) (finding conference agreement on PRWORA rejected eight of eleven key principles that Clinton administration had announced over preceding weekend). Moreover, Clinton's willingness to extend himself on behalf of the Food Stamp Program, and Congress's willingness to defer on that issue, reflected the program's underlying political strengths. His veto threats were the public vehicle for preserving the program, but his personal belief in its merits was neither a necessary nor a sufficient condition for its survival.

A second oversimplified theory is that the program's opponents were just too busy dismantling AFDC in 1995 and 1996 to have time for food stamps. If that were true, one would have expected to see a block-grant proposal resurface promptly after the 1996 election. Moreover, it exaggerates the difficulty of the task of destroying AFDC. Once the moderate Republicans—and several moderate Democrats—in the Senate Finance Committee supported a block grant in June 1995, AFDC's fate was effectively sealed. The game certainly was up in September 1995, when President Clinton and all but twelve Senate Democrats supported a welfare bill that would have converted AFDC to a block grant. That left opponents of food stamps almost a year to devote themselves to gutting or eliminating the Food Stamp Program.

158 See Gen. Accounting Office, Pub. No. 01-272, Food Stamp Program: States Seek to Reduce Payment Errors and Program Complexity 7 (2001) (finding that TANF implementation distracted state administrators from Food Stamp Program). Indeed, even states' food-stamp directors had little time for national politics as they struggled to implement dozens of complex new food-stamp provisions with the few resources left over from their states' programs to implement TANF. Moreover, many states asked their food-stamp directors to formulate the means testing and procedural rules of their TANF-funded programs since they were among the most experienced officials in state government at crafting detailed means tests. See supra note 50.
much to recommend it: It would have involved little effort or political
risk and would have preserved an arrangement familiar to claimants
and the general public. By hitching itself to programs loaded with
the popular features of "welfare reform," such as work requirements,
the Food Stamp Program could expect a warmer public reception.
Also, state administrators long had petitioned for food-stamp rules to
be brought into closer alignment with AFDC; by conforming its
rules to state-set TANF rules, the Food Stamp Program could grant
states more control without making itself vulnerable to explicit
waivers of the kind that destroyed AFDC's national benefit structure
and ultimately destabilized the program. On the other hand, this
approach would have had high costs. It would have involved substan-
tial reductions in food-stamp participation and prevented the nation's
leading anti-hunger program from serving a new, large, and vulner-
able group: those denied cash assistance under TANF's austere rules.

Second, the program's defenders also might have gone into a kind
of self-protective crouch in anticipation of Congress's next, seemingly
inevitable, onslaught. In 1996, Congress had been quite clear about
what it planned to tear down; it had said very little about what it
planned to build. There was little reason to expect that Congress
would behave any differently the next time it reviewed benefits pro-
grams. Without affirmative congressional direction, program adminis-
trators might reasonably adopt a defensive strategy that attempted to
anticipate and ameliorate possible vulnerabilities before Congress's
next pass.

This, in essence, was the approach that the administration initially
adopted. To address the new emphasis on work, FNS allowed

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159 On the other hand, some strong indications suggest that this was not what Congress
had in mind. Although it discussed extensively what work participation rates should apply
to TANF-funded programs, it did not reinstate the participation rates that had been
dropped from the Food Stamp Employment and Training (FSE&T) Program a few years
earlier, Pub. L. No. 102-237, § 907, 105 Stat. 1818, 1885 (1991), and sharply limited states'authority to impose whole-household sanctions for violations of work and other behavioral
for violation of food-stamp work requirements); accord Walton v. Hammonds, 192 F.3d
590, 599 (6th Cir. 1999) (holding that Congress intended to prohibit states from punishing
child for sins of parent). More generally, PRWORA's supporters regularly cited food
stamps as a safety net that would ensure that no family suffered too grievously under the
harsh new regime of TANF. See supra note 90.

160 See, e.g., WELFARE SIMPLIFICATION & COORDINATION ADVISORY COMM., TIME FOR
of coordinating AFDC and Food Stamp Program); id. at 125-49 (detailing effects of non-
coordination).

161 See supra note 50. FNS's career staff has a deeply entrenched culture of fidelity to
the direction of their political superiors; unlike those in some other federal agencies, they
endeavor to take the programs they administer in the direction their leadership selects.
states to count food stamps, along with cash-assistance grants, as "wages" of TANF recipients in work programs.\textsuperscript{162} Under strong pressure from OMB,\textsuperscript{163} it relentlessly pursued states to produce lower error rates\textsuperscript{164} that would win congressional and public confidence.\textsuperscript{165}

\textit{See Marissa Martino Golden, What Motivates Bureaucrats?} 61-80 (2000) (presenting results of case study finding FNS career staff "passive and acquiescent . . . [O]nly rarely did they so much as verbally confront presidential appointees"); Bonny O’Neil, \textit{Reflections on the Food Stamp Program}, POL’Y & PRACTICE, June 2004, at 10-14 (articulating moderate views of senior civil servant responsible for Food Stamp Program from 1981 to 2003). During the Clinton administration, however, both undersecretaries of agriculture for food and consumer services—the principal political officials responsible for food-assistance programs—had little prior experience with food stamps and devoted most of their attention to child-nutrition programs. See \textit{supra} note 119 and accompanying text.

In addition, during PRWORA’s final consideration and the crucial months after its enactment, President Clinton’s first undersecretary was incapacitated by an intense investigation for spending program funds to conduct focus groups of swing voters in the home districts of the Republican Chairmen of the House and Senate Agriculture Committees. See GEN. ACCOUNTING OFFICE, PUB. No. 96-157, FOOD STAMP PROGRAM: FOCUS GROUP RESEARCH AND PROCUREMENT PROBLEMS (1996) (finding apparent violations of federal law). Lower-level political officials—the deputy FNS administrator in the first Clinton administration and the deputy undersecretary in the second—were bright, capable, committed people with substantial food-stamp experience, but neither was in a position to shape the program’s overall agenda or to push policy initiatives through the clearance process.

This created a void both in the formulation and the execution of a strategy to save the Food Stamp Program. Concluding that the Clinton administration wanted the Food Stamp Program to survive, feeling heavy pressure from OMB and USDA’s Inspector General to reduce error rates, and having little capacity to promulgate regulations or to increase program costs, see \textit{supra} notes 121–22 and accompanying text, FNS’s career staff largely developed its own strategy within the resources available to it, see \textit{supra} note 50.

\textsuperscript{162} FNS did this by exercising its discretion to circumvent the Fair Labor Standards Act. \textit{See} 29 U.S.C. §§ 201–219 (2000). It announced that it would automatically approve Simplified Food Stamp Programs (in effect, statutorily constrained waivers) that treated TANF work requirements as food-stamp workfare programs, thus bringing them within the ambit of the Food Stamp Act’s provision allowing state and local governments to require food-stamp recipients to work off their benefits. \textit{See} 7 U.S.C. § 2029(a) (2000) (allowing for creation of workfare program under which participants work to pay off their foodstamps).

Furthering the pro-work theme and seeking to address a long-time priority of many anti-hunger advocates, FNS also went to considerable lengths to produce professional outreach materials for the working poor and to produce professional outreach for the working poor made available to states.

\textsuperscript{163} The General Accounting Office also kept up a steady drumbeat on error rates. \textit{See}, e.g., GEN. ACCOUNTING OFFICE, PUB. No. 98-37, FOOD ASSISTANCE: REDUCING FOOD STAMP OVERPAYMENTS AND TRAFFICKING (1997) (describing extant error reduction efforts and those still needed); GEN. ACCOUNTING OFFICE, PUB. No. 95-94, FOOD ASSISTANCE: REDUCING BENEFIT OVERPAYMENTS IN THE FOOD STAMP PROGRAM (1995).

\textsuperscript{164} \textit{See}, e.g., FOOD & CONSUMER SERV., U.S. DEP’T OF AGRIC., MANAGING FOR THE PUBLIC TRUST 11–14 (2d ed. 1995–96) (describing with approval Louisiana’s three-month certification periods for working households); FOOD & CONSUMER SERV., U.S. DEP’T OF AGRIC., MANAGING FOR THE PUBLIC TRUST 11 (1995) (same); CYNTHIA LYNN HOLMES ET AL., KRA CORP., EVALUATION OF GRANTS TO STATES FOR THE REDUCTION OF PAYMENT ERROR IN THE FOOD STAMP PROGRAM 8–12 (1996) (describing FNS-funded demonstration project in Maryland involving more verification than 7 C.F.R. § 273.2(f) appears to
It also drafted and put into the clearance process proposed regulations that gave states broad flexibility to reshape the program's operations, while preserving a recognizable core of the national benefit structure.\textsuperscript{166}

This strategy, however, compromised a great deal of the program's effectiveness as an anti-hunger safety net. The pressures to reduce QC error rates, while perhaps yielding a marginal improvement in state stewardship of federal funds, created strong incentives for the states to impose heavier burdens on the most error-prone households, particularly low-wage working families.\textsuperscript{167} In this way, it arguably made the program more vulnerable to the charge of being anti-work.\textsuperscript{168} Strict federal oversight enraged state administrators and risked driving them into active partnership with the program's ideological opponents.\textsuperscript{169} Moreover, the federal rules that FNS relaxed...
had long served to guarantee access to the program. Thus, none of the three major threats to the program would be addressed: The states would be radicalized, the working poor would be driven away, and the program would continue the self-destructive annual ritual of declaring itself poorly administered in close to half of the states.

Food stamps' supporters also had a third alternative: to cast the program in a new role. Here, the largely negative tenor of Congress's interventions in 1996 made plausible several alternative new visions of the program. The viability of this approach depended on finding a new vision that was both politically appealing and attainable with the few policy levers available. Limited policymaking capacity made this strategy risky: Publicizing an attractive new vision for the program and then failing to implement it would serve only to highlight the present program's shortcomings.

Nonetheless, it was this third approach that anti-hunger advocates adopted. Specifically, they sought to transform food stamps into a work-support program aligned and identified not with cash assistance, but with childcare subsidies, the Earned Income Tax Credit and, in particular, Medicaid. In essence, they saw the same dangers FNS career staff did but argued for a more affirmative response. Unlike the FNS career staff's approach, this strategy harmonized with PRWORA's "pro-work" message but gave priority to allowing the program to provide a safety net for families disadvantaged by the new cash-assistance policies. It focused on the food-stamp QC system that was coming to dominate the attention of both federal and state administrators, seeking to limit imposition of QC sanctions to that handful of states with serious administrative problems. It also sought to reduce error rates by relaxing the rigorous accounting that QC had required states and households to account for minor, routine changes further, with the QC system still declaring that about half the states had integrity problems. By testing states against the national average every year, it was likely that about half the states would fall above the national average, and hence face sanctions, unless some particularly large states had very high error rates to pull the national average up.)

For example, USDA's political leadership, reflecting its political background working on child-nutrition programs, sought to reposition food stamps as a nutrition program. See supra note 50. Exactly what this might mean or how it might be achieved, however, remained hazy. Moreover, it is hard to find much evidence in the events of 1995 and 1996 to suggest that the public was deeply concerned about nutrition issues. The new agenda did lead to a mushrooming of federal support for states' nutrition education programs, and encouraged FNS's Office of Analysis, Nutrition, and Evaluation to develop a measure of "food security" that the Census Bureau would include routinely in the Current Population Survey (CPS), the same survey that estimates the poverty rate each year. U.S. DEPT. OF AGRIC., STRATEGIC PLAN, 1997-2002, at 3-22 (1997). Beyond this, the new agenda had little impact.

See supra Part I.A.4.
in circumstances. This simultaneously would reduce reported error rates, remove states' incentives to demand burdensome paperwork of working households, and smooth federal-state relations. It thus would open the program to more low-wage workers and other claimants.

Implementing this strategy, however, would require more political capital than the advocates had. They hoped to motivate the Clinton administration to spend some of its capital on food stamps by reviving the "make work pay" strategy; liberals had unsuccessfully tried this strategy of incentives as a thematic alternative to block granting, work requirements, and time limits for welfare reform. The "make work pay" agenda also, however, had a positive side as a rhetorical slight-of-hand designed to channel demands to reduce the welfare rolls into support for providing other means-tested benefits to low-wage workers. Conservatives generally did not challenge directly the premise that work should pay better than welfare. Indeed, at times they turned the assumptions underlying the "make

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172 Reducing the procedural requirements on states and households reduced the number of things that households had to do and states had to monitor. This gave each fewer chances of committing something QC would consider an error. The advocates believed that the level of precision that the public would demand of a program focusing on the working poor was somewhat lower than it had been when the QC system was being designed and the dominant group of food-stamp claimants was AFDC recipients. See supra note 50.

173 It also avoided the wholesale expansion of federal mandates upon states, which the effort to ramp up the program's nutrition components that USDA political officials favored likely would have required.

174 Advocates shared the FNS career staff's concern that opening up the food-stamp benefit structure to state variation could send the program down a slippery slope leading to an indefensibly formless program of the kind AFDC had become in its final years. They concluded, however, that the current structure was just as indefensible, both because it posed too many obstacles to the working poor and because its complexity ensured unsustainably high QC error rates. They also feared that allowing states to reshape too many of their food-stamp rules to resemble their cash-assistance policies would reinforce states' tendency to think of food stamps as an adjunct to their TANF-funded cash-assistance programs; this could jeopardize food stamps' availability as an ultimate safety net for those losing cash assistance under states' new policies. The advocates thus sought ways to modify the program's rules that would ease administrative burdens on states and claimants but that had logical limits that would prevent the wholesale erosion of the program's benefit structure. Even when the political climate had changed sufficiently to move some modest additional funding for the program through Congress, advocates supported spending a significant portion of those funds on procedural simplification rather than on benefit increases for the poorest of the poor. See supra note 50.

175 For a typical analysis of this kind, see NORMA B. COE ET AL., URBAN INST., DOES WORK PAY? A SUMMARY OF THE WORK INCENTIVES UNDER TANF (1998), in which the impact that TANF, food stamps, and EITC have on welfare recipients' return for their work effort is calculated. But see GREGORY ACS ET AL., URBAN INST., PLAYING BY THE RULES BUT LOSING THE GAME: AMERICA'S WORKING POOR (2000) (arguing that relevant threshold should be higher than poverty line).
work pay” slogan around to argue for reducing the benefits available to welfare recipients as a way of improving the relative attraction of work.176

Candidate Bill Clinton had declared in 1992 that “[n]o one who works full-time and has children at home should be poor anymore.”177 President Clinton called for a change in this state of affairs in his first State of the Union Address, and his call resonated across the political spectrum. Year-round, full-time minimum wage earnings and the EITC, less withholding taxes, however, left a family of four below three-quarters of the poverty line. To make the calculation work, the Clinton administration had added food stamps to wages and the EITC.178 But PRWORA’s food-stamp reductions meant that most families of four supported by a full-time minimum-wage worker still would be in poverty, even with the EITC and food stamps.179 Advocates argued, therefore, that unless it made food stamps far more available to low-wage workers, the Clinton administration would preside over the worsening of a problem it had pledged to solve.

II
REFORMING THE FOOD STAMP PROGRAM

Traditionally, discussions of public-welfare law focus overwhelmingly on eligibility rules, both financial and categorical.180 Because

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176 Of course, critics just as easily could support the sentiment underlying the slogan by agitating for across-the-board cuts in welfare benefits—which would, perforce, make work relatively more attractive. See, e.g., MICHAEL TANNER ET AL., CATO INST., THE WORK VERSUS WELFARE TRADE-OFF: AN ANALYSIS OF THE TOTAL LEVEL OF WELFARE BENEFITS BY STATE (1995) (“Any welfare reform proposal must recognize that individuals are unlikely to move from welfare to work as long as welfare pays as well or better than working. That suggests that the most promising welfare reforms are those that substantially cut back on the level of benefits.”). Welfare benefits were so meager at the time, however, that the conservative case was difficult to make. Their analyses tended to count benefits available to welfare recipients while ignoring the availability of the same benefits to low-wage workers and to count benefits from discretionary programs available to only a tiny minority of welfare recipients. See SHARON PARROTT, CTR. ON BUDGET & POLICY PRIORITIES, THE CATO INSTITUTE REPORT ON WELFARE BENEFITS: DO CATO’S NUMBERS ADD UP? (1996).

177 CLINTON & GORE, supra note 55, at 164.

178 See supra note 50.

179 The author’s calculations assume 2000 hours per year of work at the federal minimum wage, eligibility for the EITC, and shelter expenses equal to those of the typical food-stamp household with roughly comparable earnings.

180 Financial eligibility rules are those that condition an applicant household’s eligibility and benefit levels on its income, assets, and expenses and those that determine which individuals’ circumstances shall be considered together as a household. See, e.g., 7 U.S.C. §§ 2012(i)(1), 2014 (2000). All other eligibility rules, including those that condition eligibility on conduct (e.g., work requirements, 7 U.S.C. § 2015(d) (2000)), and status (e.g., disqualifications for college students, non-citizens, or certain childless adults, § 2015(e), (f),
these represent society's formal expressions of whom it is and is not willing to help, and to what degree, these have by far the most symbolic importance among public-benefit programs' rules. They also are the easiest to understand. Their symbolic import and accessibility tends to draw more political attention to these rules than to procedural rules or agencies' practices. Moreover, the budgetary impact of changes in eligibility rules is easiest to calculate. And in the Food Stamp Program, they are the most clearly set out in statute, requiring legislation for most significant changes. For all of these reasons, major changes in eligibility rules generally are the most difficult and conspicuous in the public-benefits arena and particularly in the Food Stamp Program.

Conventional analyses of public-benefit programs' politics, therefore, would weigh the chances of resuscitating the Food Stamp Program in terms of advocates' ability to liberalize the eligibility rules that PRWORA had cut back. By this standard, the prospects were grim: In the program's weakened post-PRWORA condition and with little ability to move legislation, food-stamp advocates had little immediate opportunity to achieve significant restorations.181

Approaching the Food Stamp Program from a functional rather than symbolic perspective, however, offers a much more nuanced picture. For one thing, the practical importance of eligibility rules can easily be overstated. Even if a claimant is eligible, it is by no means assured that she will in fact receive benefits. A low-income person only will receive benefits if each of three conditions is met.182 First, she must be substantively eligible. Second, she must clear the agency's procedural hurdles. And third, she must actively seek the benefits (or, if she is already a recipient, reapply). Converting the Food Stamp Program into an effective and defensible work-support program required the program to ensure that large numbers of low-income workers would meet all of these conditions. And maintaining its effectiveness as a general nutritional safety net required it to

(o); 8 U.S.C. § 1612(a)(1) (2000)), are commonly referred to as categorical. Occasionally the line between the two types of rules blurs, as where the law grants some categories of claimants more lenient financial eligibility terms. See, e.g., 7 U.S.C. § 2014(g)(1) (2000) (amended 2002) (setting higher resource limit for households containing at least one elderly claimant).

181 To be sure, the Clinton administration proposed restoring a significant minority of PRWORA's food-stamp cuts in the budget it submitted to Congress the following winter and did so again in subsequent years. See infra note 424. But all concerned recognized that these proposals were "dead on arrival," and the administration did not fight for them seriously in budget negotiations that spring or subsequently.

ensure that other, non-working potential claimants would continue to meet them as well.

In PRWORA's wake, the Food Stamp Program was seriously deficient in all three areas. But addressing all the problems at once was far beyond the available political resources. With the Food Stamp Program's participation rapidly declining—and with the loss of benefits due to that decline greater than that caused by PRWORA's benefit cuts—the second and third factors were at least as important as the first. The program therefore would have to be reconfigured one step at a time, and it would have to accumulate political capital as it went. In particular, the program had to win back the increasingly alienated states without giving them authority broad enough to destabilize the program. This Part will address each of the necessary conditions in turn.

A. Addressing Substantive Eligibility Barriers for Low-Wage Workers

Before the program was reformed, most low-wage workers were ineligible for food stamps. The program's basic mission had been to feed those most in need; accordingly, its benefits decreased as household income increased, phasing out completely when the household exceeded the poverty line by thirty percent. This bedrock rule would have made many low-income workers ineligible had they applied, but few applied in any event. A host of other subsidiary issues in the food-stamp means test also denied eligibility to, or reduced benefits for, many low-wage working families (as well as for others for whom food stamps would have made a difference). Also, some non-financial eligibility conditions demonstrably (though by no means exclusively) disadvantaged low-wage workers. Therefore, in the name of opening access to low-wage workers, a range of entrenched eligibility rules now would be revisited. But, in the pro-

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183 See supra Part I.A.4.
184 § 2014(c)(2).
185 The food-stamp participation rate begins to drop sharply as gross household income exceeds the poverty line. For example, between 1994 and 2000, the food-stamp participation rate for individuals between half of the poverty line and the poverty line ranged from 77% to 92%; during the same period, the participation rate among eligible individuals between the poverty line and 130% of the poverty line fluctuated between 37% and 26%. KAREN CUNNYNGHAM, U.S. DEP'T OF AGRIC., TRENDS IN FOOD STAMP PROGRAM PARTICIPATION RATES: 1994 to 2000, at 12 (Mathematica Policy Res., Inc. ed., 2002).
186 See, e.g., WEMMERUS, supra note 86, at 10–12 (describing characteristics of otherwise eligible low-income households disqualified from food stamps because of vehicles they own).
cess, the Food Stamp Program would be able to extend coverage to other people as well, including those in politically less popular groups.

1. Financial Eligibility

Affirmative efforts to transform the Food Stamp Program began with the obscure and somewhat marginal issue of TANF diversion payments—payments made to families as an alternative to ongoing cash assistance. Because these payments typically are made in cash, FNS required that they be counted as income in determining households' food-stamp eligibility and benefit levels. This approach was consistent with FNS's longtime policy: Public assistance lay at the core of "income." FNS had fought several battles on this issue with states seeking to make their welfare spending go further by excluding public assistance from food-stamp calculations. The states' position was that these payments commonly went toward expenses such as car repair or childcare deposits that were necessary for low-income people to find or keep employment. Counting them as income that would reduce households' food-stamp allotments, they charged, was emblematic of the program's anachronistic insensitivity to the working poor. If FNS were to exclude TANF diversion payments, it would signal a new willingness to accommodate state priorities and to reorient itself to the needs of the working poor.

FNS finally reversed its policy in June 1998. Though the change likely had little practical impact, it represented an important

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187 See § 2014(d) (establishing default rule that payments are counted as income unless excluded by statute). FNS did not issue a formal policy interpretation that diversion payments counted as income. Nonetheless, when its regional offices made clear that they would expect QC reviewers to assign errors to any cases in which diversion payments were not counted as income, most state food-stamp directors felt they had little choice. See supra note 50.

188 E.g., Md. Dep't of Human Res. v. U.S. Dep't of Agric., 976 F.2d 1462, 1473 (4th Cir. 1992) (rejecting state's repeated efforts to recharacterize AFDC payments as energy assistance); Massachusetts v. Lyng, 893 F.2d 424, 429–32 (1st Cir. 1990) (rejecting attempt to exclude AFDC-funded back-to-school clothing allowances from food-stamp calculations); New York v. Lyng, 829 F.2d 346, 350–53 (2d Cir. 1987) (rejecting effort to exclude AFDC-funded restaurant allowances provided to homeless families). See generally 1996 GREEN BOOK, supra note 7, at 438 n.5 (listing states USDA permitted to exclude part of their AFDC and GA payments as energy assistance).

189 See GOOLSBY & RYAN, supra note 114. A point states made repeatedly, and which advocates wholeheartedly endorsed, was that the Food Stamp Program's rules had been crafted at a time when few working families received benefits and had not been updated for the post-PRWORA focus on work.

symbolic event. It also represented a watershed in the way food-stamp law is made.\footnote{From a strictly legal point of view, FNS’s memo was far less exceptional. The Food Stamp Act excludes “nonrecurring lump-sum payments.” 7 U.S.C. § 2014(d)(8) (2000). The requirement that lump sums not recur does not prevent the exclusion from applying to moneys that could come more than once as long as those funds are not scheduled to recur: The statute gives several examples of excludable payments, such as cash gifts from private charities and tax refunds that a household may receive several times. \textit{Id.; accord} Hamilton \textit{v. Madigan}, 961 F.2d 838 (9th Cir. 1992) (finding AFDC-funded payments made to resettle homeless families to be “nonrecurring lump-sum payments”).} FNS departed from the traditional model of uniform program rules in two important ways. First, it implicitly acknowledged that supporting work deserved priority in post-PRWORA food-stamp policymaking. And second, it did not issue a uniform national policy but gave states the option to exclude these payments under certain broad conditions. The states—not households relying upon FNS rules, as under the old regime—held the power to exclude payments.\footnote{Previously, § 2014(d) and 7 C.F.R. § 273.9(c) (2003) defined types of income to be excluded with little reference to the expectations or desires of states providing those funds; the Food Stamp Program relied upon itself to analyze the nature of the funds rather than on the state’s characterization. Of course, claimants could have sued under the statute and regulations. In such a suit, FNS’s memo likely would have been helpful. As it happened, although states had been providing diversion payments for several years prior to June 1998, no claimants filed suit.} Thus began a thaw in the dangerous cold war between federal and state administrators.\footnote{Incredibly, however, states continued to cite the federal administration’s superseded policy on diversion payments for several months in their attacks. \textit{See supra} note 53.} This opened the door to further changes in the Food Stamp Program’s financial eligibility rules. Some of these changes, particularly those involving income, sought to simplify the program; others, particularly those liberalizing resource rules, endeavored to aid the working poor directly.

a. Simplifying Income Calculations

Much of the Food Stamp Program’s complexity resulted from efforts to target benefits precisely at need. With benefit levels already quite meager,\footnote{\textit{Compare} \textit{CTR. FOR NUTRITION POLICY AND PROMOTION, THE THRIFTY FOOD PLAN} (2000) (describing ways in which households could make best use of modest budget to obtain nutrients), \textit{with} Mary Ellen Natale & David A. Super, \textit{The Case Against the Thrifty Food Plan as the Basis for the Food Component of the AFDC Standard of Need}, 25 also \textit{CTR. ON BUDGET & POLICY PRIORITIES, U.S. DEPARTMENT OF AGRICULTURE PERMITS TANF DIVERSION PAYMENTS TO BE EXCLUDED FROM FOOD STAMP INCOME CALCULATIONS} (1998) (analyzing guidance and suggesting additional means by which diversion payments not falling within memo’s criteria could nonetheless be excluded). A year later, FNS issued another memo confirming that states had many additional options to exclude diversion payments from income. \textit{Food & NUTRITION SERV., U.S. DEP’T OF AGRIC., TANF DIVERSION PAYMENTS} (1999), http://fns.usda.gov/fsp/rules/Memo/Support/99/TANF_Diversion.htm.} any significant simplification of the program not
accompanied by additional resources was likely therefore to shift benefits away from the worse-off (those with severe difficulties purchasing food) to the somewhat better-off. For this reason, advocates traditionally had resisted efforts to reduce the targeting of food-stamp benefits.\footnote{See U.S. Gen. Accounting Office, Pub. No. 96-54, Food Stamp Program: Achieving Cost Neutrality in Minnesota’s Family Investment Program (1996) (describing unusual cost-neutrality system in which state agreed to make large payments to federal government). See generally 7 U.S.C. § 2026(b) (1994) (amended 1996) (prohibiting food-stamp demonstration waivers that would reduce any household’s benefits except under very narrow circumstances); 7 U.S.C. §§ 2030, 2031 (2000) (requiring welfare reform experiments in Washington State and Minnesota to “hold harmless” recipients against any reductions in benefits under new experimental rules); Operating Guidelines and Forms, 7 C.F.R. § 272.3(c)(2)(ii) (2003) (prohibiting administrative waivers that disadvantage any household).}

In the new environment, however, the complexities of the current food-stamp benefit formula were not politically sustainable. They also were causing states to establish eligibility determination procedures whose stringency was deterring many households from seeking the food-stamp benefits they needed.\footnote{See supra notes 107-10 and accompanying text (discussing food-stamp QC system).} It could be argued that here the perfect was the enemy of the good: In its pursuit of highly accurate targeting, the program was driving millions of otherwise eligible people away.

Advocates were willing to relax some targeting rules in the name of simplification. They distinguished, however, between “horizontal” and “temporal” targeting. Horizontal targeting compares claimants with one another, seeking to provide the greatest aid to those claimants with the greatest need. Income definitions, deductions for necessary expenses, and rules imputing financial responsibility for some claimants are the primary means by which programs target horizontally. Thus, for example, if household A has less income, higher expenses, or more mouths to feed than household B, horizontal targeting rules will seek to give household A more benefits. Temporal targeting, by contrast, compares a given claimant’s circumstances over time, reducing or eliminating benefits when her need declines and restoring aid should the claimant suffer a reverse. A variety of budgeting rules and reporting requirements implement temporal targeting. Thus, temporal targeting rules may seek to reduce a retail employee’s benefits as she works more hours in the holiday shopping season and then restore those benefits when she is laid off after the holidays. Similarly, temporal targeting rules seek to increase a house-
hold's benefits when it has a new child and reduce those benefits when an older child leaves the home.

State administrators advocated a radical reduction in horizontal targeting by eliminating virtually all of the food-stamp deduction structure. This raised a number of serious legal, political, and functional problems. Because horizontal targeting rules historically had been much more controversial, they were specified in far more detail in the statute. Thus, changing horizontal targeting rules would require either the unlikely cooperation of an unwilling Congress, or the issuance of waivers that could destabilize the program. In addition, advocates concluded that the variations between households that the deduction structure captured had significant impacts on households' ability to purchase food. For example, a household with federal housing subsidies really did have a meaningfully greater ability to purchase food than a household with the same gross income that had to pay fifty to eighty percent of that income for rent on the private market.

Understanding that "you cannot fight something with nothing," advocates therefore sought to deflect the states' demands with a dramatic relaxation of temporal targeting. Legally, temporal targeting could be reduced much more quickly and easily through administrative waivers. Since waivers of this kind cannot override any provi-

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197 AM. PUB. HUMAN SERVS. ASS'N, CROSSROADS IN SOCIAL POLICY 37-48 (2001) (proposing to eliminate current system of deductions for essential household expenses in favor of system structured around gross income).

198 See, e.g., H.R. REP. NO. 95-464, at 140-45 (1977) (discussing historical and proposed amendments to Food Stamp Act, in which differences between households justified differences in food-stamp benefits).

199 Compare 7 U.S.C. § 2014(e) (2000) (specifying in minute detail which expenses each household may deduct from its income), with § 2014(f) (providing only very general guidance as to which month's circumstances determine household's eligibility and benefit level).

200 See supra Parts II.A.4, II.C.1.

201 Thus, for example, among Wisconsin food-stamp households of three in 2000, the two quintiles with the lowest shelter costs received average benefit increases from the shelter deduction of only one dollar and six dollars, respectively. But the twenty percent with the highest shelter costs received sixty-four dollars in extra food stamps in recognition of the fact that the same money cannot both pay rent and purchase food. CTR. ON BUDGET & POLICY PRIORITIES, THE SHELTER DEDUCTION TARGETS BENEFITS ON HOUSEHOLDS WITH HIGH HOUSING COSTS (2001).

202 In recent years, steadily increasing numbers of low-income families have experienced housing costs in this range as the private unsubsidized low-cost housing market has collapsed in many areas and the growth of public subsidies has stagnated. See generally JENNIFER DASKAL, CTR. ON BUDGET & POLICY PRIORITIES, IN SEARCH OF SHELTER (1998).

203 FNS has authority to waive the provisions of any regulation so long as the waiver is not inconsistent with any provision of the Food Stamp Act and does not abridge rights of any claimants. Operating Guidelines and Forms, 7 C.F.R. § 272.3(c)(2) (2003).
sions of the Food Stamp Act or impair any claimants' rights, this approach offered the prospect of relatively rapid progress while maintaining the integrity of the statutory benefit structure. FNS's support was assured: it had attempted a modest initiative of this kind in the early 1990s only to be halted by OMB over cost concerns. Advocates also determined that temporal targeting was likely a greater source of QC errors than the deduction structure. Thus, much of the pressure that was driving states to advocate eliminating deductions could be relieved by making reporting and budgeting rules less sensitive to changes in household circumstances.

In practical terms, this focus on administrative waivers to reduce the precision of temporal targeting also ensured that simplification would be accomplished exclusively through benefit increases. OMB only would accept the resulting increased costs if the advocates had high-level administration support. By mid-1999, advocates had gained that support. They had, by then, convinced the very highest levels of the Clinton administration that food stamps were essential authority should be contrasted with the broader statutory-waiver authority in support of pilot projects, which might impair household benefits. Research, Demonstration, and Evaluations 7 U.S.C. § 2026(b) (2000); General Purpose and Scope, 7 C.F.R. § 281 (2003).

See Operating Guidelines and Forms, 7 C.F.R. § 272.3(c)(2)(ii) (2003) (prohibiting non-demonstration project and administrative waivers that would result in material impairment of claimants' rights).

See supra note 124.


7 C.F.R. § 272.3(c)(2)(ii) (mandating that any waiver either increase benefits or leave them untouched).

See supra note 50. The Program Associate Directors (PADs) of OMB with responsibility for food stamps in the post-PRWORA period, first Ken Apfel and then Barbara Chow, had long been sympathetic to the program. Frank Raines, OMB director early in the post-PRWORA period, had been a Carter White House aide partially responsible for the biggest expansion of the Food Stamp Program in its history. As OMB director, however, he had little time to become involved in specific food-stamp issues. His deputy and successor, Jack Lew, also had a long history of interest in and sympathy for the Food Stamp Program. Drawing on his experience in past battles, however, he initially concluded that relentless pressure on states to reduce QC error rates was the best way to secure the program's position. Pressure from his staff helped ensure that FNS staff would adopt that strategy. He, too, lacked the time to learn about the deep hostility between USDA and the states that threatened to blow the program apart. Agriculture Secretary Glickman and several other cabinet members expressed concern about the Food Stamp Program's decline, but all had limited time to follow through on specific initiatives. White House Chief of Staff Leon E. Panetta, the Food Stamp Program's leading champion in the House from 1982 to 1990, also had great sympathy but little time. His concept of public service also compelled him to address the full range of issues before the executive branch even-handedly, rather than pursuing his personal policy agenda.

The real breakthrough was interesting senior members of the staffs of the Domestic Policy Council and the First Lady's Office. These staff members had been engaged in efforts to open Medicaid to the working poor as the best available way of expanding health
for families to make successful transitions from welfare to work\textsuperscript{209} and that the current QC-induced procedural barriers\textsuperscript{210} were making that program inaccessible to large numbers of working families.\textsuperscript{211}

The Food Stamp Program's move away from temporal targeting came in several stages. Its origins can be traced to two FNS initiatives in the early 1990s that, although modest, nonetheless foundered at OMB for lack of offsets.\textsuperscript{212} On July 14, 1999, President Clinton announced an initiative that allowed states both to reduce the number of changes in circumstances\textsuperscript{213} that working households must report,\textsuperscript{214} and to replace all requirements to report changes as they
happen with a single report form that a working household would be required to submit every three months. Over its last year-and-a-half, the Clinton administration steadily lengthened the permissible interval between reports and expanded the share of the caseload that could benefit from these simplifying options. These changes creation would have given states three options, the most appealing of which relieved households of the obligation to report any changes in earnings other than a change in job, a change in hourly wage, or moving from part-time work to full-time employment or vice versa. OMB was concerned, however, about the cost of continuing to provide the same level of benefits to households whose hours of employment had increased since their last certification. Therefore, it required FNS to limit this “status reporting” option to households that a state required to apply for recertification every three months. See supra note 50.


215 Letter from Dan Glickman, Secretary of Agriculture, to State Welfare Commissioner (July 14, 1999). Longstanding food-stamp regulations allow states to require households to submit monthly reports in lieu of reporting changes as they happen. Monthly Reporting and Retrospective Budgeting, 7 C.F.R. § 273.21(h) (2003). If the household fails to submit a monthly report, it does not receive food stamps the following month even if it had no change in circumstances. § 273.21(m)(1)(ii). Research has found that monthly reporting interrupts or terminates benefits to a large percentage of eligible households due to a variety of misunderstandings, mail delays, clerical problems, etc. ROBERT GREENSTEIN & MARION E. NICHOLS, CTR. ON BUDGET & POLICY PRIORITIES, MONTHLY REPORTING IN THE FOOD STAMP PROGRAM (1988); MARION E. NICHOLS & ROBERT GREENSTEIN, CTR. ON BUDGET & POLICY PRIORITIES, RESEARCH FINDINGS ON MONTHLY REPORTING (1988). The Clinton Food Stamp Initiative in effect allowed states to apply the same system to working families with a three-month, rather than one-month, interval between reports. SUSAN CARR GOSSMAN, U.S. DEP’T OF AGRIC., FSP—MODIFYING THE STATUS REPORTING WAIVER AND OFFERING THE QUARTERLY REPORTING WAIVER TO ALL STATE AGENCIES (1999), available at http://www.fns.usda.gov/fsp/rules/Memo/99/raletter.htm.

216 In the fall of 1999, FNS informally permitted states to extend quarterly reporting to households with a recent work history as well as those currently working. See supra note 50. In November 2000, FNS inserted a state option for semiannual reporting in a final rule dealing with other procedural issues. Reporting Changes, 7 C.F.R. § 273.12(a)(1)(vii) (2003); Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 70,134, 70,177 (Nov. 21, 2000) (to be codified at 7 C.F.R. pts. 272–77) [hereinafter Final NECP Rule]. The proposed rule had not contained a comparable provision. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 10,856 (proposed Feb. 29, 2000) (to be codified at 7 C.F.R. pts. 272–74, 277) [hereinafter Proposed NECP Rule]. Unlike quarterly reporting households, the final rule did not completely absolve a household subject to semiannual reporting of its obligation to report changes as they happened. It only required these households, however, to inform the food-stamp office if their income rose above 130% of the federal poverty income guidelines.
ated such momentum that first the ranking Republican on the Senate Agriculture Committee and then President Bush proposed allowing states to extend semiannual reporting to almost all households, and the 2002 Farm Bill enacted these proposals into law.\footnote{Pub. L. No. 107-171, § 4109, 116 Stat. 134, 309 (2002) (to be codified at 7 U.S.C. § 2015(c)(1)(D)).} Under the new reporting system, a household may report an adverse change in its circumstances at any time and receive an increase in its monthly allotment.\footnote{States are obligated to act promptly on any reported changes that result in eligibility for increased benefits. 7 C.F.R. § 273.12(a)(vii)(A), (c)(i). One may reasonably question, however, how diligent states will be in informing households of this opportunity. Several states requested and received waivers allowing them to act on all reported changes, positive or negative, in semiannual reporting systems. See supra note 50. Reliable information is unavailable about what message these states are giving households about whether and when to report: The states could encourage households to report all changes, in which case the burdens of this system would differ only modestly from the previous change-reporting regime. Or the state could be pointing to the possibility that change reporting could reduce benefits to discourage households from making any reports at all. In that case, the reporting burden likely is reduced, but households experiencing significant increases in need may be enduring hardship. This would represent the one significant departure from the pattern of relaxing temporal targeting in ways that did not reduce households' benefits.}

Thus, these changes reduce targeting primarily by providing greater benefits to households with

\footnote{Reporting Changes, 7 C.F.R. § 273.12(a)(1)(vii) (2003). Semiannual reporting, too, was limited to working households. Id. A few weeks later, just before leaving office, the Clinton administration responded to states' complaints about the administrative burden of maintaining different reporting systems by allowing them to apply quarterly reporting to virtually all households, without regard to their connection with the workforce. Arthur T. Foley, FNS, FSP—Universal Quarterly Reporting Waivers (Jan. 10, 2001), http://www.fns.usda.gov/fsp/rules/Memo/99/universal_quarterly_rpt.htm. Under this revised guidance, states could receive waivers to apply quarterly reporting to households except the three categories excluded by statute from periodic reporting systems: migrant and seasonal farm workers, the homeless, and elderly and disabled households without earnings. Id.; see 7 U.S.C. § 2015(c)(1)(A) (2000). It also offered simpler methods of accounting for fluctuating unearned income, such as child support, to states that still required households to report changes. These options grew from a longstanding but oft-ignored regulation directing states to disregard any income whose receipt during a particular month cannot be anticipated with reasonable certainty. Determining Household Eligibility and Benefit Levels, 7 C.F.R. § 273.10(c)(1) (2003). Among other things, this guidance allowed states to disregard child-support income that is received irregularly. Arthur T. Foley, FNS, Treatment of Unearned Income from Private Sources (Jan. 10, 2001), http://www.fns.usda.gov/fsp/rules/Memo/01/unearnedincome.htm. The 2002 Farm Bill offered states additional options for simplifying the accounting for child support income designed to avoid reductions of benefits to households. Pub. L. No. 107-171, § 4101(b), 116 Stat. 134, 305-06 (2002) (to be codified at 7 U.S.C. § 2014(e)(4), (n)).}

rising incomes,\textsuperscript{219} and they simplify the program without reducing benefits available to any significant group.\textsuperscript{220} These changes also diminished the appeal that broader waivers and similar devices had held.\textsuperscript{221} Instead of having to design benefit reductions to offset the costs of any simplification and then undergoing painstaking cost-neutrality review, states could simplify many significant aspects of the program at their own discretion.

b. Resource Eligibility

The primary goal of simplifying reporting procedures was to ease access to the program for people who already were eligible. As it happened, the regulatory changes did permit a new population to qualify, although that was not their main goal. By contrast, efforts to change

\textsuperscript{219} Households with other changes in circumstances that indicate a reduction in need—such as the loss of household members or the reduction in certain deductible expenses—also can postpone the resulting reduction of benefits up to two months under quarterly reporting and up to five months under semiannual reporting.

\textsuperscript{220} Some households presumably were terminated for failure to submit quarterly or semiannual reports. Given the strong trend towards three-month certification periods prior to 1999, see supra note 148 and accompanying text, many of these same households likely would have been terminated in the recertification process.

The 2002 Farm Bill did give states the option to freeze most deductions between recertifications. \S 4106, 116 Stat. 308. Although it exempts two of the most important changes in deductions—the twenty percent earned-income deduction and changes in shelter costs resulting from a reported move—this option could cause households to lose deductions for rent or utility increases, additional childcare costs, increased child support obligations, or some other costs for several months. In practice, since food-stamp rules do not require most of these changes to be reported, it is unclear how well food-stamp offices inform recipients of the potential benefit of reporting these changes. In addition, only tiny fractions of food-stamp households receive the dependent-care, medical, or child-support-payers' deductions, the three deductions that may be frozen completely. Randy Rosso, U.S. DEP'T OF AGRIC., CHARACTERISTICS OF FOOD STAMP HOUSEHOLDS: FISCAL YEAR 2001, at 42 tbl.A-9 (Mathematica Policy Res., Inc. ed., 2003), http://www.fns.usda.gov/oane/MENU/Published/FSP/FILES/Participation/2001CharReport.pdf. More importantly, few states are likely to take this option since the new reporting options offer much greater simplification.

\textsuperscript{221} The Food Stamp Act long has authorized FNS to waive its provisions to facilitate demonstration projects just as HHS may do under section 1115 of the Social Security Act. Compare 7 U.S.C. \S 2026(b)(1)(A) (2000) (permitting Secretary of Agriculture to waive food-stamp regulations in order to conduct pilot projects), with 42 U.S.C. \S 1315(a)(1) (2000) (permitting waiver of Social Security Act provisions for demonstration projects). PRWORA added an alternative opportunity for states to dispense with federal rules: the Simplified Food Stamp Program. 7 U.S.C. \S 2035 (2000). This provision gives states broad authority to apply the rules they have set for TANF to TANF recipients' eligibility and benefit levels in the Food Stamp Program. States initially hesitated to adopt the simplified program option because it would require operating under two sets of rules simultaneously, one for non-TANF households and the other for TANF recipients. See supra note 50. The pressure to eliminate rules that could form the basis for QC errors, however, might well have caused them to reconsider had FNS not provided alternative means of simplification and error reduction. See supra notes 213–19 and accompanying text.
the Food Stamp Program's resource eligibility rules explicitly sought to extend food-stamp eligibility to an ineligible population whom the program's income-eligibility rules indicated needed food assistance.\textsuperscript{222}

Few would argue that households should receive food stamps when they are fully able to buy food from their savings. Thus, advocates generally did not place much priority on raising the program's $2000 overall resource limit.\textsuperscript{223} Asking impoverished families to sell their cars before they can receive food stamps, on the other hand, makes little sense. Thus, efforts to liberalize the Food Stamp Program's resource limits focused on its treatment of motor vehicles.

The roughly one million otherwise eligible low-wage families with vehicles exceeding the program's eligibility limits\textsuperscript{224} constituted one of the most sympathetic groups of low-income people that were ineligible for food stamps.\textsuperscript{225} But for the cash value of their cars, these low-wage workers would have been financially eligible for the program. Along with the program's treatment of diversion payments, food-stamp vehicle policy was a favorite target of state administrators.\textsuperscript{226} Almost all states liberalized their treatment of vehicles as

\textsuperscript{222} Obviously advocates also could have tried to liberalize the Food Stamp Program's gross and net income limits. See 7 U.S.C. § 2014(c) (2000). Households with incomes near these limits receive very modest benefits and participate at very low rates. See, e.g., Karen Cunyngham, U.S. Dep't of Agric., Trends in Food Stamp Program Participation Rates: 1999 to 2001, at 13 tbl.2.5 (Mathematica Policy Res., Inc. eds., 2003) (showing participation rates for households with incomes between 101 and 130% of poverty line fluctuating between 25.5 and 31.2%), http://www.fns.usda.gov/oane/MENU/Published/FSP/Files/Participation/Trends1999-2001.pdf. As a result, advocates long have been skeptical that raising the limits would bring many additional households onto the program. See supra note 50. In addition, advocates traditionally have favored targeting benefits on those most in need. Id. That criterion would prioritize almost any other benefit expansion over raising income eligibility limits. As a result, no significant legislation has been introduced to change these limits since Congress established them in 1981. The categorical eligibility policy, described infra notes 231–245 and accompanying text, also has the effect of exempting households from the gross and net income limits, but this does not appear to have been a primary motive behind states' adoption of it.


\textsuperscript{224} Wemmerus, supra note 86, at 10.

\textsuperscript{225} This population is composed of "relatively well-established, working-class households that rely primarily upon earnings for financial support." Id. at 37.

resources in cash-assistance programs before, or shortly after, PRWORA's enactment.227

Four times between 1984 and 1990, one or the other chamber of Congress had liberalized the food-stamp vehicle rule, only to have the bill die in the other chamber or in conference.228 In 1993, Congress enacted a very modest increase on the value limit for vehicles that food-stamp households could own229 but repealed almost all of that increase in PRWORA.230 And Congress only grew more intransigent thereafter. If the rule was to be liberalized, FNS would have to find a way to do so unilaterally within the existing statute and regulations.

In looking for strategies for using the existing framework to overcome the resource limitation, advocates hit on an obscure feature of the Food Stamp Act called "categorical eligibility."231 This provision could empower states to eliminate the food-stamp resource test altogether and thus avoid disqualifying applicants because of the value of their vehicles. Originally, categorical eligibility had allowed states to dispense with all but a handful of food-stamp eligibility rules for households composed entirely of recipients of AFDC or SSI benefits.232 Since those programs generally had rules at least as (or more)
restrictive than those of the Food Stamp Program.\textsuperscript{233} This provision was basically moot. But PRWORA had simply substituted a reference to TANF for the old one to AFDC.\textsuperscript{234} Thus, recipients of benefits under TANF- or Maintenance-of-Effort-funded programs now had become categorically eligible for food stamps without regard to the food-stamp resource limit.

In the first two years following PRWORA’s enactment, FNS and the states simply had assumed that categorical eligibility applied only to the cash-assistance programs that replaced AFDC.\textsuperscript{235} Thus, when families left cash assistance for work, the vehicles they relied upon to commute could render them ineligible.\textsuperscript{236} Advocates noted, however, that as states’ cash-assistance programs were shrinking,\textsuperscript{237} they were spending more on other kinds of benefits, some of them distributed to many households that did not receive cash assistance. If the recipients of these non-cash benefits could be exempted from the food-stamp resource limits through categorical eligibility, the Food Stamp Program’s restrictive vehicle rules would affect far fewer people. Indeed, states could take advantage of TANF’s broad flexibility to provide modest, inexpensive (“thin”) services\textsuperscript{238} with TANF funds specifically in order to qualify households for categorical eligibility.

the program. \textit{Barbara Cohen, Urban Inst., Categorical Eligibility in the Food Stamp Program} (1989).

\textsuperscript{233} For example, while the Food Stamp Program exempts the first $4,650 of the fair market value of most motor vehicles that households own and then applies the remainder against a $2000 or $3000 resource limit, 7 U.S.C. § 2014(g)(1)-(2) (2000), AFDC counted the equity value of vehicles to the extent that they exceeded $1,500 against a resource limit that states could not set higher than $1000. Need and Amount of Assistance, 45 C.F.R. § 233.20(a)(3)(i)(B) (1996).

\textsuperscript{234} 7 U.S.C. § 2014(a) (2000). The revised provision made categorically eligible any household composed entirely of SSI recipients or recipients of “benefits under a State program funded under Part A of Title IV of the Social Security Act . . . .” \textit{Id.} Since Title IV-A includes TANF’s state maintenance of effort (MOE) requirement, 42 U.S.C. § 609(a)(7) (2000), as well as the TANF block grant itself, this provision effectively made recipients of benefits funded with either TANF block grants or TANF MOE funds categorically eligible.


\textsuperscript{236} This may help to explain why participation rates declined in urban but not rural areas. \textit{See supra} note 136. In both areas, households leaving cash assistance also left the Food Stamp Program. In rural areas, those households were more likely to have vehicles and hence to be ineligible for food stamps.

\textsuperscript{237} \textit{See supra} Part I.B.1.

\textsuperscript{238} For example, some states gave households publications printed with TANF block grants or MOE funds that listed resources available to low-wage workers and suggested techniques for getting along with supervisors at work and winning promotions.
Some states presumably would not be willing to take this route, but those states then would be hard-pressed to attack the program for rules they had the capacity to dismantle.

After a tortuous debate, 239 advocates persuaded the administration to include guidance in the Clinton Food Stamp Initiative of July 1999 to encourage the sweeping application of categorical eligibility. 240 Fairly rapidly, several states adopted policies designed to exempt all families with children from the food-stamp resource test. 241 For example, Michigan gave every family a brochure about services available to domestic violence victims. 242 The brochure itself was printed with TANF funds. In this way, every family was receiving "benefits under a State program funded under part A of title IV," 243 thereby becoming categorically eligible for food stamps. Some of the earliest states to adopt liberal categorical eligibility policies, such as Michigan and North Dakota, had conservative Republican administrations; this helped immunize the new categorical eligibility policy from congressional attack. More broadly, in the wake of the devolutionary rhetoric of 1995 and 1996, a benefit expansion structured as a state option made a difficult political target.

Although categorical eligibility made benefits available to many low-income working families, the reluctance of some states to pursue this option aggressively 244 prevented it from eliminating vehicle policy as a barrier to many other low-wage workers. In addition, since TANF benefits are limited to families with children, 245 categorical eligibility could not help childless households. The July 1999 initiative did, however, put food-stamp vehicle policy on the political agenda, and it substantially reduced the cost of further initiatives in this

239 Advocates initially sought out a state with a Republican governor to ask FNS to change this policy. Although several food-stamp directors from these states were interested, they declined to move forward: They were so alienated from FNS during this period that they were convinced that after they got their superiors' approval, FNS would reject them and further feed their superiors' hostility to the program. See supra note 50.

240 See infra Part II.B.2.


244 See Food & Nutrition Serv., supra note 241, at 8 (reporting that more than one quarter of states had not implemented any expanded categorical eligibility policies). Some state food-stamp administrators could not win the cooperation of their TANF counterparts. Others were suspicious that FNS would withdraw the policy. Still others simply were not troubled by existing food-stamp vehicle policy. See supra note 50.

area. It also legitimated the largely novel idea of giving states discretionary control over food-stamp eligibility criteria. Thus, in 2000, a bipartisan, bicameral group of congresspersons introduced hunger relief legislation that included a broader state option to liberalize vehicle policy. Although the bills never moved in either chamber, a pair of Republican appropriators in the group inserted the state vehicle option into the conference report of the agriculture appropriations bill that passed in fall 2000. This allowed states to import into the Food Stamp Program any exclusions for vehicles in their TANF assistance programs. Between categorical eligibility and the TANF conformity option, almost half of the states now exclude all vehicles

246 For example, CBO estimated that PRWORA's provision reducing the food-stamp vehicle exclusion by $350 from the level specified in prior law and freezing it saved over $1 billion over six years. Cong. Budget Office, supra note 130, at 40, 44–45. CBO estimated that the Hunger Relief Act provision enacted in October 2000—which allowed far more sweeping exclusion of vehicles—cost about $200 million over five years. To be sure, a shrinking spending baseline, see supra Part 1.B.2, and CBO's projections of states' propensity to adopt the option entered into the latter estimate. Nonetheless, the fact that the cost of a provision allowing the complete exclusion of all vehicles was smaller over five years than essentially just preserving an inflation adjustment would have been over six suggests that CBO believed that a great many vehicles either already had been or would be excluded under categorical eligibility.

249 Like the policies relaxing the program's temporal targeting, this provision only allowed changes that would benefit households. States could not replace food-stamp rules with TANF exclusions to the detriment of any claimant. Id.
250 Learning from the substantial fiscal consequences of the loosely drafted PRWORA technical amendments applying categorical eligibility to recipients of all TANF-funded services (no matter how thin), see supra note 234 and accompanying text, CBO threatened a huge cost estimate unless this option was limited to TANF-funded benefits that are "assistance." See supra note 50; see also What Does the Term "Assistance" Mean?, 45 C.F.R. § 260.31(a)(1) (2001) (defining “assistance” as including “cash, payments, vouchers, and other forms of benefits designed to meet a family’s ongoing basic needs”); § 260.31(a)(3), (b)(3) (defining childcare and transportation subsidies as “assistance” unless provided to working families). Any month in which a family receives “assistance” counts against the federal sixty-month time limit and in calculating states' compliance with TANF work-participation rates. 42 U.S.C. § 607(a) (governing calculation of participation rates); § 608(a)(7)(A) (establishing sixty-month limit). Nonetheless, since many states have childcare or transportation subsidy programs that meet the definition of assistance but impose no resource test, this option effectively allowed almost any state to exclude all vehicles from consideration as assets in the Food Stamp Program. Thus, a childcare program that does not absolutely require that all recipients be employed is a program that provides assistance even if, as a practical matter, most or even all recipients do have jobs. Administrators cannot immediately exclude all vehicles from food-stamp resource calculations where a state statute locks in traditional food-stamp resource policy. In practice, administrators also face cost constraints in liberalizing food-stamp vehicle policy where state law ties other programs' vehicle policy to the food-stamp limit. Administrators also cannot supersede the food-stamp vehicle policy where they have no TANF-funded programs without asset tests that meet the definition of assistance and where state law denies them.
from resource consideration, with most of the rest substantially liberalizing their food-stamp vehicle policies.\textsuperscript{251}

With two simple options available for states to liberalize vehicle policy—exempting households from food-stamp resource rules through categorical eligibility or conforming their food-stamp vehicle policies to those in any TANF-funded assistance program—advocates felt free to seek modifications of national food-stamp vehicle policy that would benefit working-poor families even at the cost of complicating the program: Any state that found the national policy onerous simply could eliminate consideration of vehicles altogether. To do this they revisited a theory that had failed in court earlier in the decade.

The Food Stamp Act excludes “resources that, as a practical matter, the household is unlikely to be able to sell for any significant return because the household’s interest is relatively slight.”\textsuperscript{252} Since its enactment in 1990, FNS had insisted that this exclusion did not apply to vehicles with large outstanding loan balances\textsuperscript{253} and had successfully defended a welter of lawsuits challenging that limitation.\textsuperscript{254}

\textsuperscript{251} CTR. ON BUDGET & POLICY PRIORITIES, supra note 227, at 3 (finding that twenty-four states exclude all vehicles completely and another four apply policies likely to have same effect in almost all cases).

Some at USDA remained uncomfortable with leaving states such broad discretion. USDA’s proposals for the 2002 Farm Bill would have restricted categorical eligibility to recipients of cash assistance and spent the savings to exclude one vehicle per adult household member on a uniform national basis and to exclude retirement savings accounts from food-stamp resource considerations. OFFICE OF MGMT. AND BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2003, at 68–69 (2002), http://www.gpoaccess.gov/usbudget/ty03/pdf/budget.pdf; 2003 GREEN PAGES, supra note 120, at 26–51 (2002). The lateness of these proposals, CBO’s differing cost estimates, and the tenacity of a North Dakota senator in protecting his state’s ambitious categorical eligibility program prevented this proposal from receiving serious consideration in the Farm Bill debates. See supra note 50.


All but one of these decisions had explicitly relied upon *Chevron*\(^255\) deference to USDA's authority, rather than judicial endorsement of its construction.\(^256\) The advocates argued that these decisions extended an invitation to the administration to reverse USDA's interpretation of this provision in the Act.\(^257\) President Clinton, emboldened by the generally favorable reaction to his initiative of the previous summer, made the exclusion of these vehicles a centerpiece of an initiative on improving transportation for the working poor in February 2000.\(^258\) That November, the administration also simplified

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\(^{255}\) *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (requiring courts to defer to agency interpretations of statute unless Congress has spoken to issue or agency's approach is unreasonable).

\(^{256}\) *Alexander*, 139 F.3d at 736 (finding USDA's interpretation sufficiently reasonable to pass *Chevron* scrutiny); *Warren*, 65 F.3d at 391 (same); *Beckman*, 891 F. Supp. at 1329 ("[B]ecause the Secretary's interpretation is reasonable, it is entitled to judicial deference and must be upheld."); *Wasserman*, 882 F. Supp. at 295 ("Because the Secretary's interpretation of the Act is based on a permissible construction of the statute and is sufficiently reasonable, it is entitled to judicial deference."); *Bizzell*, 1995 WL 569620 at *3 ("The statute is ambiguous as an automobile could clearly fall within the definition of an inaccessible asset as provided in subsection (g)(5)."; *Rainwater*, 1994 WL 849528, at *9 ("[B]oth interpretations are reasonable constructions [but] the Court [must] give deference to [USDA's] clearly reasonable construction of the statute in question, even if that construction is 'technical' and not particularly compassionate."); *Butler*, 1994 WL 860788, at *3-*4; *Cook*, 856 F. Supp. at 1095 ("USDA's interpretation of this statute is not necessarily the result the Court would have reached if the question initially had arisen in a judicial proceeding. Nonetheless . . . USDA has met its burden of demonstrating its interpretation of the statute is reasonable."). *But see* Valenzuela v. Espy, 860 F. Supp. 1421, 1428 (D. Ariz. 1993) (rejecting USDA's construction as unreasonable).

\(^{257}\) CTR. ON BUDGET & POLICY PRIORITIES, PREVENTING CARS WITH HEAVY LOAN BALANCES FROM MAKING LOW-INCOME WORKING FAMILIES INELIGIBLE FOR FOOD STAMPS 7-10 (1999).

\(^{258}\) Remarks Announcing Budget Initiatives on Transportation for Working Families, 36 WEEKLY COMP. PRES. DOC. 359 (Feb. 23, 2000). Initially, the administration published proposed rules to exclude vehicles with net equity values that did not exceed half of the resource limit for a given household, half of $2000 for most households and half of $3000 for households with elderly members. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 10,856, 10,878 (proposed Feb. 29, 2000) (to be codified at 7 C.F.R. pts. 272-74, 277). Thus, in a household without an elderly member, a vehicle whose outstanding loan balance was within $1000 of its fair market value would be completely excluded from consideration as a resource; if the household's net equity exceeded $1000, the vehicle's fair market value would count as a resource to the extent it exceeded $4650 and quite possibly would render the household ineligible. At meetings of state food-stamp directors, FNS encouraged states to seek administrative waivers under 7 C.F.R. § 272.3(c)(2) to implement this proposed rule immediately. *See supra* note 50. That fall, in response to state administrators' and advocates' complaints about the complexity of having two different thresholds for determining when a vehicle is "worthless," FNS's final rules set the threshold at $1,500 for all households. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 70,134, 70,170-71 (Nov. 21, 2000) (to be codified at 7 C.F.R. pts. 272-77).
and loosened a separate "equity test," with the result that many fewer households with more than one vehicle were disqualified. This brought federal policy somewhat closer to a complete exclusion of vehicles that households need to seek or commute to work and gave states a further signal encouraging them to go the rest of the way.

c. Other Changes in Financial Rules

Before it announced its major food-stamp initiatives, the USDA quietly took steps to defuse state demands for control over the food-stamp benefit structure. It announced that any state wishing to increase food-assistance benefits to any household could do so through an electronic benefit transfer (EBT) system without affecting the household's eligibility for federal food stamps. Thus, states no longer could argue that giving them control of the food-stamp benefit structure was the only way to aid particular politically appealing groups. Instead, a state seeking a waiver had the burden of explaining why, in a time of generally flush state budgets, a given benefit expansion should be financed by offsetting cuts in other households' benefits—as the federal government's cost-neutrality requirement for waivers dictated—rather than by the states' own funds.

More generally, by putting forward its initiatives on reporting, vehicles, and QC, the Clinton administration had endorsed the

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259 This rule, which antedates the Food Stamp Act of 1977, 7 C.F.R. § 271.3(c)(4)(iii)(a), (iv) (1976), see H.R. REP. No. 95-464, at 506 (1977), counts as a resource the household's full equity in a vehicle (i.e., its fair market value less encumbrances). Resource Eligibility Standards, 7 C.F.R. § 273.8(f)(1)(iii), (iv) (2001). Prior to 2000, the rule exempted one vehicle per household plus an additional vehicle for each household member who was employed or looking for work. § 273.8(f)(2). The more valuable of any additional vehicle or vehicles count toward the household's resource level at fair market value less $4,650. § 273.8(f)(1). The administration acknowledged that the statutory authority for this regulation had been tenuous since the 1977 Act took effect. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. at 10,878. Nonetheless, apparently fearing adverse media coverage of a hypothetical household receiving food stamps under federal rules with numerous cars, it declined to drop the rule outright. Instead, it exempted one car for each adult in the household plus each working minor. § 273.8(f)(2). This made the rule effectively meaningless, but the decision to keep it on the books in some form showed that the new politics of simplification and accommodating states had not triumphed completely over the much older politics of jealousy-driven attacks on means-tested programs.


262 See supra Part II.A.1.a.

263 See supra Part II.A.1.b.

264 See infra Part II.B.1.a.
notion that the Food Stamp Program was an important support to the working poor. This endorsement was echoed by senior House Republicans\(^2\) and state administrators,\(^3\) opening the door for additional administrative and, eventually, legislative initiatives. Thus, in November 2000, the USDA reversed decades-old policy, allowing self-employed workers to exclude capital costs from their gross revenues.\(^4\)

The following year, Senator Richard Lugar, Ranking Republican on the Senate Agriculture Committee, introduced legislation giving states several new options to simplify the program's financial rules in ways that could only benefit households.\(^5\) Democrats rapidly adopted many of these concepts in the Farm Bill they brought to the Senate floor, as did President Bush in his February 2002 budget. Most of these proposals became law that spring. The legislation allowed states to import income exclusions from their TANF assistance programs or Medicaid so long as they continued to count wages, government benefits, and a few other major sources of income.\(^6\) Similarly, states could adopt resource exclusions from TANF assistance programs or Medicaid so long as they continued to count cash, readily accessible bank accounts, and a few other major, readily accessible resources.\(^7\) In addition to allowing states and households to stop tracking various unusual types of income and resources,\(^8\) these provisions gave states broad license to develop a simpler, more generous treatment of self-employed workers and to exclude the defined contribution retirement accounts that had prevented food stamps from

\(^{265}\) Nancy L. Johnson et al., Welfare Reform Has Already Achieved Major Successes: A House Republican Assessment of the Effects of Welfare Reform (1999) (expressing concern about declining food-stamp participation in paper signed by Speaker of House, Chairman of Ways and Means Committee, Chairwoman of Ways and Means Subcommittee on Human Resources, and former chairman of that subcommittee (who had presided over passage of PRWORA)).

\(^{266}\) Am. Pub. Human Servs. Ass’n, supra note 197, at 38.


\(^{268}\) Farm and Ranch Equity Act of 2001, S. 1571, 107th Cong. §§ 412–415, 417–428, 431–435 (2001). In effect, the Food Stamp Program had come close to adopting as a guiding political principle the rule enshrined in the Medicaid statute: States could have broad flexibility so long as their rules were not more restrictive than the federal rules they replaced. See 42 U.S.C. §§ 1396a(r)(2), 1396u-1(b)(2) (2000).


\(^{270}\) 7 U.S.C. § 2014(g)(6). Although this provision does not provide independent authority to exclude motor vehicles, it does not interfere with the options states already had through categorical eligibility and the vehicle-specific TANF conformity option. See supra Part II.A.1.b.

\(^{271}\) Two types commonly mentioned were the proceeds from sale of claimants' blood or from garage sales.
serving as a bridge for many recently unemployed workers until they could find new jobs.\footnote{272}{PRWORA had included a state option to simplify the calculation of self-employed workers' expenses but required that states' methodologies be cost-neutral to the program. 7 U.S.C. § 2014(m) (2000); see Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. at 70,179–80 (declining to offer any specific options to states). Although the USDA has not collected information on states' practices in this area, see Food & Nutrition Serv., supra note 241, the author believes from his conversations with state administrators that none has taken advantage of this provision.}

More broadly, these provisions reversed the quarter-century-old principle that the program counted all moneys absent a specific exclusion. The Farm Bill also allowed states to simplify their calculation of the shelter deduction by ignoring some of the financial benefits that two households might realize by doubling up in the same house or apartment.\footnote{273}{Pub. L. No. 107-171, § 4104, 116 Stat. 134, 307 (2002) (to be codified at 7 U.S.C. § 2014(e)(7)(C)(iii)). Here again, the simplification is structured so that it only may increase households' benefits: Households had previously been denied the benefit of a "standard utility allowance" because they shared housing or lived in certain kinds of public housing units. States have difficulty keeping track of which households share housing since non-household members are irrelevant for most other food-stamp purposes, and hence households often do not think to report the presence of non-household members.}

2. **Non-Financial Eligibility Rules**

these rules did not limit eligibility on the basis of either need or misconduct—a departure from the Food Stamp Program’s longstanding principles. Second, both sets of rules were extremely complex, requiring state agencies’ eligibility staffs to apply numerous nuanced criteria, some of which involved analyzing households’ circumstances over months or years.278 Direct action by FNS, however, was impossible: Even if legal authority had been vested in the agency, Congress would not have hesitated to overrule it. Thus, any efforts to moderate these rules also had to be framed as expansions of state flexibility, just as most of the liberalizations of financial rules had been. Overriding FNS policies expanding the discretion of states so soon after justifying PRWORA’s sweeping changes on the basis of states’ wisdom would have been difficult indeed for Congress.

a. Childless Adults

Of the two groups disadvantaged by the new rules, immigrants and childless adults, the latter seemed to present the best opportunity for state-driven liberalization. Initially, states did take advantage of these opportunities. In December 1996, FNS released an extensive list of criteria on which it would grant states’ requests to waive the

Although Republicans on the agriculture committees were willing to terminate food stamps to childless adults without offering them a chance to work for continued aid, their bills gave these individuals more than three months to find work or allowed them to return, if needed, much sooner than the final legislation. This provision became steadily more draconian throughout 1995 and 1996, as the Republican leadership pressed the agriculture committees to achieve steadily more food-stamp savings. During consideration of the welfare bill, Senate Agriculture Chairman Richard Lugar agreed to accept a Democratic amendment to reduce the number of people cut off from food stamps when they were unable to find work, with offsetting food-stamp reductions. Democratic Senator Kent Conrad, however, was so enraged by the principle of terminating people who were willing to work, that he insisted on completing his speech, even after Senate Budget Chairman Domenici accepted the amendment on Senator Lugar’s behalf. 146 Cong. Rec. S8407–09 (daily ed. July 22, 1996). This speech drew Senate Majority Leader Trent Lott’s attention to the provision—he subsequently intervened in the conference committee to compel Republicans from both chambers to accept a far more draconian provision than any of them had ever proposed. See supra note 50.

278 For example, to decide whether an immigrant is eligible, an eligibility worker must determine how many quarters of work the immigrant, the immigrant’s spouse, and perhaps the immigrant’s parents have accrued and whether the immigrant was receiving certain kinds of public benefits while earning those quarters. 8 U.S.C. §§ 1612(a)(2)(B), 1645 (2000). To apply the three-month time limit, an eligibility worker may be required to determine how many months of benefits the claimant had received over the previous three years and on what basis (since some months count toward the basic three-month limit, some count toward a separate period of eligibility available for those that have exhausted the first period, and others do not count at all). 7 U.S.C. § 2015(o)(2), (5) (2000).
time limit for finding work due to "insufficient jobs." Within a few months, about forty states responded by submitting waiver requests that, according to FNS estimates, exempted roughly half of all recipients potentially subject to the time limit. Getting states to help the rest of this vulnerable population proved much more difficult.

The most direct way in which states can assist claimants subject to the time limit is to offer them work slots. FNS did what it could to encourage states to do so, issuing guidelines that allowed states to avoid many of the regulations' costlier requirements for workfare programs. In 1997, the Clinton administration obtained $1.5 billion over five years for the Food Stamp Employment and Training (FSE&T) Program to cover one-hundred percent of the cost of state-administered food-stamp work slots for persons subject to the time limit. Nonetheless, even with FNS paying the full cost, only a handful of states took the "pledge," and few others made any substantial efforts to provide work slots to persons subject to the time limit.

Instead, most states allowed large portions of their FSE&T allocations to revert to the federal treasury, and few accepted FNS's offers to redistribute unused funds. This failure surprised and perplexed


280 These could be either a workfare slot that would allow claimants to work off the value of their benefits at the minimum wage or a twenty-hour-per-week training position. 7 U.S.C. § 2015(o)(2)(A)-(C) (2000).

281 FOOD & NUTRITION SERV., U.S. DEP'T OF AGRIC., REVISED FOOD STAMP PROGRAM GUIDANCE FOR SELF-INITIATED WORKFARE PROGRAMS (1997), http://www.fns.usda.gov/fsp/rules/Memo/97/SELFWORK.htm. National advocacy groups either encouraged or tolerated the issuance of this guidance. Where claimants have a legal right to benefits if no work slot is provided, adding one merely increases the chances of a sanction. Where, as here, the lack of a work slot prevents claimants from qualifying, even badly-administered slots are likely to increase the number of claimants receiving assistance. If the terms of the work slot strike claimants as too onerous, they can decline to participate, leaving themselves in the same position in which they would have been, had no slot been offered. See infra note 525 and accompanying text.

282 Pub. L. No. 105-33, § 1002(a), 111 Stat. 251, 252-54 (1997) (codified at 7 U.S.C. § 2025(h)(1) (2000)). (In estimating the cost of this funding, CBO counted both the amount spent on programs and the additional food-stamp benefits that low-income people would receive because they were allowed to perform workfare.) FNS also announced it would provide this funding under very favorable reimbursement rules to any state that pledged to offer a work slot to every individual that otherwise would be denied benefits under the time limit. Food Stamp Program: Work Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 and Food Stamp Provisions of the Balanced Budget Act of 1997, 67 Fed. Reg. 41,589, 41,600 (June 19, 2002).

283 GEN. ACCOUNTING OFFICE, PUB. NO. 99-40, FOOD STAMP PROGRAM: INFORMATION ON EMPLOYMENT AND TRAINING ACTIVITIES 6-7 (1998) (discussing widespread under-spending of states' FSE&T grants). FNS staff made a series of enthusiastic presentations about the availability of these funds at food-stamp directors' meetings, only to be met with disinterest and even scorn from food-stamp directors. See supra note 50. Congress repeat-
both advocates and officials at OMB and FNS, who continued to search for better ways to promote this option. Setting up work programs for childless adults facing the three-month time limit would seem an obvious choice for states.

The Clinton administration won another concession for this population in 1997—discretion for states to exempt substantial numbers of claimants from the time limits. But for several years, this proved nearly as futile as the work-slots initiative. A few states applied these discretionary exemptions to extend the number of months claimants had before being terminated or to supplement geographic waivers for administrative ease. Florida, Illinois, and Oregon exempted all childless workers within the state through a combination of waivers and discretionary exemptions after USDA reported that those states had among the highest rates of food insecurity in the country. The vast majority of states’ allocations of discretionary exemptions, how-

284 See supra note 50.
285 But see infra notes 521–526 and accompanying text for an explanation of this seemingly incongruous result.
287 Many states administer the Food Stamp Program with project areas corresponding to counties. See Definitions, 7 C.F.R. § 271.2(g) (2003) (defining “project area” as “county or similar political subdivision designated by a State as the administrative unit for program operations’’). Some counties that do not qualify for waivers as a whole contain substantial areas that do qualify. For example, Chicago has been waived due to insufficient jobs since PRWORA imposed the time limit, but most of the rest of Cook County has not qualified. Illinois gives discretionary exemptions to all claimants in Cook County who are subject to the time limit but who do not live in a waived area. Thus, it did not have to train Cook County eligibility workers on how to apply the time limit.
288 Michael Leachmen, Or. Ctr. for Pub. Policy, Hunger in Oregon 4 (2001) (attributing Oregon’s high food insecurity rate to workers in counties with insufficient jobs, among other causes); Mark Nord et al., U.S. Dep’t of Agric., Prevalence of Food Insecurity and Hunger, by State, 1996–1998, at 3 (1999). Prior to the report, Oregon had declined to seek waivers for its qualifying areas and had used few, if any, discretionary exemptions. More recently, Louisiana, another state found to have high food insecurity, sought statewide exemption from the time limit based on data showing an unemployment rate exceeding the national average by more than one-fifth over a two-year period. Food & Nutrition Serv., U.S. Dep’t of Agric., Summary of Requests to Waive 7 C.F.R. 273.24, at 4 (2004), http://www.fns.usda.gov/fsp/rules/Memo/PRWORA/abawds/
ever, have gone unused. States evidently are disinclined to complicate the time-limit rule by adding new exemption criteria which eligibility workers then would have to learn and apply.

More generally, the experience of waivers, work slots, and discretionary exemptions suggests that, despite the upheavals wrought by PRWORA, administrative concerns still are likely to trump ideology in setting state policy. Waivers arguably flew in the face of the dominant pro-work ideology, yet they were sought in roughly forty states because they were easily obtained. Discretionary exemptions would have accomplished much the same end and given states greater control over the design of their own substantive exemption criteria. Yet these largely have been ignored except where they further administrative simplicity. And although both right and left would seem to have reasons to support creating work slots for time-limited claimants and the federal government would foot the entire bill, only a handful of states have bothered to take advantage of this opportunity.

b. Immigrant Households

The history of efforts to restore eligibility to legal immigrants after 1996 provides a good measure of the fortunes of the Food Stamp Program. In PRWORA, food stamps (along with SSI) suffered the most sweeping restrictions on immigrants’ eligibility: Apart from three fairly small groups, all legal immigrants were denied food


290 To be sure, several states, such as Michigan, Ohio, and Wisconsin, declined for many years to seek waivers from the three-month time limit on ideological grounds. At this writing, however, the only state with significant areas eligible for waivers that has not applied for at least some of those areas is Massachusetts.

291 States’ waiver applications also showed this strong preference for simplicity. FNS’s guidance on waivers identified a number of grounds on which waivers could be justified and expressed openness to consider other kinds of evidence that an area had insufficient jobs. FOOD & NUTRITION SERV., supra note 279; see also 7 C.F.R. § 273.24(f)(2)(ii). Yet the overwhelming majority of states’ applications have relied upon the two simplest criteria, areas with unemployment exceeding ten percent and labor surplus areas (LSAs) designated by the U.S. Department of Labor (DOL). Under both of these criteria, states could obtain simple lists of qualifying areas, either from DOL or from their state labor statistics agency.
stamps for life unless they naturalized.\textsuperscript{292} By 2002, Congress enacted legislation with President Bush's blessing that made restrictions on food-stamp eligibility for immigrants the least severe among major federal assistance programs.

In 1997, the Clinton administration, states' organizations, and advocates struggled to persuade Congress to restore SSI and Medicaid eligibility to as many immigrants as possible but ignored food stamps almost completely. The following year saw modest restorations of immigrants' eligibility for food stamps. This did not represent a significant improvement in the Food Stamp Program's political status. Rather, the agriculture committees funded these restorations\textsuperscript{293} entirely through reductions in other aspects of the program.\textsuperscript{294} Since those committees lacked jurisdiction over SSI and Medicaid, these funds could not have been feasibly applied to restorations in those programs even if immigrants' advocates might have preferred to do so. The restoration was exceedingly modest, providing some additional benefits to refugees and other asylum-seekers\textsuperscript{295} and restoring eligibility to some elderly,\textsuperscript{296} disabled,\textsuperscript{297} and child\textsuperscript{298} immigrants who arrived in the United States prior to PRWORA. A much broader res-

\begin{footnotesize}
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\item \textsuperscript{292} 8 U.S.C. § 1612(a)(1) (2000) (denying food stamps to non-citizens except for refugees and others fleeing oppression and in their first five years in country, legal permanent residents with credit for substantial work histories of their own or immediate family members, and immigrants with past or present service in U.S. Armed Forces, along with their immediate families).
\item \textsuperscript{294} Id. §§ 501-502.
\item \textsuperscript{295} The legislation also restored eligibility to certain Native Americans granted rights by treaty to cross the U.S. borders with Canada and Mexico without demonstrating citizenship. 8 U.S.C. § 1612(a)(2)(G) (2000).
\item \textsuperscript{296} 8 U.S.C. § 1612(a)(2)(I). Only elderly immigrants who were at least sixty-five when PRWORA was signed (i.e., those born on or before August 22, 1931) could receive benefits under this provision. Thus, with every passing year, the minimum eligibility age rises, and the number of elderly immigrants covered shrinks as those born before the cut-off date die.
\item \textsuperscript{297} 8 U.S.C. § 1612(a)(2)(F). Only immigrants with disabilities who are receiving one of a limited list of mostly federal disability benefits are considered disabled for the purposes of this restoration. \textit{Id.; see also} 7 U.S.C. § 2012(r)(2)-(7) (2000) (defining “elderly or disabled member” as person receiving certain types of disability benefits administered by state or federal authorities). Of these benefits, Social Security disability and veterans' disability benefits largely are limited to people who were otherwise exempt from the food-stamp ban on the basis of military service or quarters of work (as measured by Social Security system). \textit{See} 8 U.S.C. § 1612(a)(2)(B), (C). A few SSI recipients whose eligibility Congress restored in 1997 were eligible to receive benefits under this provision.
\item \textsuperscript{298} Although many immigrant families include children, those children often are U.S. citizens because they were born in this country. Only seventeen percent of immigrants whom PRWORA denied food-stamp eligibility were children. \textsc{Mike Stavrianos et al.}, U.S. DEP'T OF AGRIC., CHARACTERISTICS OF CHILDLESS UNEMPLOYED ADULTS AND LEGAL IMMIGRANT FOOD STAMP PARTICIPANTS: FISCAL YEAR 1995, at 37 (Mathematica Policy Res., Inc. ed., 1997). Moreover, since the 1998 restoration covered only children present in the U.S. prior to August 1996, its effective minimum age rose every year as
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toration became the centerpiece for bipartisan anti-hunger legislation introduced in 1999, although it was excluded from the food-stamp legislation enacted in October 2000. By 2001, however, Senator Richard Lugar made a substantial restoration of food-stamp eligibility for legal immigrants a centerpiece of the Republican Farm Bill proposal, and Democrats countered with a still-broader proposal. The following spring, President Bush included his own broad restoration of immigrants' eligibility for food stamps in his budget proposal, and a bipartisan group of senators essentially added the Bush proposal to the bill that the Democrats had brought to the Senate floor. The final Farm Bill restored benefits to all immigrant children who were eligible under pre-PRWORA rules and allowed other immigrants to qualify after five years in the country.

As a result of the Farm Bill, food stamps went from being the federal program in which immigrants faced the most daunting eligibility rules to the program among the major federal entitlements to which they had the most extensive, if still very incomplete, access. Unquestionably, the bipartisan interest in these restorations during the 107th Congress in part reflects the increasing political clout of


These provisions of the Farm Bill removed the limitation on children's eligibility that caused the 1998 restoration's impact to dissipate over time. Cf. supra note 298. The 2002 Farm Bill also allowed persons with disabilities to receive food stamps even if they entered the country after PRWORA's enactment. Pub. L. No. 107-171, § 4401(a), 116 Stat. 134, 333 (2002) (to be codified as amendment to 8 U.S.C. § 1612(a)(2)(F) (2000)). This is unlikely to have any broad impact unless and until SSI eligibility is restored to immigrants arriving after 1996. Without such a restoration, immigrants with disabilities may have no way to obtain recognition of their disabilities under food-stamp law. But see Eve H. Shapiro & David A. Super, The Rights of the Disabled in the Food Stamp Program, 25 CLEARINGHOUSE REV. 68, 69–71 (1991) (noting that food-stamp definition of disability includes Medicaid and state and local general assistance programs if eligibility depends on disability determination).
immigrant communities as well as standard Farm Bill politics. Nonetheless, the elevation of food stamps from an afterthought to the primary focus of efforts to restore immigrant eligibility reflects the program's new respectability and prominence.

Because PRWORA's restrictions on legal immigrants' food-stamp eligibility were relatively specific, FNS had little direct authority to moderate PRWORA's disqualifications of immigrants. Thus, administrative politics played a relatively modest role in ameliorating PRWORA's restrictions on low-income immigrants' eligibility.

One area where the administrative process did prove important involved "sponsor deeming," a complex process typically resulting in findings of substantive or procedural ineligibility for the Food Stamp Program. FNS promulgated rules in 2000 that largely abrogated sponsor deeming in the Food Stamp Program. Since virtually no sponsored immigrants were eligible for food stamps under PRWORA,

\[305\] But see infra note 480.

\[306\] See 7 U.S.C. § 2014(i) (2000) (pre-PRWORA provision requiring sponsor deeming in Food Stamp Program for immigrant's first three years in U.S.). Under sponsor deeming, the income and resources of an immigrant's sponsor are counted along with those of the immigrant when determining the immigrant's eligibility for means-tested benefits. Thus, an immigrant whose sponsor's income or resources exceed the program's limits—or whose income or resources exceed those limits when combined with the immigrant's own income or assets—will be ineligible financially even if the sponsor does not help support the immigrant in any way. Because the Food Stamp Program's eligibility limits are set relatively low, this system of determining eligibility can render many low-income immigrants substantively ineligible. Probably even more significant, however, is the procedural consequence: If the immigrant cannot persuade his or her sponsor to provide extensive documentation of the sponsor's income and assets, the immigrant is ineligible automatically. 7 C.F.R. § 273.4(c)(5) (2003). With little incentive to cooperate, sponsors appear to do so rarely. See, e.g., CODY, supra note 40, at 36 (finding that less than one-tenth of one percent of food-stamp households participating before PRWORA had any income deemed under § 2014(i)). Thus, although commonly described as a way of holding immigrants' sponsors responsible for the immigrants' well-being, it can disqualify, on substantive or procedural grounds, numerous immigrants with no access to alternative means of support.

\[307\] Citizenship and Alien Status, 7 C.F.R. § 273.4(c)(3)(iv) (2003). PRWORA provided an exception from deeming for immigrants without adequate shelter or food. 8 U.S.C. § 1631(e) (2000). FNS interpreted this exception as applying to all those with incomes below the Food Stamp Program's gross income limit, 130% of the poverty line. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 70,134, 70,166–69 (Nov. 21, 2000) (codified at 7 C.F.R. §§ 271–85 (2004)). FNS reasoned that the Food Stamp Act defines that level as the point below which households' income is "a substantial limiting factor in permitting them to obtain a more nutritious diet." 7 U.S.C. § 2014(a) (2000). Since the only households with incomes above 130% of poverty that are eligible for food stamps are those containing elderly or disabled members and the categorically eligible, this policy effectively limited sponsor deeming to a very small fraction of food-stamp households. KAREN CUNNINGHAM, U.S. DEP'T OF AGRIC., CHARACTERISTICS OF FOOD STAMP HOUSEHOLDS: FISCAL YEAR 2000, at 14 (Mathematica Policy Res., Inc. ed., 2001) (finding that only one percent of food-stamp households have incomes exceeding 130% of federal poverty income guidelines).
these rules, promulgated a few months before the end of the Clinton administration, attracted little notice.\textsuperscript{308} They did, however, dramatically increase the number of immigrants that later could receive benefits under the legislative restorations of 2002\textsuperscript{309} and provided a standard against which other programs’ exemptions from deeming could be judged.

B. Reducing the Likelihood of Procedural Denials

Even if a claimant is substantively eligible, she still may be denied benefits on procedural grounds. Although lawyers\textsuperscript{310} and program administrators\textsuperscript{311} conventionally distinguish between “correct” and “incorrect” procedural denials\textsuperscript{312}—the former being cases in which the claimant failed to take some required action, and the latter those in which the agency violated its own rules—the distinction makes no difference to the unsuccessful claimant. Moreover, the state plays a role in both: One reasonably can predict that any procedural requirement will result in some number of additional denials to otherwise eligible claimants who misunderstand, or lack the resources to comply with, the rule. Low-wage working parents already juggle a great deal, including the demands of their employers and their children; their capacity to comply with stringent procedures, therefore, is especially limited. And yet, the procedures they confront are often the most finicky.

Arguably, the Food Stamp Program’s most radical changes occurred in this area of procedural denials. In a sharp break from the pre-PRWORA era, however, reformers largely eschewed the due process model for reforming program administration. Instead, they focused initially on creating administrative options to improve access and on proper incentives to prompt state administrators to implement those options. Only then, with a viable new system in place, did they turn to the more traditional advocacy approaches of seeking new legal rights for claimants and enforcing existing mandates against recalcitrant states. Once states no longer faced incentives to restrict access

\textsuperscript{308} See supra note 50. Some staff members of the agriculture committees politely noted their disagreement with these provisions at a briefing held by FNS staff, but FNS received no member-level complaints. This issue, like most technical aspects of immigrants’ eligibility for means-tested benefits, received no media attention whatsoever.

\textsuperscript{309} See supra note 304 and accompanying text.


\textsuperscript{311} See, e.g., Review of Negative Cases, 7 C.F.R. § 275.13 (2003) (requiring states to examine sample of their denials and terminations of claims for food stamps to identify errors).

\textsuperscript{312} See, e.g., 7 C.F.R. § 275.13(c).
to benefits, advocates were able to secure a series of mandates that belied the conventional wisdom that PRWORA represented an enduring triumph for states’ autonomy.

1. Incentives and Access Barriers

Post-PRWORA, procedures for accessing food stamps were ripe for change. Not only did delays and denials of benefits produce a great deal of litigation, but available evidence suggested that states’ eligibility determination processes largely were to blame for the plummeting of food-stamp participation, particularly among the working poor. In the Food Stamp Program’s weakened political condition, more litigation would have been disastrous: USDA would have come under overwhelming pressure to reverse judgments in claimants’ favor by granting waivers and, where the administration declined to act, Congress would have stepped in. Advocates thus had to approach these problems indirectly, by seeking to change the incentives that drove many states to establish forbidding access barriers.

a. Reforming Quality Control

In seeking the reasons that states imposed such draconian procedures, all roads led to quality control. FNS had pressed states to reduce error rates as a central part of its effort to restore the Food Stamp Program’s credibility. Given the difficulty of significantly reducing error rates with the limited resources available to them during this period, state administrators strongly resented the pressure. Error rates increasingly came to dominate all aspects of program policy. For example, whereas states’ waiver proposals in AFDC had been primarily ideological—imposing work or other behavioral requirements—states’ food-stamp waiver proposals sought primarily to define away errors. And it was QC pressures that were driving states to create eligibility determination procedures that, though easily administrable, were burdensome for claimants and denial-prone. Indeed, because low-income workers, immigrant households, and families recently terminated from cash assistance often have particu-


314 See supra note 148 and accompanying text.

315 See supra Part I.A.3.

316 See supra Part I.A.3.

317 See CTR. ON BUDGET & POLICY PRIORITIES, supra note 148, at 10.

318 See supra note 148 and accompanying text.
larly unstable circumstances that can lead to errors, it was these households that state procedures tended to target.\textsuperscript{319}

Advocates' efforts to reform QC focused on three main goals. First, they sought to change the definition of an error to exclude as many minor, inadvertent, and technical errors as possible; a QC error then would be assigned to a case only where a mistake, by the household or the state agency, genuinely implicated the program's integrity.\textsuperscript{320} Second, they sought to reduce the QC system's bias against households with particularly unstable circumstances and thus to relieve states' reluctance to serve those households. Finally, they sought to reduce the number and severity of sanctions so that only the modest number of states with seriously deficient administrations would fear fiscal penalties. Several proposals sought to address more than one of these goals at once.

Just as food-stamp QC is not a traditional focus for advocates, it was hardly a familiar subject of discussion for the high-level administration officials whose authority was needed to push through a major change in food-stamp policy. Advocates put QC on the agenda by demonstrating that participation reductions among working-poor households were concentrated almost entirely in states engaged in crash programs to reduce their QC error rates. They also showed specifically that some of the error-reduction policies targeting those households—such as three-month certification periods—appeared to be responsible for bringing about those reductions.\textsuperscript{321} Once advocates had White House policymakers' attention, it was relatively easy to persuade them to take forceful action. The White House had no investment in the existing QC system, and its reform was all upside: It simultaneously pleased states and aided the working poor.

\textsuperscript{319} Id. States could, for example, direct their eligibility workers to assign shorter certification periods to households in these "error-prone" categories. See Determining Household Eligibility and Benefit Levels, 7 C.F.R. § 273.10(f) (2001). States also could encourage eligibility workers to increase verification requirements for these households. See Office Operations and Application Processing, 7 C.F.R. § 273.2(f)(2), (3).

\textsuperscript{320} It is difficult to argue that anything important is at stake, for example, when an eligibility worker mistakes biweekly wages for semi-monthly pay and incorrectly converts it into a monthly figure. On the other hand, the national benefit structure and the public's confidence in the program may be undermined if states fail to follow clear eligibility policies, or if households conceal information they have been asked to provide.

Although the Clinton Food Stamp Initiative of July 1999 most visibly changed vehicle policy through broadened categorical eligibility, its primary focus was, in fact, QC. One element of the initiative was the availability of new reporting options, which freed states from the obligation to adjust households' benefits to reflect routine fluctuations in earnings. Previously, households often had failed to report these fluctuations or states had failed to act in a timely manner on the reports they did receive, both cases resulting in QC errors when the households' allotments remained the same from month to month. By ratifying those stable benefits in policy, these reporting options defined away a raft of errors. More generally, the initiative raised the dollar threshold for an "error" from five to twenty-five dollars. Thus, errors in net income of eighty dollars or less were unlikely to cause payment errors for QC purposes.

When the Clinton administration's July 1999 initiative was well-received, the administration became willing to take more direct action on QC. Since it had announced states' error rates for fiscal year 1998 that April, FNS staff had been warning states to brace for more aggressive collections policies. In particular, FNS had warned states that it might require direct payment of sanctions, rather than allowing states to "reinvest" their sanctions in improvements to their program administration.

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322 See supra Part II.A.1.b.
323 See supra Part II.A.1.a.
326 If a state improperly underestimated a household's net income by eighty dollars, the thirty percent benefit reduction rate would give the household roughly twenty-four dollars more in food stamps than it was eligible to receive. This twenty-four-dollar variance would not count as an error unless the additional income put the household over the program's gross or net income eligibility limits. Review of Active Cases, 7 C.F.R. § 275.12(f)(1) (2003).
327 See supra note 50. FNS's communication with the states about its intentions concerning QC penalties is a particularly baroque process. Important decisions are made exclusively at the highest levels of the national office, yet states' communication is exclusively with the regional offices. When states hear ominous warnings from their regional office, it rarely is clear whether the regional offices are conveying genuine messages from the national offices or trying to lower states' expectations so that any ultimate resolution will seem lenient, thereby avoiding an angry state reaction.
By the time FNS issued states' bills in September, however, it had dramatically changed its tune. It adjusted states' liabilities downward to eliminate the effects of the issuance errors of less than twenty-five dollars that the July initiative had disclaimed measuring prospectively.\textsuperscript{328} It further adjusted states' liabilities to compensate for any increased QC errors resulting from disproportionately high or rising shares of working households or of non-working immigrants in a state's caseload.\textsuperscript{329} Thus, if two states had the same error rates for working households, non-working immigrants, and for all other households, one state could not be pushed into sanction simply because a larger share of its caseload was employed or living with immigrants. Finally, the administration announced that it not only would continue to allow reinvestment of sanctions but also was broadening the definition of permissible reinvestment activities to allow states to spend up to thirty-five percent of their sanctions on activities designed to increase participation.\textsuperscript{330} FNS announced that it would make similar adjustments the following spring to states' QC liabilities for fiscal year 1999.

The QC adjustments reduced the total sanctions imposed on states for 1998 by roughly two-thirds and reduced the number of states in sanction by one third—from twenty-four to sixteen.\textsuperscript{331} More importantly, the adjustments eliminated most of the QC-based disincentives to serve working and immigrant households.\textsuperscript{332}

\textsuperscript{328} ROSENBAUM & SUPER, supra note 106, at 8.
\textsuperscript{329} Id. Although FNS's formula was quite complex, in essence it broke each state's error rate into three components: its error rate for households with earnings, its error rate for households without earnings but with at least one immigrant member, and its error rate for all other households. For the vast majority of states, the latter was the lowest of the three. FNS then reweighted these components. For earners and non-earning immigrants, FNS imputed to each state the lowest of the actual share of the state's caseload composed of that group, that group's share in the state in 1996, and the national average share. FNS then compared this adjusted error rate with the unadjusted national average to determine what sanctions, if any, to impose on the state. Id. at 9.
\textsuperscript{331} Id. at 10.
\textsuperscript{332} Some disincentive did remain in two areas. First, by statute, enhanced administrative funding for states with extremely low error rates is based on states' official payment error rates, without adjustments. 7 U.S.C. § 2025(c)(1)(A) (2000) (repealed 2002). Thus, a state with a large number of working-poor households would have less chance of having FNS increase its matching rate for administrative expenses from fifty to sixty percent than a state with comparably strong performance but fewer working recipients. Second, FNS had postponed collection of some states' financial liabilities for prior years to increase its leverage to press the states to reduce their error rates. FNS would forgive these "at-risk" sanctions if the state brought its error rate below specified levels. Since the White House
A few days before leaving office, the Clinton administration’s FNS administrator announced that these adjustments would be improved and made permanent. The Bush administration ignored the promised improvements and applied a version of the adjustments that excused only about a third of the sanctions that states incurred for 2000 and 2001. Nonetheless, the principles that serving more working and immigrant households should not heighten the risk that states would face sanction, and that turning those households away would secure states no benefit, remained in place. The QC reforms of 1999 probably did more to change state administrators’ attitudes toward the Food Stamp Program—and their service to the working poor—than any other Clinton administration initiative. They also coincided with the end of the largest participation decline in the program’s history and fundamentally changed the way that a wide spectrum of policymakers perceived QC, paving the way for further, more fundamental reforms.

In early 2001, Senator Christopher Dodd and Representative George Miller introduced broad legislation on children’s issues.
developed by the Children's Defense Fund (CDF). In addition to more predictable food-stamp benefit increases, the proposed “Act to Leave No Child Behind” included a detailed set of proposals to reform the food-stamp QC program. The CDF bill would reduce the number of states the QC system would sanction in a typical year to between one and three. Later that year, the House included three of the CDF bill's four major QC reforms in its version of the Farm Bill. In early 2002, the Senate passed a farm bill containing all of CDF's major QC proposals. Furious lobbying by USDA Undersecretary Bost persuaded the conferees to step back from the House and Senate versions. Nonetheless, the final version of the Farm Bill reduced the number of states likely to be sanctioned in a typical year to about six or seven and cut the total amount of sanctions by well over half. The conferees also secured Undersecretary Bost's commitment to make permanent the adjustments for states serving high proportions of earners or immigrants. The fact that states did not lobby the conferees aggressively on this issue may

337 The QC provisions of the Dodd and Miller bills had four major features. First, they would raise the threshold against which states' performance was measured from the national average to one percentage point above the national average. Second, they would only consider states to have exceeded the threshold if they could be determined to have exceeded it to a ninety-five percent statistical certainty. Third, they would impose automatic sanctions only in the third consecutive year that a state was determined to have exceeded the threshold. Finally, they would make the adjustments for high or rising shares of working or immigrant households a permanent feature of the statute. See Ctr. on Budget & Policy Priorities, Summary of Food Stamp Provisions in S. 940/H.R. 1990: The “Leave No Child Behind” Bill 5-7 (2001). See generally Ed Bolen, A Poor Measure of the Wrong Thing: The Food Stamp Program's Quality Control System Discourages Participation by Working Families, 53 Hastings L.J. 213 (2001) (discussing some deficiencies in food-stamp QC system that these bills sought to address).

338 These figures were calculated by the author and his then-research assistant, Daniel Tenny, by applying the formula in the CDF bill to the actual results of QC reviews during the 1980s and 1990s.

339 See H.R. 2646, 107th Cong. § 404 (2001) (as engrossed in House) (setting QC measurement threshold at one percentage point above national average, requiring a ninety-five percent statistical certainty to determine state to have exceeded threshold, and imposing penalties only for third consecutive year in which state exceeds threshold, but not requiring continued adjustment for high numbers of earners or immigrants).

340 H.R. 2646, 107th Cong. § 431 (2001) (as engrossed in Senate) (similar to House bill but also requiring continued adjustment for high numbers of earners or immigrants).

341 Ctr. on Budget & Policy Priorities, Reform of the Food Stamp Quality Control System 3 (2002).


343 States’ lobbying on QC focused primarily on killing a Senate provision that would require FNS to determine if a state was “seriously negligent” in its administration of the Food Stamp Program in the first or second year the state was determined to have exceeded the sanction threshold. (The Senate bill, like its House counterpart, would impose auto-
suggest that QC already had ceased to dominate their thinking about food stamps.

b. Other State Incentives

QC is by far the strongest, but not the only, system of incentives that operates on states' administration of the Food Stamp Program. The food-stamp initiatives of 1999 paved the way for several other measures designed to encourage state administrators to improve service to low-wage workers. PRWORA had provided funds to award bonuses to states with high-performing TANF programs; HHS set aside a modest amount of that bonus money for states whose participation level among potential low-income working families was highest. In a similar vein, the 2002 Farm Bill replaced the system of enhanced administrative funding for states with extremely low error rates with a pool of money that could be used to reward outstanding achievements in various aspects of states' administration of the Food Stamp Program, including those relating to access.

FNS also revived the moribund portion of the QC system that logs improper denials and terminations of benefits. Because FNS had not been checking the findings of any states except those appearing to qualify for enhanced funding due to low payment error rates, a number of states were reporting improbably low "negative case error rates" or none at all. FNS ordered its regional offices to begin reviewing a sample of states' findings in this area. It found that, in some states, nearly one in five denials was unlawful. FNS also increased the emphasis on access in the management evaluation reviews that states are required to perform on their local offices and

matic sanctions only in the third consecutive year a state exceeded the threshold.) Though these fiscal sanctions were modest and largely duplicative of authority FNS had elsewhere under the Act, see 7 U.S.C. § 2020(g) (2000), state administrators evidently were concerned that a determination of "serious negligence" would be an embarrassment. Thus, states supported the House bill's QC provision, even though it lacked the Senate's requirement that FNS continue to adjust error rates downward to offset the effects of high or disproportionate numbers of working and immigrant households.

344 Bonus to Reward States for High Performance Under the TANF Program, 65 Fed. Reg. 52,814 (Aug. 30, 2000). HHS also set aside an identical amount to reward states that appeared to have high Medicaid participation by low-income working families. Id.


directed its own regional offices to visit two local offices in each state every year to identify any possible access barriers. The direct practical effect of these changes is difficult to measure, but simply recognizing access as a goal of program administration seems likely to have moderated the impact of the earlier overwhelming emphasis on error rates.

2. Direct Steps to Simplify the Eligibility Determination Process

The Food Stamp Act delineates eligibility determination procedures far more extensively than any other major means-tested public-benefit program. In addition, longstanding food-stamp regulations specify those procedures that states are to follow in far more detail than the corresponding AFDC or Medicaid regulations. Because of the specificity of the statutes and regulations, the kind of radical reconceptualization of the application process that Medicaid pursued, for instance, was not possible for food stamps. More importantly, as long as states feared that any relaxation of the application process could result in QC penalties, procedural reform was impossible. Nonetheless, once QC reform got under way in 1999, advocates sought and obtained several significant changes that simplified the food-stamp application process. As the Food Stamp Program's transformation gained momentum, FNS took several additional initiatives on its own.

In April 1999, HHS had ordered states to systematically identify and restore benefits to families erroneously terminated from Medicaid. Two months later, USDA sent a letter to states in a similar vein. Although it apparently intended to bring the Food Stamp Program into conformity with the Medicaid initiative, its tone was so

352 See Ross & Cox, supra note 211 (describing transformation of Medicaid application process from trial model, in which claimant had to prove eligibility, to marketing model, in which state was promoting Medicaid coverage).
353 See infra Part II.B.3.
tepida that the letter served almost as a repudiation of the HHS approach.\footnote{356}

More constructively, FNS issued a series of "access guides" that summarized and provided liberal glosses on its regulations. These guides set out the steps that states must take to make food stamps available to several vulnerable groups. FNS issued the guide for the working poor\footnote{357} as part of the Clinton Food Stamp Initiative and followed with guides focusing on the elderly and on immigrant households.\footnote{358}

A potentially more significant—and certainly more audacious—innovation sought to keep households from losing their food stamps when they were terminated from cash assistance. Medicaid and the pre-PRWORA federal childcare subsidy programs had addressed this problem by providing transitional benefits for those leaving cash assistance. Transitional Medical Assistance (TMA) and transitional childcare, however, were statutory. Even without any statutory authority, advocates persuaded the Clinton administration to provide three months of transitional food stamps (technically the "transitional benefit alternative" (TBA)) calculated under a highly generous formula to households leaving cash assistance for reasons other than a sanc-

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\footnote{356}{For example, where HHS required that states review those cases where families lost Medicaid following the termination of their cash-assistance benefits and that they act ex parte to restore coverage to families improperly terminated, USDA merely suggested that states take whatever measures they felt were needed. In addition, by waiting several months, USDA lost the opportunity to have states include food stamps in the HCFA-mandated reviews of closed cases. With USDA taking such a diffident position, few states were prepared to devote the staff time required to undertake a second review of the same closed cases. USDA also failed to adopt a policy analogous to HCFA's requirement that states use information from open food-stamp cases where available to restore terminated Medicaid coverage. Many households that had improperly lost food stamps might have been recertified with information from states' Medicaid cases, either those that stayed open or those that had been reopened through the HCFA reviews. Perhaps USDA felt that reopening these cases without a new application from the household could violate the Food Stamp Act's requirements that an application precede the award of benefits and that benefits lapse at the end of a certification period. \textit{See} 7 U.S.C. § 2020(e)(4) (2000). Even if these households could not be restored ex parte to current participation in the program, they could have received retroactive food stamps for any months remaining in their certification periods when they were terminated, \textit{see} 7 U.S.C. § 2020(b), (e)(11) (2000), and the states could have notified the households that they could reapply for food stamps as part of a corrective action plan, \textit{see} 7 C.F.R. §§ 275.16–275.19 (2003) (detailing state corrective action planning guidelines).}


Designing a transitional food-stamp benefit, however, poses significant obstacles not present in administering TMA: Households leaving cash assistance generally remain substantively eligible for food stamps even without special transitional provisions. These households’ problems are far more likely to be procedural: They typically fail to gather and supply information required for setting their benefit levels. Thus, merely declaring that those leaving TANF remain eligible for food stamps without addressing the procedural reasons why such households’ benefits are terminated would accomplish little.

In 2000, however, advocates suggested an approach analogous to the quarterly reporting reforms that FNS had begun to make the previous year. FNS could use its broad authority over budgeting rules to allow states to issue several months’ benefits based largely on the household’s circumstances in the month before its cash-assistance benefits ended, unless the household reported a change that would increase its benefit level, such as a new child or a recent job loss. Except for those few states whose computer systems would be incompatible with this approach, the QC and ideological advantages would attract most states’ participation. And advocates further recommended that TBA be made a state option, avoiding the resentment bred by federal mandates.

Although the advocates argued that this TBA could be provided through an offer of administrative waivers, the Clinton administration chose to insert a three-month TBA into a final rule already on its way to the Federal Register to assure that this policy would continue after it left office. Uncertain about the stability of this policy, states were initially discouraged from taking this option. The 2002 Farm Bill,

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359 The Family Support Act created transitional medical assistance (TMA) in 1988, but no serious attempt had ever been made to establish a similar system in the Food Stamp Program.

360 Households that recently have left the cash-assistance rolls are likely to have unstable circumstances. A new job, child support income, or a loss of income likely to lead to a change in living arrangements could contribute to a household's instability.

361 Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 70,134, 70,183–85 (Nov. 21, 2000) (codified at 7 C.F.R. § 273.12(f)(4) (2003)). The proposed rules had not included anything similar, although they had addressed procedures that states should follow when households leave cash-assistance programs. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 10,856, 10,884–87 (proposed Feb. 29, 2000). More importantly, since TBA was set up as a state option, it seemed unlikely anyone would have the desire or the standing to challenge the procedures by which it was promulgated.

362 The author received numerous inquiries from state food-stamp directors about the political stability of the new transitional benefit alternative. Although he tried to tell an optimistic story, it was apparent his reassurances were falling on skeptical ears. See supra note 50. Subsequent FNS guidance did little to address these issues. See FOOD & NUTRITION SERV., supra note 235. Unfortunately, OMB's Office of Information and Regulatory
however, emphatically endorsed the policy, liberalized the transitional benefit amount, and extended the transitional period to five months. Since the passage of the Farm Bill, the number of states implementing TBA has increased gradually and now exceeds a dozen.

Although TBA was a qualified success in practice, it sent states an important signal about the role of the Food Stamp Program. Medicaid and childcare subsidies had long had transitional components, giving the clear message that they were intended to continue beyond the termination of cash assistance. That first FNS and then Congress would add a transitional component to the Food Stamp Program symbolically linked it to those “work support” programs and distanced it from cash assistance. FNS, too, sent an important message about its priorities. After several years of calling frequent regional and national “payment accuracy conferences” and issuing voluminous publications on error rates, its access guides suggested a significant shift in emphasis. Those new priorities were to be tested in the Clinton administration’s final year.

3. Establishing the Priority of Access over State Flexibility

Throughout most of the post-PRWORA period, the goals of expanded access to food stamps and state flexibility were not in conflict. Indeed, several of the earliest access-expanding initiatives, such as categorical eligibility, the exclusion of TANF diversion payments, and decreased reporting requirements, gained traction specifically

Affairs (OIRA) ruled that TBA required the collection of new information and thus could not go into effect without an approved burden impact statement under the Paperwork Reduction Act. 4 U.S.C. §§ 3506(c), 3507(a)(1) (2000). Before the statement could be approved, OIRA required FNS to give the public sixty days to comment on its burden estimates. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. at 70,135. Because the Clinton administration had been so late in publishing the rule of which TBA was a part, this effectively made TBA’s implementation contingent on discretionary actions of the Bush administration. The Bush administration eventually did approve the necessary publication and granted two states waivers to implement TBA before the rule became effective, but by then states feared making changes in their systems that the pending Farm Bill might require them to reverse. Thus, TBA has yet to be tested on a large scale.

Farm Security Rural Investment Act of 2002, Pub. L. No. 107-171, § 4115(a), 116 Stat. 134, 314 (to be codified at 7 U.S.C. § 2020(s)). Both House and Senate passed TBA provisions with six-month transitional periods corresponding to the initial period of TMA that is provided without regard to current income. See 42 U.S.C. § 1396r-6(a) (2000); see also AM. PUB. HUMAN SERVS. Ass’n, supra note 197, at 41 (recommending six-month transitional period). The conference committee reduced the transitional period to five months for cost reasons. The statute also allowed every household to receive a full period of transitional benefits without regard to when it was last certified, greatly simplifying states’ computer programming and staff training. Pub. L. No. 107-171, § 4115, 116 Stat. 134, 314 (2002) (to be codified at 7 U.S.C. § 2012(c)).

because they were state options. This left ambiguity as to whether these liberalizations were simply a continuation of PRWORA’s devo-
olutionary movement or represented a new appreciation of the impor-
tance of making food stamps available to people in need. As long as
this ambiguity remained, the Food Stamp Program’s political stability
remained in doubt. In 2000, however, the goals of claimant access and
state flexibility came into stark opposition. This forced a choice
between the alternative political strategies for securing the Food
Stamp Program: the administration’s initial strategy, appeasement of
states on procedural matters with a strong emphasis on program integ-
rity, and the advocates’ strategy of converting the program into a
work support while mollifying states, primarily through QC reform.\footnote{365}

The one-pitched battle concerned the fate of decades-old food-
stamp rules protecting claimants’ rights in the eligibility determination
process. In the first few months after PRWORA’s enactment, FNS
drafted several large packages of regulations to implement the new
law. Consistent with the strategy that the administration adopted in
PRWORA’s wake,\footnote{366} these rules preserved a sharply defined national
benefit structure and demanded increased claims collection activity
from states, but gave states broad discretion on procedural matters.
They rapidly cleared the agency, but then became mired hopelessly in
USDA’s clearance process.\footnote{367} The political officials specifically over-
seeing FNS were focused primarily on child-nutrition programs, and
other officials in departmental offices in the clearance process, both
career and political, had long seen farm programs, not food stamps, as
the Department’s main priority. The major food-stamp rules only
began to clear USDA in late 1999 as advocates, alarmed that the rules
might not be finalized before the end of the Clinton administration,
made urgent pleas to the White House and Secretary Glickman’s
office.\footnote{368} The largest set of proposed regulations, the Noncitizen
Eligibility and Certification Provisions (NECP) Rule, finally appeared
on February 29, 2000.\footnote{369} Its provisions would make advocates ques-
tion the wisdom of pushing it into publication.

\footnote{365 See supra Part I.C.2.}
\footnote{366 See supra text accompanying note 174.}
\footnote{367 See supra text accompanying note 121.}
\footnote{368 See supra note 50. At about this time, Edward M. Cooney, former deputy director of
FRAC, began work as Secretary Glickman’s special assistant for food and nutrition policy.
With an experienced, focused, and highly skilled staff person to facilitate his intervention
at crucial moments and to follow up on his instructions, Secretary Glickman became a
much more important force in guiding USDA’s food-stamp policy for the remainder of the
administration.}
\footnote{369 Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed.
Reg. 10,856 (proposed Feb. 29, 2000) (to be codified at 7 C.F.R. pts. 272–74, 277).}
Coming on the heels of the Clinton Food Stamp Initiative and other steps to improve access to food stamps, the proposed regulations were a jarring throwback. In 1996, PRWORA had removed explicit statutory endorsement of some protections for claimants, although it had left FNS with broad authority to continue virtually all of them if it saw fit. FNS had drafted the Proposed NECP Rule when it was pursuing its most defensive strategy for securing the Food Stamp Program’s survival. To deflect states’ anger over QC pressures and their demands for greater leeway to modify the national benefit structure, FNS stripped claimants of dozens of protections, particularly in the application and recertification processes. Moreover, these proposed rules reflected a major effort to comply with President Clinton’s directive that agencies reduce by half the number of pages occupied by regulations in the Code of Federal Regulations. Apparently because of considerations of length, FNS proposed to repeal even provisions that were neither affected by PRWORA nor particular subjects of states’ ire.

The Proposed NECP Rule would have increased the risk of procedural denials in numerous ways. It would have eliminated virtually all guidance designed to ensure readable application forms, weakened a longstanding rule barring procedural denials for unintentional noncompliance with program requirements, dropped many

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370 See PRWORA § 835 (striking much of previous 7 U.S.C. § 2020(e)(2) and (i), which included prohibitions on excessive verification requirements and requirements to coordinate processing of applications for cash assistance and food stamps).


372 See supra Part I.C.2.

373 See supra note 118. The Food Stamp Program was in a particularly tight bind. USDA’s farm programs had political support to resist this directive. The political officials supervising FNS were unwilling to require its Special Nutrition Programs staff to cut large numbers of pages from the regulations on child nutrition and WIC. See id. USDA’s Inspector General doubtless would object to trimming the regulations that help enforce program integrity and accountability. The Food Stamp Act itself requires that eligibility standards be set out in regulations—and PRWORA had just made those standards considerably more complex. 7 U.S.C. §§ 2013(c), 2014(b) (2000). That left the Food Stamp Program’s procedural rules to bear the burden of page reduction displaced from a much larger volume of regulations. Moreover, FNS staff, acting in characteristic good faith, rejected disingenuous approaches to achieving their page-saving goals, such as repealing several dozen pages of obsolete effective date provisions. See, e.g., General Terms and Conditions, 7 C.F.R. § 272.1(g) (2003).

374 The Proposed NECP Rule also included numerous measures that would have increased the costs of participation or otherwise have made potential claimants less likely to participate. See generally infra Part II.C.


376 65 Fed. Reg. at 10,865, 10,897; see 7 C.F.R. § 273.2(d)(1).
limitations on the verification that states could demand of claimants, including prohibitions on policies with discriminatory impacts on vulnerable populations (e.g., migrant farm workers).377 dropped rules prohibiting states from terminating food stamps automatically upon closing cash-assistance cases,378 dropped several provisions requiring state agencies to assist claimants having difficulty with the application process,379 deleted a two-decades-old requirement that state agencies reschedule missed application interviews,380 wiped out most rules designed to prevent procedural terminations in the recertification process,381 and eliminated the key standards preventing states from setting extremely short certification periods382 or from unilaterally shortening certification periods once set.383

Despite these deletions, the preamble gives the general impression that, in many instances, FNS did not intend the proposed rule to alter substantive policy.384 State administrators, however, were

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377 65 Fed. Reg. at 10,856, 10,868, 10,899; see 7 C.F.R. § 273.2(f)(2)(i), (3)(i).
378 65 Fed. Reg. at 10,873, 10,902–03, 10,910–11; see 7 C.F.R. §§ 273.2(j)(1)(iii), (v), 273.12(f)(5). PRWORA actually had codified this prohibition in statute. 7 U.S.C. § 2020(i)(2) (2000) ("[N]o household shall have its application to participate ... denied nor its benefits ... terminated solely on the basis that its application ... has been denied."). Nonetheless, numerous studies found that families terminated from cash assistance tended to leave food stamps as well. DION & PAVETTI, supra note 137, at 17.
379 E.g., 65 Fed. Reg. at 10,863–64, 10,865, 10,867, 10,868–70, 10,896–99, 10,901; see 7 C.F.R. § 273.2(c)(2), (d)(1), (f)(1)(i), (4), (5), (h)(1). By the time the Proposed NECP Rule was published, some states already had ceased complying with these rules. See, e.g., DION & PAVETTI, supra note 137, at 14 (describing impact on food stamps of attempts to divert families from cash assistance); GEN. ACCOUNTING OFFICE, PUB. NO. 99-185, FOOD STAMP PROGRAM: VARIOUS FACTORS HAVE LED TO DECLINING PARTICIPATION 35–37 (1999) (describing barriers New York, Oregon, and Wisconsin imposed in way of applicants seeking food stamps).
380 65 Fed. Reg. at 10,866, 10,897–98; see 7 C.F.R. § 273.2(e)(3).
381 65 Fed. Reg. at 10,891–92, 10,911; see Recertification, 7 C.F.R. § 273.14(b)(1), (3), (4), (c), (d), (e) (2001).
384 See, e.g., 65 Fed. Reg. at 10,866–67, 10,872 (citing as reason for making certain changes "President [Clinton]'s regulatory reform initiative to remove unnecessary, redundant, outdated, or overly prescriptive rules," not substantive policy reasons); id. at 10,865 (insisting that, despite repeals, "we nonetheless expect State agencies to continue to determine non-cooperation in accordance with the standard set forth in the regulation"). FNS apparently proposed these changes to reduce the number of pages in the Code of Federal Regulations that the food-stamp rules consumed. See, e.g., id., at 10,866–67, 10,872 (citing President's Regulatory Reform Initiative, rather than substantive policy considerations, as reason for removing material from regulations).
required to follow policy as set out in actual regulations.\(^{385}\) Given the history of comprehensive federal regulation of the Food Stamp Program,\(^{386}\) these omissions would have been striking. Particularly given their strong predisposition to interpret PRWORA as giving states sweeping control over family assistance programs,\(^{387}\) it seems virtually certain that most states would have taken such large-scale deletions of protections for claimants as a sign that FNS no longer felt strongly about these issues. These states likely would have made similar deletions in their manuals, training curricula, and systems designs.\(^ {388}\)

States could have been expected to rally forcefully behind these proposals, but they did not. Only a handful submitted comments of any kind, and these generally were limited to suggestions for a few detailed changes.\(^ {389}\) Perhaps the states thought a show of support was unnecessary. The recent expansions of their discretion over vehicle rates, reporting and budgeting rules, the tempering of QC, and the proposed rules themselves may have suggested an all-encompassing pro-state consensus that would make these rules non-controversial. In addition, with QC pressures relaxed, states may have been less focused on preserving their plenary authority to extract verification from claimants.

By contrast, advocates responded to these proposals in force. FNS received well over 400 comments from anti-poverty, civil rights, labor, religious, women’s rights, and other organizations on the local, state, and national level decrying the proposed rules.\(^ {390}\) Since few people generally comment on proposed food-stamp rules, this could hardly fail to make an impression. Even the large package of rules implementing PRWORA’s numerous sanction provisions and the

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386 See supra note 112.

387 See supra text accompanying note 127.

388 With no state benefit dollars at stake, most states have relatively thinly staffed food-stamp policy staffs. See supra note 50. Many simply convert federal food-stamp regulations into their manuals’ formats and pass it on to their staffs unedited. The regulatory deletions proposed in the NECP Rule to comply with President Clinton’s directive to reduce the number of pages would look to hard-pressed state staff just like deletions of material that FNS was affirmatively disavowing as policy.

389 These comments are on file with New York University Law Review.

390 Unlike most final regulations FNS publishes, the Final NECP Rule did not state the number of comments received. FNS staff report that the number was well over four hundred, of which only a bare handful were supportive. See supra note 50.
three-month time limit, published two months earlier, had generated only seventy-six comments. In addition, leaders from a range of organizations met with Secretary Glickman, high OMB officials, and senior White House staff to argue that the Proposed NECP Rule would destroy much of the progress the administration had made in opening the program to the working poor.

In launching an all-out assault on the Proposed NECP Rule, the advocates deviated from their general reliance on incentive-based structures to influence states' administration of the program. This seemed necessary both because of the difficulty of designing effective incentives for accessible administration of the Food Stamp Program and, in part, because of the likelihood that future political officials would swamp any such incentives with stronger error-reduction incentives. In fact, given their weak enforcement, the rules at issue in the Proposed NECP Rule operate more like incentives than mandates.

If states had engaged in a concerted defense of the Proposed NECP Rule, or if advocates had not been able to point to numerous recent initiatives that had helped state administrators, the outcome might have been unclear. Indeed, had FNS's career staff still believed that the Proposed NECP Rule's concessions were essential to prevent states from rising up against the Food Stamp Program, they probably could have frustrated political officials' efforts to intervene in the rule's content—or simply dragged their feet and prevented the Clinton administration from finalizing it. As it happened, advo-

393 See supra note 53 and accompanying text.
395 See supra notes 163–65 and accompanying text.
396 See supra notes 116–17 and accompanying text.
397 Non-compliance increased marginally the likelihood of litigation or FNS enforcement action, but the possibilities remained relatively remote. Factoring in the likelihood of such action, and the annoyance it would bring, states could calculate an effective cost for non-compliance. This cost might be sufficient to provide incentives to write manuals appropriately and to take action against the most flagrant, widespread non-compliance, but it certainly allowed states to forego the costs of seeking perfect compliance.
398 Indeed, the final NECP was published on the last possible day for it to go into effect before the close of the Clinton administration. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 70,134, 70,134 (Nov. 21, 2000) (to be codified at 7 C.F.R. pts. 272–77). As several prior administrations had done, the Bush administration suspended all rules published by its predecessor that were not yet effective
icates encountered very little resistance, and the NECP Rule, once a vehicle for sharply limiting claimants’ rights, was refitted as a mechanism that significantly expanded them.\textsuperscript{399} Perhaps more importantly, it drove home to the states the fact that the program’s primary goal was, and remains, feeding the poor and the hungry,\textsuperscript{400} and that neither pending review by its political appointees. See Food Stamp Program: Personal Responsibility of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Delay of Effective Date, 66 Fed. Reg. 8886 (Feb. 5, 2001) (to be codified at 7 C.F.R. pts. 272, 273) (delaying effective date of Clinton administration rules). Much of FNS’s career staff remained committed to the Proposed NECP Rule’s substance, and virtually all were deeply hostile to the scope of OMB’s redirection of the Final NECP Rule. Their ability to resist was limited, however, because the author had provided a complete set of draft language to replace that of the Proposed NECP Rule. With OMB hence not dependent on FNS career staff’s technical expertise, OMB political officials requiring their career staff to justify any departures from the author’s alternative language, and USDA’s political appointees under strict orders to expedite the necessary documents through the clearance process, only a ruthless effort to obstruct the rule would have postponed it into the next administration—and FNS’s senior staff was much too professional for that. See supra note 161 and accompanying text. It also may be that, by 2000, some FNS staff may no longer have been fully committed to the strategy of appeasing states with procedural flexibility that the NPRM represented in the extreme. If so, why did they publish the NPRM in the form that they did? The answer likely is the ossification of the clearance process. Had FNS tried to overhaul the proposed rule that it had written more than three years earlier, it would have had to send that rule back to the same offices within USDA that had obstructed it for so long. In addition, once the rule left FNS, the agency’s managers’ priority had been prodding it through the departmental and OMB clearance processes. Some FNS officials may have forgotten how far the NPRM went in weakening protections for households’ access to the program, having cleared it so long before.

\textsuperscript{399} The Final NECP Rule restored some important guidance on the readability of application forms, including instructions distinguishing food-stamp and cash-assistance requirements. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. at 70,146–49. It retained the prohibition on denying benefits to applicants for non-cooperation short of intentional “refusal to cooperate.” Id. at 70,149–50. It retained and even strengthened limitations on the verification that states could demand of claimants as well as on verification policies that disproportionately affect vulnerable populations. Id. at 70,152–56. It added several new rules to prevent states from terminating food stamps inappropriately when they close cash-assistance cases—as well as TBA. Id. at 70,182–85; see also supra notes 235–43 and accompanying text. It heightened state agencies’ duty to assist applicants in distress. Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. at 70,150. Although it struck the absolute requirement that state agencies reschedule missed interviews (a fairly meaningless rule, since over forty states had received administrative waivers from that requirement already), it did require states to notify applicants missing interviews that a second interview would be scheduled upon their request. Id. at 70,151. It expanded protection against procedural terminations in the recertification process. Id. at 70,185–87. It increased from three months to six the minimum certification period that states may issue absent extraordinary circumstances. Id. at 70,176–78. And it prohibited states from shortening certification periods once they had been issued unless the household had failed to respond to a prior notice asking the household to contact the state agency. Id. at 70,178–79.

\textsuperscript{400} See 7 U.S.C. § 2011 (2000) (“It is declared to be the policy of Congress . . . to safeguard the health and well-being of the Nation’s population by raising levels of nutrition among low-income households . . . . To alleviate . . . . hunger and malnutrition, a food-stamp program is herein authorized . . . .”).
the goal of state flexibility nor of improving payment accuracy could justify excessive burdens on access.

The Final NECP Rule’s application-processing provisions angered state administrators but did not rekindle anything like the earlier level of hostility toward the Food Stamp Program. When Congress and the Bush administration began reauthorizing the Food Stamp Program the next summer, states did not try to override any of the claimants’ protections in the NECP Rule. States’ bitterness over these provisions was balanced by expansions of state flexibility with regard to reporting and budgeting,\textsuperscript{401} codification and simplification of categorical eligibility,\textsuperscript{402} and the new transitional food stamps option,\textsuperscript{403} none of which had appeared in the proposed rule.

More generally, the changes in the food-stamp QC system blunted states’ enthusiasm for flexibility. States had just seen the federal government sharply reduce QC pressure both explicitly, through sanction adjustments and a higher error threshold,\textsuperscript{404} and implicitly, through policy changes allowing states to calibrate benefits less precisely, thus effectively eliminating many relatively inconsequential variances from the definition of a QC error.\textsuperscript{405} States were no longer in a position of being held to standards they lacked the capacity to meet. They therefore could tolerate maintaining the eligibility determination procedures to which they had become accustomed over two decades, if FNS was no longer pressing them to collect ever more current and precise information about households’ circumstances. Indeed, collecting the kind of information required to continue to reduce error rates demands a great deal of eligibility workers’ time. Thus, correcting states’ incentives had made a reasonably open application process acceptable to the vast majority of state administrators.

The reconciliation of mainstream state administrators to the Food Stamp Program gave both advocates and FNS latitude to deal firmly with the few outlier states that opposed making food stamps freely available to eligible households. New York City Mayor Rudolph Giuliani, for example, began replacing welfare offices with renamed and consolidated “job centers,” whose mission included discouraging claimants from seeking public benefits, including food stamps.\textsuperscript{406}

\textsuperscript{401} See supra Part II.A.1.a.
\textsuperscript{402} See supra Part II.A.1.b.
\textsuperscript{404} See supra Part II.B.1.a.
\textsuperscript{405} See supra Part II.B.1.a.
\textsuperscript{406} See, e.g., Reynolds v. Giuliani, 35 F. Supp. 2d 331, 341–42 (S.D.N.Y. 1999) (describing conditions at “job centers,” including findings that 23% of agency staff (“financial planners”) were actively attempting to discourage individuals from applying for assis-
Most obviously, job centers would refuse to allow households to apply for food stamps on their first visit to the office with the idea that some would become discouraged and not return.  FNS investigated and issued a damning report of the practice, and a class of applicants sued, relying on many of the regulatory provisions that the Proposed NECP Rule soon would imperil. Other states declined to come to New York's political defense, and, by itself, the City had no ability to change national policy. Ultimately, the City acquiesced in court orders requiring it to restore the accessibility of food-stamp benefits.

C. Increasing the Likelihood that Low-Income Workers Will Begin and Continue Participation

The Food Stamp Program could not expand its coverage of low-income working families without persuading significantly more of these families to apply for benefits and, subsequently, to stay with the program. Like the recalibration of states' incentives, outreach is not a conventional role for legal services lawyers: When an individual client approaches a lawyer, she or he typically has already decided to pursue the benefit in question. But now, with the political survival of the Food Stamp Program depending on increasing participation within the working-poor population, a model of advocacy very different from that of lawyer and client was required.

Greater numbers of eligible claimants can be induced to apply for, or continue to receive, benefits in three principal ways. First, information can be supplied to those who do not know about the program or that mistakenly believe themselves to be ineligible. Second, the value of the benefit can be increased to make complying with the program's administrative requirements more worthwhile to prospective claimants. Finally, the costs of applying for or continuing to receive benefits can be lowered.

408 Id.
409 Reynolds, 35 F. Supp. 2d at 347.
411 See supra Part II.B.1.
Unfortunately, FNS had relatively little capacity to make significant changes in these areas. It was bound by statute to something resembling the traditional, adversarial model of the application process; it could not adopt the promotion and recruitment model that Medicaid did during this period. Nor could it increase the rewards for applying, since it had little direct control over the level of food-stamp benefits. It did, however, seek to lower the costs of applying by changing the incentives that had led states to adopt policies that made the application process particularly burdensome for households. It also prohibited outright some of the policies that seemed likely to deter claimants most severely.

The most straightforward method of increasing eligible households' propensity to apply for food stamps was outreach. The Clinton Food Stamp Initiative included a severely understaffed toll-free number with information about how to apply for food stamps. 413 Outreach had at one time in the program's history been controversial; those receiving federal funds actually were prohibited from actively reaching out to the eligible population for several years in the 1980s. 414 Outreach is very popular with grassroots advocacy organizations, and they sold the idea to both political and career officials at USDA. Strong support for federal outreach funding—including a series of camera-ready posters and leaflets 415—was a major component of FNS's strategy to solidify advocates' support for the program.


415 The lead poster—showing a sad little girl and urging parents to provide their children with enough to eat—seemed better suited to a fairly crude appeal for donations and could well be considered patronizing or insulting by its intended audience. Another poster, showing a man besieged by paperwork (presumably bills) also may not have been the ideal association for the Food Stamp Program. Nonetheless, the zeal with which FNS promoted these outreach initiatives left no doubt about its desire to make this program work.
since early in the post-PRWORA period. Later, the administration allowed states to devote thirty-five percent of reinvested sanctions to outreach efforts as part of its QC reform package and won appropriation of several million dollars a year for vaguely defined purposes that it chose to spend on grassroots outreach demonstration projects. There is little evidence, however, that failure to understand how to apply was a major barrier to eligible claimants receiving food stamps. Far larger problems are stigma, the burden of applying, and eligible households’ mistaken belief that they do not qualify, often because of a prior unsuccessful application. Thus, outreach can be seen, at least in part, as a distraction from more politically difficult problems.

Subsequently, the Bush administration replaced these posters with ones showing a diverse group of people, presumably food-stamp recipients, smiling or looking confident and giving more positive messages about food stamps.

See supra text accompanying note 330.


See, e.g., Dion & Pavetti, supra note 137, at 23-24 (analyzing research on stigma as cause of nonparticipation).

See, e.g., id. at 20-21 (describing misconceptions of both claimants and eligibility workers). To be sure, stigma and the belief that one is ineligible are problems that outreach might successfully address. See id. And certainly public information efforts at some stage were essential to helping the Food Stamp Program establish a new public identity. FNS, however, began this advertising campaign at a time when its product—the food-stamp eligibility determination process—was still quite repellant. Some advocates feared that bringing working families into the food-stamp office to experience rampant over-verification, three-month certification periods, and the other unpleasant features of the program as it then existed would make it all but impossible to persuade them to give the program a second chance after its procedures improved.
Improving the rewards for applying was more difficult. PRWORA had reduced the potential reward for applying for food stamps significantly by reducing food-stamp allotments, primarily through across-the-board benefit reductions and elimination of many of the program’s adjustments for the effects of inflation. On a proportional basis, low-wage workers bore some of the deepest reductions. Congress was in no mood to restore all or even most of these reductions, and the Clinton administration was unwilling to spend much political capital on major food-stamp restorations. In the agricultural appropriations bill enacted in fall 2000 and in the 2002 Farm Bill, however, advocates succeeded in restoring the majority of the two most important inflation adjustments in the formula used to determine food-stamp benefits. Relaxation of temporal targeting also had the effect of increasing benefits, particularly for households

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422 SUPER ET AL., supra note 37, at 12.

423 The author’s calculations follow the methodology described in SUPER & PARROTT, supra note 97.


The 2002 Farm Bill restructured the standard deduction that PRWORA had frozen at $134 so that it was calculated as a percentage of the poverty income guidelines based on household size. Pub. L. No. 107-171, § 4103, 116 Stat. at 306 (codified at 7 U.S.C. § 2014(e)(5)(e)). The law does not allow any of a household’s standard deduction to fall below prior-law levels, so that for the first several years this provision affects only the largest households. Id. The standard deduction for these households, and eventually for all households, will be adjusted for inflation automatically as the poverty income guidelines are adjusted each year. See 42 U.S.C. § 9902(2) (2000) (poverty income guidelines). Although the total value of this new standard deduction is less than that of $134 indexed (i.e., smaller households will lose more to inflation than larger households will gain), this provision limits further erosion of the value of food-stamp benefits.

The third major inflation adjustment that PRWORA eliminated—for the limit on the fair market value of vehicles that may be excluded from resource calculations, see 7 U.S.C. § 2014(g)(2) (1994)—has become far less important because of other liberalizations in vehicle policy, see supra Part II.A.1.b.
getting new jobs or increasing their earnings at jobs they already had.\footnote{428}{See supra notes 203–20 and accompanying text.}

Much more substantial progress was made in reducing the costs of seeking food stamps. A more specialized information barrier than that addressed in most outreach campaigns did appear to be a problem: The states, and hence claimants, misunderstood which TANF eligibility criteria also applied to food stamps.\footnote{429}{See, e.g., DION & PAVETTI, supra note 137, at 20–21 (reviewing literature connecting TANF implementation with discouragement of food-stamp participation); VIVIAN GABOR & CHRISTOPHER BOTSKO, U.S. DEP'T OF AGRIC., CHANGES IN CLIENT SERVICE IN THE FOOD STAMP PROGRAM AFTER WELFARE REFORM 14–17 (2001) (citing studies of policies adopted in Kansas, Utah, Oregon, Wisconsin, and Washington that inadvertently deterred claimants from receiving food stamps).}

One of the most aggressive initiatives in the Final NECP Rule was a requirement that states explain, at several junctures, that TANF requirements such as diversion policies and time limits do not apply to food stamps.\footnote{430}{Food Stamp Program: Noncitizen Eligibility and Certification Provisions, 65 Fed. Reg. 10,856, 10,864 (proposed Feb. 29, 2000) (to be codified at 7 C.F.R. pts. 272–74, 277). This implemented the recommendations of several researchers. See, e.g., DION & PAVETTI, supra note 137, at 23 (compiling literature). The Proposed NECP Rule would have weakened further the vaguely analogous language in prior regulations. Id. at 10,896–97.}


This represented an important shift of the burden of proof with respect to potential claimants’ right to apply: In proving that an applicant was denied (as opposed to merely discouraged from) benefits and that a state is therefore in violation of its obligations, an applicant need demonstrate only that her application was treated as inconvenient or unwelcome or even that the state failed to take affirmative steps to encourage applications.

Increasing ease of access also came as an ancillary benefit of other changes in the law. The 2002 Farm Bill’s broad authority for states to exclude relatively trivial sources of income and resources from food-stamp eligibility determinations\footnote{432}{See supra notes 249–51 and accompanying text.} allowed states to eliminate many questions from their application forms and certification
interviews. Simpler forms and shorter interviews may make the application and recertification process somewhat less daunting for prospective claimants. The Final NECP Rule also sought to reduce the burden of interviews by requiring states to establish fixed times for interviews rather than making applicants wait in their offices for hours for an available eligibility worker.433

The Final NECP Rule's general prohibition on most certification periods of less than six months434 reduced the number of applications a household must complete, and the number of interviews it must attend, during the course of a year.435 FNS's authorization for states to conduct interviews only annually—initially through waivers offered as part of its 1999 access initiative436 and later through the Final NECP Rule437—reduced the number of interviews that households must attend in states still imposing short or moderate certification periods. The Final NECP Rule also made newly employed workers less likely to face premature demands for recertification by prohibiting states from shortening certification periods without first allowing the household to provide any necessary information informally438 and by offering states TBA as a simpler, QC-friendly alternative to early recertifications for those leaving TANF.439

The loss of privacy entailed in applying for food stamps also tended to deter claimants. Although the Food Stamp Act precluded the kind of revolutionary measures Medicaid was taking to eliminate

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434 See supra note 399.
435 Recipient households may not be required to submit to interviews except when they are due for recertification or, in very rare instances, when they are selected as part of the QC sample. 7 C.F.R. § 273.2(d), (e) (2003). Thus, increasing the interval between recertifications reduces the maximum number of interviews households must attend. Another provision of the NECP Rule, as well as waivers FNS had been granting since the late 1990s, allowed states to limit interviews to once a year. 7 C.F.R. §§ 273.2(e)(1), 273.14(b)(3)(i) (2003). For QC reasons, however, some states were reluctant to recertify households without conducting new interviews.
436 See supra notes 321–26 and accompanying text.
437 See supra note 216.
439 See supra notes 359–63 and accompanying text.
intrusive interview and verification requirements, the Final NECP Rule took some important steps to protect claimants’ privacy. It preserved existing language that made documents supplied by the claimant the primary source of verification, permitting more intrusive means only if paper verification was unavailable. The rule as originally proposed, by contrast, would have abandoned these constraints on states.

The Final NECP Rule went much further than prior regulations, as well, in limiting the way in which states may seek verification through collateral contacts (i.e., calls to third parties) and home visits. Under the new rule, when making a collateral contact, an eligibility worker may not disclose any confidential information supplied by the household, including the fact that it had applied for food stamps. This effectively bars workers from sharing information obtained from the claimant with employers, landlords, neighbors, children’s schools, etc., to elicit their reactions. Before it was prohibited, this practice (known as “talking up”) had rendered the program’s privacy guarantees virtually meaningless for many claimants.

The Final NECP Rule also gave households a stronger say in whom an eligibility worker may contact first for third-party verification and prohibited unannounced home visits. The Final NECP Rule also required that

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{440} Ross & Cox, supra note 211 (describing many states’ policies of dispensing completely with interview requirements and paper verification for some categories of Medicaid applicants).

{441} Moreover, because claimants are more likely to provide candid information if they know it will not be disclosed to employers, neighbors, or strangers, advocates were able to argue that protecting claimants’ privacy was essential to reducing fraud and lowering error rates. See supra note 50.


{444} 7 C.F.R. § 273.2(f)(4)(ii).


{446} At the food-stamp directors’ annual conference, staff from states with low error rates described applying these techniques to as many as one-third of applicants and recipients. See supra note 50. Because working households have higher error rates, states generally treat them as “error-prone” households and target them for more intensive investigation of this kind. A state conducting preemptive investigations of the most error-prone third of claimants would be likely to call the employers, neighbors, etc., of virtually all working claimants.

{447} 7 C.F.R. § 273.2(f)(4)(ii), (iii). States have managed to evade these standards by arguing that the purpose of a collateral contact or home visit is “fraud detection” rather than “verification” and hence is not controlled by these regulations. Some states subject a large percentage of claimants to routine “fraud investigations” at application or recertification. See 2002 STATE ACTIVITY REPORT, supra note 79, at 24, 26.
interviews be conducted in facilities capable of preventing claimants from being overheard.\textsuperscript{448}

Finally, food-stamp benefits will be much less attractive if the potential claimant believes that they bring with them a serious risk of fraud charges. The program typically has treated anti-fraud enforcement as a wholly distinct issue from accessibility, and they accordingly have received relatively little attention from advocates and scholars.\textsuperscript{449} In some states, however, a third or more of applicant and recipient households are routinely investigated for possible fraud, often without probable cause.\textsuperscript{450} Even if the state ultimately makes no accusations, these investigations can frighten claimants—and humiliate them if the investigators approach their friends, neighbors, or employers. In addition, states increasingly are relying upon coerced waivers to disqualify claimants for fraud without proving wrongdoing at a hearing.\textsuperscript{451} In some states, investigators routinely press claimants to confess to fraud based on generic computer profiles or overissuances that bear no particular signs of fraud.\textsuperscript{452} If prospective claimants learn that a friend or neighbor known for honesty has been investigated for or charged with fraud, they are likely to assume that the same could happen to them.

One way to mitigate this problem, while retaining anti-fraud protections, might be to restrict investigations to those cases that likely involve willful wrongdoing. Advocacy in this area, however, has met with mixed success. Anti-hunger legislation in 1993 had eliminated

\begin{footnotesize}

\textsuperscript{449} The work in this area tends to be at most “how-to” guides, oriented to practitioners representing individual clients accused of fraud. See, e.g., DAVID A. SUPER, FOOD RESEARCH AND ACTION CENTER, FRAC'S GUIDE TO THE FOOD STAMP PROGRAM §§ 80–84, 177–120 (8th ed. 1988); Louisa Nickerson et al., Representing Food Stamp Claimants in Fraud and Overissuance Cases, 26 CLEARINGHOUSE REV. 1565 (1993); David A. Super, Food Stamps and the Criminal Justice System, CHAMPION, Nov. 2001, at 20.

\textsuperscript{450} See 2002 STATE ACTIVITY REPORT, supra note 79, at 6, 23.

\textsuperscript{451} The ratio of waivers to adjudicated disqualifications increased dramatically from 1991 to 2002. Compare, e.g., STATE ADMIN. BRANCH, U.S. DEP'T OF AGRIC., FOOD STAMP PROGRAM STATE ACTIVITY REPORT FISCAL YEAR 1991, at 24, 26 (1992), with 2002 STATE ACTIVITY REPORT, supra note 79, at 24, 26 (reporting that fifty-eight percent of people disqualified for food-stamp fraud in 2002 were removed on the basis of waiver or consent forms they were persuaded to sign, not including those that pled guilty in court or that failed to appear at their administrative disqualification hearing).

\end{footnotesize}
some incentives on states to give priority to anti-fraud units when allocating staff.\textsuperscript{453} On the other hand, in July 2000, FNS in effect transformed fraud prosecutions into a bounty hunt. It published new rules that treated food-stamp allotments recovered from households disqualified for trafficking as "overissuances,"\textsuperscript{454} because a state may retain thirty-five percent of all overissuances it recovers from households guilty of fraud, the rule created a new, powerful financial incentive on states to prosecute these kinds of fraud claims.\textsuperscript{455} But building a case and holding hearings is costly; so states routinely resort to coercive tactics, intimidating recipients into waiving their rights by sending frightening letters on prosecutors' letterhead.\textsuperscript{456} Moreover, states can now employ these tactics in far more cases, including many where the evidence would be too weak to support charges of fraud.\textsuperscript{457}

Because of the sheer volume of fraud investigations, legal services programs lack the resources to provide accused claimants with


\textsuperscript{455} 7 C.F.R. § 273.18(k)(1)(i). Expanded provisions for intercepting income tax refunds and other federal payments have made collection of overissuances relatively inexpensive for state agencies. See 7 C.F.R. § 273.18(f)(7), (n).


\textsuperscript{457} Indeed, some states achieving large numbers of disqualifications by consent or waiver rarely bring charges when claimants refuse to waive their rights consensually—suggesting that they have no case at all. See, e.g., 2002 STATE ACTIVITY REPORT, supra note 79, at 26 (showing that Florida, Missouri, Pennsylvania, and Tennessee achieve over ninety percent of administrative disqualifications by inducing claimants to sign disqualification consent forms rather than by proving wrongdoing at hearing, and that California and two other states held no hearings, relying exclusively on waivers). This suggests problematic practices: Federal regulations prohibit a state from requesting waivers in cases where it has not obtained an independent determination that its case is strong enough to warrant scheduling a hearing. Disqualification for Intentional Program Violation, 7 C.F.R. § 273.16(f) (2003).

Many states, with FNS's encouragement, identify trafficking suspects through computer analyses of their EBT purchases—an extremely cheap, but severely error-prone method. See Waste, Fraud, Abuse, and Mismanagement: Hearing Before the House Budget Comm., 106th Cong. 9–12 (2000) (Statement of Roger C. Viadero, Inspector General, U.S. Department of Agriculture) (explaining EBT system and attempts to analyze data collected by EBT system), available at http://www.usda.gov/oig/webdocs/Ebt.PDF. For example, one common means by which these programs hunt for fraud is to identify large numbers of purchases in which the price is an even dollar amount. A USDA administrative review officer, however, recently found that in some cultures it is common for customers to ask a store to give them $50 or $100 of meat. In addition, since the computer models typically target large transactions, they disproportionately burden the largest and poorest families.
individual counsel. Moreover, because the regulations of the Legal Services Corporation (LSC) bar legal assistance providers receiving grants from the LSC from participating in criminal matters, states can block their involvement by threatening to bring criminal charges. Advocates persuaded the Clinton administration in its last days to abandon a proposal to repeal the requirement that states have documentary evidence of an “intentional” act of fraud before pursuing a case as fraud. Similarly, FNS retained the requirement that an independent reviewer within the state agency determine that the evidence of fraud is sufficient to schedule a hearing before it asks a recipient to sign a waiver of the right to that hearing. But enforcing those regulations is difficult in the face of the strong financial incentives states have to disregard them and the traditional skittishness many policymakers feel about interfering with anti-fraud activities.

Even where availability of counsel is not the limiting factor, legal-services programs are likely to have difficulty reaching claimants before they sign a waiver form and explaining to them the importance of consulting with counsel. This is particularly true where claimants are overwhelmed by investigators insisting that they sign the waivers immediately or face prosecution. The mere potential that a matter might be prosecuted in the future is insufficient to trigger disqualification under §§ 1613.1, 1613.2 (barring legal assistance only in “criminal proceedings” actually initiated by formal complaint, information, or indictment), but LSC-funded programs will not be eager to invest resources in a case that they subsequently will be obliged to drop. Moreover, because the constitutional right to appointed counsel in criminal cases does not attach until the state brings formal charges, Kirby v. Illinois, 406 U.S. 682, 689-90 (1972), most claimants faced with the threat of criminal charges have no access to an attorney at all.


On the other hand, under the Bush administration, FNS has prohibited states from requiring cooperation with fraud investigators as a condition to ongoing eligibility. Memorandum from Arthur T. Foley & Lou Pastura to Food & Nutrition Service Regional Program Director (Apr. 24, 2003) (discussing food-stamp participants’ cooperation with fraud investigations), http://www.fns.usda.gov/fsp/rules/memo/03/fraud.htm.
III

ASSESSING THE NEW FOOD STAMP PROGRAM

The effort to reconfigure the Food Stamp Program had both political and practical goals, and its success in each domain therefore should be evaluated independently.

The program's political strength might be judged best indirectly, by the degree to which it succeeded in distancing itself from those "welfare" programs whose demise both parties had celebrated, and the extent to which it reclaimed the strong bipartisan support it had enjoyed before the upheavals of the mid-1990s. The functional objective of increasing the participation of low-wage working families can be evaluated more directly. And finally, we can ask directly the moral (if not politically salient) question of whether this reorientation to the needs of the working poor was bought at the expense of other, more vulnerable groups.

Part III.A assesses how efforts to redirect the Food Stamp Program affected its political position. Part III.B assesses the changes' impact on low-wage working families. And finally, Part III.C seeks to determine how other claimants have fared.

A. Success in Redefining the Program

To become politically sustainable after the fall of AFDC, the Food Stamp Program needed to shed as many of the characteristics it shared with that program as it could. But some of these were integral to the program's fundamental purposes. For example, since many of the hungry also are unemployed, food stamps could not be made completely conditional on employment without neglecting many of those most in need.

Also, experience has taught that the program's stability—as well as the incentive structures that help it serve those most in need—would have been jeopardized if its administration was placed wholly in the hands of the states. For that reason, near-complete devolution (on the model of TANF) was out of the question. Instead, advocates sought to pour oil on the waters, reasoning that in easing the friction and outright antagonism between FNS and state administrators, the program's ideological opponents could no longer count the states as allies. This approach has proven to be a great success.

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463 See supra Part I.A.2.
464 See supra note 102 and accompanying text.
466 See supra note 114 and accompanying text (describing pre-reform relationship).
In other areas, the program has sought to expand and highlight its distinctness from cash assistance. Food-stamp benefits are still provided in kind, and the conversion to EBT may give the public some confidence that the program's benefits are being monitored for fraud more closely. And with more realistic expectations of the precision of food-stamp benefit calculations, the program no longer is inflating its error rate with relatively trivial cases that likely would not disturb most members of the public if properly explained.

On a more difficult front, the Food Stamp Program may have made modest gains in increasing its relevance to middle-class people. It is difficult to know to what extent formerly well-employed people have turned to food stamps as a safety net during the current economic slump. One reasonably can imagine that the liberalization of the program's financial eligibility rules, which render many formerly middle-income people eligible, are so new that few of these potential beneficiaries have thought to apply. States' implementation of liberalized food-stamp resource policies still was quite incomplete at the outset of the recession, and the 2002 Farm Bill's provision allowing states to disregard retirement accounts had not yet been enacted. Nonetheless, the program's rules and procedures have changed enough that advocates and administrators legitimately can claim that they are available to serve as a safety net for formerly middle-income people that fall on hard times.

More encouragingly, although the program's structure never provided any incentives as perverse as those that afflicted AFDC, the Food Stamp Program nonetheless has significantly improved its incentive structure. Under the old rules, households had an incentive (albeit hypothetical) to dispose of vehicles that might help them find or keep employment in order to meet the resource eligibility limits; the new, liberalized vehicle policy eliminated this incentive. The new rules also had the effect of eliminating preferential treatment for cash-assistance recipients, whose vehicles do not affect their eligibility. The 2002 Farm Bill's resource-exclusion option allows states to eliminate any incentive for a household to liquidate its retirement savings

467 See supra note 82 and accompanying text.
468 See supra note 87 (describing public perception of widespread fraud). EBT has an added benefit: Because its use is less conspicuous in grocery check-out lines, it provides participants with a greater measure of privacy and lessens the stigma of participation.
469 See supra note 86 and accompanying text.
470 See supra note 84 and accompanying text.
471 But see MARMOR ET AL., supra note 43, at 219-22 (noting that "incentives d[o] not translate directly into behaviors" and might be shown not to affect behavior at all). Cars and trucks are so essential to everyday life in much of this country that it is difficult to believe that many households would sell them merely to qualify for food stamps.
to obtain food stamps. And the relaxation of temporal targeting to the benefit of households with increased incomes reinforces the Food Stamp Program's already strong work incentives.\textsuperscript{472}

Arguably, the most important measure of the success of the program's political transformation, however, was the extent to which it came to serve low-income people employed outside the home.\textsuperscript{473} Progress on this score brings a double benefit: Not only has it enhanced the program's palatability to the public, but this, unlike nebulous discussions of "incentives," is a concrete, real-world change to which legislators and advocates can point.\textsuperscript{474}

The improvement in Congress's treatment of the Food Stamp Program also demonstrates how much its political position has improved. In 1997 and 1998, the Clinton administration extracted very modest restorations of some of PRWORA's harshest food-stamp cuts from Congress as part of the price for the enactment of other initiatives. But by 2000, Republican appropriators were pushing through an additional major funding restoration and a liberalization of food-stamp vehicle rules that went far beyond pre-PRWORA law.\textsuperscript{475} In 2001, Senate Republicans' food-stamp reauthorization proposals were far more liberal than those of Agriculture Committee Chairman and liberal Democrat Tom Harkin.\textsuperscript{476} In February 2002, the trend toward more generous benefits continued when President Bush proposed increasing food-stamp benefits by one of the largest proportions in a quarter century.\textsuperscript{477} Several conservative Republican senators then took to the floor to propose their own amendments to increase

\textsuperscript{472} See \textit{supra} notes 203–17 and accompanying text.

\textsuperscript{473} See \textit{infra} Part III.B.

\textsuperscript{474} In 1999, for the first time in the program's history, the number of working families with children receiving food stamps exceeded the number of unemployed households receiving cash assistance. \textit{SUPR}, \textit{supra} note 102, at 10. The preponderance of working families increased in subsequent years. \textit{Id.} In the average month in fiscal year 2002, forty-three percent of food-stamp households with children that included at least one able-bodied, non-elderly adult had earnings. \textit{Id.} at 9.

\textsuperscript{475} See \textit{supra} text accompanying notes 247–249.

\textsuperscript{476} 147 \textit{CONG. REC.} S12990-91 (daily ed. Dec. 12, 2001) (statement of Sen. Lugar) (criticizing Chairman Harkin's food-stamp reauthorization proposal for having "less than half the nutrition impact" of Senator Lugar's own proposal).

\textsuperscript{477} When fully implemented in 2006, the Bush proposals would increase food-stamp spending by almost two percent above the administration's projections for food-stamp benefit spending. The author's calculations are based on data contained in the tables in 2003 \textit{GREEN PAGES}, \textit{supra} note 120, at 26–50, and \textit{OFFICE OF MGMT. \\& BUDGET, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003}, at 215–16 (2002), subtracting from the food-stamp baseline the cost of the separate food-assistance program operating in Puerto Rico under 7 U.S.C. § 2029 (2000). See \textit{Office of Mgmt. \\& Budget, supra note 251, at 55, 59, 68–69. The Congressional Budget Office's unpublished estimate of the administration's proposals was substantially higher. See \textit{supra} note 50.
THE QUIET "WELFARE" REVOLUTION

food-stamp benefits, winning most over the objections of Senator Harkin. Although some of these amendments targeted low-wage workers or other politically appealing groups, others were general benefit increases. To be sure, complex farm politics played a role in these initiatives. But the fact that rural legislators chose food-stamp increases as a politically appealing initiative—rather than, for example, land conservation, funding to farmers to alleviate air and water contamination, research, land grant colleges, or international food aid—shows the remarkable turnaround in the general perception of the Food Stamp Program.

The conduct of other political actors, too, reveals the new enthusiasm for the Food Stamp Program. For example, under Governor Tommy Thompson—the most prominent gubernatorial opponent of welfare—the Wisconsin Department of Workforce Development bragged in September 2000 that, "Wisconsin Ranks Number One for


479 Id.

480 The traditional model of farm-food politics holds that agricultural interests support food stamps in part to generate markets for their products and, in part, to attract urban votes, particularly in the House, to secure the passage of farm bills. See Ohls & Beebout, supra note 50, at 128–29. This broke down over the years for several reasons. First, the increasing importance of the formal budget process meant that farm and food-stamp legislation often moved separately in reconciliation bills. Second, when they did move together, it was often in the context of strict budgetary caps that forced one-for-one trade-offs between funding for farm and nutrition-assistance programs. Third, conservation and other environmental programs provided alternative means for attracting urban votes to farm bills, while export promotion programs provided more direct means to increase demand for agricultural products. And fourth, the departure of some of the Food Stamp Program's strongest Republican supporters—notably Senators Bob Dole and Rudy Boschwitz and Representative Bill Emerson—left a gap that their successors only partially filled.

Curiously, however, some of these same factors gave rise to a new coalition in support of the Food Stamp Program. Advocates of free trade, including agricultural interests tied to export-oriented crops, opposed agricultural subsidies that violated U.S. treaty obligations or that made it more difficult for the United States to negotiate reductions in foreign trade-distorting subsidies. Thus, they preferred food stamps as a means of subsidizing domestic agriculture. They also found that by increasing food-stamp spending, they could crowd out spending on trade-distorting farm subsidies within the budgetary limits. Both the Bush administration and Senate Agriculture Chairman Lugar were strong proponents of free trade. In addition, Senate Agriculture Chairman Harkin defied the Committee's long tradition of bipartisanship to involve only Democrats in crafting his 2002 reauthorization proposals. This enraged Republican senators, who saw amendments cutting farm subsidies in favor of food stamps as a convenient way to embarrass Harkin.
Increasing Food Stamp Participation." In early 2000, the Robert Wood Johnson Foundation, which had in the past pledged money exclusively to health-care programs like Medicaid, offered $6.8 million to help states improve access to those programs—and to food stamps. The Kansas welfare agency, which had been discouraging food-stamp applications along with cash assistance, sent its staff a newsletter with food-stamp outreach ideas. Indiana, which had seen one of the steepest declines in food-stamp participation in the nation, undertook a comprehensive overhaul of its procedures to promote participation. Other states that previously had applied similar policies in cash-assistance programs and food stamps reversed course as well. All but a handful of states adopted semiannual reporting, liberalized vehicle-resource rules, and waivers of the three-month cut-off for childless adults in areas of high unemployment. States' election of other options to ease burdens on households was slower but steady.

To be sure, the Bush administration proposed, in both 2002 and 2003, to include food stamps in a broad initiative that would allow

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483 See GABOR & BOTSKO, supra note 429, at 14-15.
487 CTR. ON BUDGET & POLICY PRIORITIES, STATE IMPLEMENTATION OF SEMI-ANNUAL REPORTING (2004) (showing that forty-three states and District of Columbia have adopted or are planning to adopt semiannual reporting).
488 CTR. ON BUDGET & POLICY PRIORITIES, supra note 227 (showing that thirty-nine states and District of Columbia exclude at least one vehicle per household and eight more have liberalized food-stamp vehicle rules from standards PRWORA specified).
489 CTR. ON BUDGET & POLICY PRIORITIES, STATE WAIVERS FROM THE 3-MONTH TIME LIMIT (2004) (showing that forty-six states and District of Columbia have waivers, with Massachusetts as only state with significant areas eligible for waivers that has declined to seek any).
490 E.g., CTR. ON BUDGET & POLICY PRIORITIES, STATE IMPLEMENTATION OF TRANSITIONAL FOOD STAMPS (2004) (showing that twelve states have implemented transitional food stamps, with another five having announced plans to do so); CTR. ON BUDGET & POLICY PRIORITIES, STATES ELIMINATING THE FOOD STAMP ASSET TEST (2004) (identifying nine states with broad categorical eligibility policies).
HHS to waive many programs’ rules at once, and House conservatives included an optional food-stamp block grant in their TANF reauthorization bills each year. Yet the program’s transformation changed the terms of the debate. The congressional opponents of these proposals now can charge that they undermine the nutritional safety net that the Food Stamp Program provides—and expect that charge to carry political weight with members of both parties. In the immediate wake of PRWORA, by contrast, a congressperson charged with dismantling the Food Stamp Program would have worn it as a badge of honor.

Some state officials, however, remain skeptical about the Food Stamp Program. The states of Florida and Texas recently sought USDA approval to replace the public employees that determine food-stamp eligibility with private contractors that will not be bound to follow federal procedures. This could pose both an immediate danger to the accessibility of food stamps and a long-term threat to the viability of the program should more states divest themselves of the means of delivering food-stamp benefits. In addition, state fraud investigators have reacted violently against relaxation of temporal targeting, seeming to suggest that any significant mismatch between current circumstances and benefit levels should be regarded as a threat to the program’s integrity even if the household has fully complied with applicable rules. To date, however, Florida and Texas are alone in seeking to dismantle the Food Stamp Program’s eligibility-determination system, and states widely have ignored fraud investigations.

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494 The April 2004 Newsletter of the United Council on Welfare Fraud (UCOWF) urges fraud investigators to mobilize against semiannual reporting, insisting that it will “enable frauds” by weakening “program integrity.” Letter from the Editor, UCOWF News (United Council on Welfare Fraud, Mesa, A.Z.), Mar.–Apr. 2004 (on file with New York University Law Review). The newsletter suggests that semiannual reporting will reduce the workloads of fraud investigators and that they may need to shift to investigating other programs if their states adopt semiannual reporting. Id. Since a large proportion of fraud charges likely have involved accusations that households failed to submit required reports of changes, this reduction in reporting requirements presumably means that fewer errors that could be investigated for fraud will occur.
investigators' complaints about semiannual reporting's potential impact on their jobs.\footnote{See supra note 487 (describing state's widespread adoption of semiannual reporting).} Illustrative of the widespread acceptance of food-stamp reforms is the fact that when two senior state human services officials who once had been fervently critical of the Food Stamp Program were asked to respond to a paper praising the progress in the program, they largely agreed.\footnote{Gary Stangler, Comment, in The New World of Welfare 363 (Rebecca M. Blank & Ron Haskins eds., 2001); Don Winstead, Comment, in The New World of Welfare, supra, at 360.}

The program's conservative detractors remain critical. Some remain interested in its dismantlement through block granting.\footnote{Ron Haskins & Rebecca M. Blank, Welfare Reform: An Agenda for Reauthorization, in The New Work of Welfare, supra note 496, at 20-21.} Others favor large-scale work requirements;\footnote{E.g., Rector, supra note 156.} given the resistance states demonstrated to providing work slots for people facing PRWORA's three-month time limit,\footnote{See supra text accompanying note 283.} this likely would result in wholesale denials of food stamps to families never given the chance to work off their benefits. Others continue to recycle old critiques of the program as being anti-worker, largely ignoring the dramatic changes the program made in the six years following PRWORA.\footnote{Ann Kim, Progressive Policy Inst., Fixing Food Stamps (2003), http://www.ppionline.org/documents/Food_Stamps_902.pdf; Isabel Sawhill & Ron Haskins, Brookings Inst., Welfare Reform and the Work Support System 4-5 (2002); see also Robert I. Lerman & Michael Wiseman, Restructuring Food Stamps for Working Families 50-60 (2002) (brushing aside recent changes while proposing that food stamps be converted to tax credit for working families), available at http://www.urban.org/UploadedPDF/410557_RestrFoodStamps.pdf.} Even this criticism, however, is relatively muted compared to what the program faced in the mid-1990s. Rather than calling for the program's immediate dismantling, the architect of PRWORA argues for a carefully evaluated block-grant demonstration in a few states. And while the Heritage Foundation's chief welfare spokesman remains harshly critical of the program,\footnote{See Rector, supra note 156.} its budget spokesman recently declared that "[f]ood stamps provide the model for a successful voucher program."\footnote{Brian M. Riedl, Heritage Foundation, How to Get Federal Spending Under Control 15 (2004), http://www.heritage.org/Research/Budget/bgl733.cfm.}

\section*{B. Service to Low-Income Working Families}

Several years will be required before it becomes apparent how much the food-stamp reforms implemented between 1997 and 2002 will increase participation rates among the working poor. Many of the
most important food-stamp liberalizations are options that states are implementing fairly gradually. Changes in substantive eligibility rules rarely receive much publicity, and newly eligible claimants therefore may take months or years to learn about those changes and apply.

Procedural changes may take even longer to produce palpable effects. Potential claimants alienated by the prior, onerous procedures may be slow to believe that the program has changed. They may only learn of the changes and consider returning if their friends apply and experience the new procedures firsthand. Even then, the former recipients may assume that their friends' good fortune is a fluke. We therefore should not expect participation rates to reflect fully the success of the reforms at this early date.

That said, participation rates are already quite encouraging. From September 1999 to September 2001, the participation rate for households with earnings climbed from 42.7 to 52.1%.\(^{503}\) This increase reflects some changes that states made in response to the reporting and budgeting options made newly available by the Clinton Food Stamp Initiative of July 1999, the food-stamp QC system's reorientation in the summer and fall of 1999, and perhaps the beginning of the implementation of the NECP Rule and the fall 2000 stamp legislation. It does not, however, include the effects of transitional food stamps or any of the 2002 Farm Bill's liberalizations and simplifications.

Although participation rates are unavailable for the last two years, the number of low-wage working families receiving food stamps increased by several hundred thousand from 2001 to 2002,\(^ {504}\) the first substantial increase in a decade.\(^ {505}\) Coinciding with this increase was a dramatic drop in states' use of short certification periods for working families.\(^ {506}\) These changes, too, antedate the effective date of the 2002 Farm Bill, including its authorization of semiannual reporting for virtually the entire food-stamp caseload,\(^ {507}\) which proved crucial to inducing large numbers of states to take this option. The increase in the number of low-wage workers receiving food stamps is all the more remarkable because it came at a time of rising unemployment, when many low-income people were losing employment. Since 2000, food-

\(^{503}\) See Cunninghame, supra note 222, at 13 tbl.2.5.


\(^{505}\) Super, supra note 102, at 6.

\(^{506}\) Id.

\(^{507}\) See supra notes 215–17 and accompanying text.
stamp participation has continued to rise substantially,\footnote{508} even during summer months when it traditionally falls (due to the seasonal employment cycle in agriculture, construction, and some service industries). So, while researchers are just beginning to evaluate the new Food Stamp Program, preliminary results are encouraging.\footnote{509}

C. Service to Other Vulnerable Populations

The transformation of food stamps to serve the needs of the working poor could not be regarded as a clear success if it was purchased at the expense of other low-income people.\footnote{510} But these groups were, in fact, largely unharmed by the reforms aimed at the working poor, and the program's survival should be counted as a great benefit to all participants.\footnote{511} For the most part, it appears that low-

\footnote{508} The author's calculations are based on data contained in USDA's Keydata reports, \textit{supra} note 50.\footnote{509} \textsc{Sheila R. Zedlewski}, \textit{Urban Inst., Recent Trends in Food Stamp Participation: Have New Policies Made a Difference?} 6 (2004) (concluding that new rules and procedures explain increase in participation by former cash-assistance recipients); \textsc{Gen. Accounting Office, Pub. No. 04-346, Food Stamp Program: Steps Have Been Taken to Increase Participation of Working Families, but Better Tracking of Efforts Is Needed} 37-38 (2004) (finding "a number of initiatives that show promise in addressing one or more of the reasons why working families do not participate in the program").

\footnote{510} Expansions of the EITC have helped low-income working families a great deal but have done nothing for other low-income people. The refundable child credit enacted as part of the 2001 tax cut bill, Pub. L. No. 107-16, § 201(a), 115 Stat. 45 (2001) (to be codified at 26 U.S.C. § 24(a)) (2001), similarly served only the working poor. Most states have abandoned any pretext of updating their basic cash-assistance grants to protect recipients from the effects of inflation; if states liberalize their cash-assistance programs at all, it is more likely to be by increasing the amount of earned income disregarded in determining grants for the minority of recipients with earnings. \textit{See Comm. on Ways & Means, 2004 Green Book: Background Material and Data on the Programs within the Jurisdiction of the Committee on Ways and Means} 7-43 to 7-44 (2004) (showing that thirty states froze or cut their maximum cash-assistance grants between 1995 and 2003, resulting in real reductions in purchasing power in those states and others with small nominal increases). Increasing the percentage of wages disregarded in food-stamp eligibility and benefit calculations obviously would benefit low-income workers while leaving other claimants as they were. But neither advocates nor administrators seriously considered adopting such a policy. The Food Stamp Program already reduces benefits twenty-four to thirty-six cents for every additional dollar of income and cuts food-stamp allotments thirty cents for each dollar of net income. 7 U.S.C. §§ 2014(e)(2)(B), 2017(a) (2000). The phase-out of the deduction for high shelter costs can increase this net benefit reduction rate from twenty-four to thirty-six percent. § 2014(e)(7). The food-stamp earned-income deduction is statutory, and reducing the program's benefit reduction rate significantly would require Congress to expend substantial resources. \textsc{David A. Super, Ctr. on Budget & Policy Priorities, Options to Change the Food Stamp Benefit Structure} (2000).

\footnote{511} \textsc{FNS} initially did make some of the simplified reporting options available only for working families. \textit{See supra} note 216. By the time Congress enacted the 2002 Farm Bill, however, all of those distinctions had been eliminated. Pub. L. No. 107-171, § 4109, 116 Stat. 134, 309 (2002) (to be codified at 7 U.S.C. § 2015(c)(1)(D)). Indeed, in order to
income working families served as poster children for a broad-reaching effort to improve the program's service to all low-income people. Similarly, reducing states' incentives to require three-month recertification periods probably benefits the homeless—whose circumstances are among the least stable—as much if not more than it does the working poor. And the initiatives to prevent families whose cash-assistance has ceased from losing food stamps help those leaving the rolls for reasons of child support collections, time limits, or procedural terminations as much as it does those leaving for reasons of employment. The program's improved image, along with the economic downturn beginning in 2001, also may have helped to persuade a record number of states to seek waivers of the three-month time limit for childless adults not working twenty hours per week.

The overall food-stamp participation rate rose from 58.8 to 61.6% between September 1999 and September 2001. It rose among all age groups except the elderly. Participation fluctuated among households with no income—dropping from 1999 to 2000 but then rising in 2001—but increased for all other income groups. Families that had recently left welfare for work in 2002 participated at a substantially higher rate than did their counterparts finding employment

preserve periodic reporting exemptions for those non-working claimants who might find them especially onerous (the elderly, disabled, and homeless), the statute and rules made the reporting requirements somewhat more complex for states to administer, and hence created a strong incentive for states to make the simplified reporting procedures available to all participants. 7 U.S.C. § 2015(c)(1)(A).

See supra notes 359-63 and accompanying text.

See supra note 489.

CUNNYNGHAM, supra note 222, at 12 tbl.2.4.

Id. The elderly were among those groups least affected by PRWORA. Moreover, because their circumstances tend to be quite stable and their allotments relatively modest, the elderly had low error rates. E.g., QUALITY CONTROL BRANCH, U.S. DEP'T OF AGRIC., FOOD STAMP PROGRAM QUALITY CONTROL ANNUAL REPORT FISCAL YEAR 1996, at 47 (1997) (finding only 8.7% of error dollars in households with elderly members). Hence they were not targets of states' efforts to tighten eligibility determination procedures to reduce error rates. (From 1994 to 1999, the share of working households required to reapply every three months or less jumped from 10 to 33%; among the elderly, it only edged up from 1 to 3%. Compare SMOLKIN ET AL., supra note 141, at 64 (showing distribution of certification period lengths for all households and those with elderly or working members in 1994), with RANDY ROSSO & LISA FOWLER, U.S. DEP'T OF AGRIC., CHARACTERISTICS OF FOOD STAMP HOUSEHOLDS, FISCAL YEAR 1999, at 46 (Mathematica Policy Res., Inc. ed., 2000) (same for 1999). The elderly's participation had not been depressed in the years immediately following PRWORA; accordingly, they were not primary targets of efforts to restore access to the program. It thus is not surprising that participation among the elderly, having not declined much in the first place, was not then climbing.

CUNNYNGHAM, supra note 222, at 13 tbl.2.5.
in the late 1990s. Food-stamp participation continued to decline among non-citizens and among U.S. citizen children living with non-citizen adults, as it had since PRWORA's enactment. Here again, the data were collected more than a year before the Farm Bill's provisions aiding immigrants took effect.

CONCLUSION

Revolutions are messy things, notorious for leaving myriad loose ends. The anti-welfare revolution of the mid-1990s was no exception. The sweeping consensus that fueled this revolution was remarkably intense but relatively specific. A fairly broad coalition of interests, backed by a large majority of American public opinion, united against "welfare" and in favor of policies that "supported work." Although the legislation enacted reached far beyond these simple concepts, the consensus did not. Indeed, even the points of apparent agreement were blurred by ambiguities in what was meant by "welfare" and how one should support work. State officials traded their support of the legislation for funding and authority, but little evidence suggests that devolution was central to the public's agenda or that PRWORA's conservative backers retained much lasting allegiance to state governments after its enactment had been secured.

Once the 1996 welfare law passed, the political system's fever broke, and attention rapidly shifted to other issues. Food stamp policy no longer was set through the symbolic politics that had governed the anti-welfare revolution, but in response to the more familiar functional politics that shaped the program through most of its life.

The intense, if short-lived, intervention by the broader political community left the much smaller group of actors having ongoing involvement with the Food Stamp Program a handful of general, largely expressive, concepts but considerable latitude in how to interpret those concepts. With the bluster of the revolution passed, these questions would have to be resolved through the longstanding process of competition and accommodation among the interest groups with ongoing functional interests in the program. The program's supporters in and out of government seized this opportunity to repair much of the political and operational damage the program had suffered. By reorienting the program's philosophies and rules toward meeting the needs of low-income working families, they helped dis-

518 Id. at 12 tbl.2.4.
tance it from the stigma of "welfare." They also showed that policies that helped the working, instead of those that punished the non-working, could satisfy demands for a greater emphasis on work. This reorientation helped break decades-old barriers on several important procedural issues: Latitude that policymakers never would have granted to "welfare recipients" seemed altogether reasonable when sought on behalf of low-wage workers.

The Food Stamp Program's champions recognized state officials as important actors whose support must be purchased, but they found ways of doing so that were consistent with the well-being of both the program and low-income families. In particular, they restructured states' incentives and gave them flexibility to innovate in ways that expanded access and benefits. Having done this, advocacy groups opposed and defeated states' proposals for the kind of policymaking primacy that hastened AFDC's collapse. The success of these efforts supports the theory that decentralization was not a fundamental tenet of the mid-1990s revolution but merely the currency that conservatives used to purchase the legitimacy that came with state officials' support.

At the end of the day, many of the Food Stamp Program's most glaring structural weaknesses were corrected, and a viable political coalition was assembled. As importantly, this happened without sacrificing the program's ability to serve its most vulnerable constituents, including those disadvantaged by changes in cash-assistance programs. The weaknesses that remain—notably the allure of extensive waiver authority—have long defied easy solution.

The success in transforming food stamps offers a possible path for buttressing other programs serving low-income families, such as those subsidizing housing, childcare, transportation, health care, and utility costs. It certainly indicates that some liberals have been premature in giving up on direct-assistance programs that lack explicit work tests, and that the ongoing obsession with cash-assistance programs is obscuring other important opportunities. Indeed, a strong argument can be made that the approaches to work, state flexibility, and public skepticism about means-tested programs that the Food Stamp

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519 To the extent that food stamps were less available to vulnerable populations in 2002 than they were in 1996, it was almost entirely due to PRWORA's restrictions on the eligibility of legal immigrant families for both programs and childless adults for food stamps. As discussed in Part II.A.2, supra, however, administrative and legislative actions since 1996 significantly moderated even these restrictions.

Program's supporters crafted are the only ones likely to be consistent with a politically stable program.

The major alternative way of operationalizing the expressive statement favoring work is to create large, unpaid work programs. That approach proved unsustainable during the Great Depression, and both the Family Support Act of 1988 and PRWORA failed to induce states to set up such programs.\(^{521}\) A simple exercise in game theory shows why. For simplicity, assume there are three possible policy outcomes: providing means-tested benefits without a work requirement, providing those benefits with a work requirement, and not providing those benefits at all (or providing them to a dramatically smaller share of the eligible claimants). Assume also that there are four relevant sets of players: traditional liberals (a group that may include some welfare-rights or similar organizations), career state-human-services administrators, anti-public-benefits conservatives (perhaps inspired by Charles Murray\(^{522}\) or Robert Rector\(^{523}\) and often sitting in state legislatures or as political appointees in state administrations), and fiscal conservatives who care little about the substance of benefit programs' policies but want to keep their budgets as low as possible.

When societal concern for the poor rules out a massive, arbitrary purge of the rolls, three of these four groups—all but the social conservatives—are likely to prefer providing assistance without work requirements.\(^{524}\) When, on the other hand, social conservatives suc-

\(^{521}\) See supra notes 5–8 and accompanying text.  
\(^{524}\) See infra app., tbl.1. Liberals' clear preference traditionally has been to provide aid without work requirements, which many have contended are punitive in concept and tend to lead to large numbers of sanctions for innocent errors in practice. Labor unions, particularly those representing public employees that might be displaced by unpaid workfare workers, will be particularly anxious to avoid work requirements.

State administrators without a strong ideological orientation also are likely to prefer providing aid without a work requirement. Operating large-scale work requirements is fraught with problems. The inevitable administrative misunderstandings about sanctions may produce negative media stories. Monitoring and adjudicating compliance is a massive, costly, stressful undertaking. And, most fundamentally, finding enough placements for a large caseload is extremely difficult, with many potential placements regarding participation as far more trouble than it is worth (and some nonprofits refusing to take workfare placements on ideological grounds). As a result, placements tend to be found a few at a time and to require extensive (and expensive) hand-holding of the placement sponsors or employers. Failing to find and maintain enough placements is likely to bring intense criticism from outsiders who assume that “free labor” is easy to give away.

Fiscal conservatives—both those believing in low government spending in general and those seeking resources for other kinds of programs—are unlikely to want to pay for the
ceed, as they did in the mid-1990s, in rousing public anger against providing aid without requiring work, most groups are likely to choose broad reductions in the number of people receiving aid over the establishment of large-scale work programs. Thus, in both liberal and conservative times, most key actors are likely to oppose large, mandatory work programs. This explains anti-hunger advocates' widespread failure to persuade states to operate work programs for childless adults who otherwise could not receive food stamps for more than three months. More broadly, it suggests that large-scale work programs are likely never to be sustainable politically and that responding to the public's pro-work sentiments with a strategy relying on such work programs is likely to end in the dismantlement of the underlying benefit program. The better approach, successfully fol-

costly administrative apparatus required to locate and supervise work placements. Some also may be concerned that these programs could expand the government's role in the economy.

See infra app., tbl.1. Caseload reduction—and the savings it produces—is the obvious first choice for fiscal conservatives. Many anti-welfare conservatives argue that any means-tested government benefits are likely to distort the economy and send undesirable messages to claimants and potential claimants. See, e.g., Murray, supra note 522. It seems unlikely that they would work to defend these programs against massive caseload purges even if they establish mandatory unpaid work programs.

Most career state human services administrators are unlikely to welcome purges of the eligibility rolls: Most made a vocational choice to go into human services because they believe in helping people. Taking adverse action against large numbers of needy people is likely to produce unfavorable media stories about "heartless bureaucrats." And if caseloads drop enough, political officials may demand reductions in the labor forces of their agencies. On the other hand, the burdens and risk of failure in running large work programs are daunting. Thus, if they cannot have a simple aid program without major work requirements, some state administrators might prefer to shrink the rolls so that running work programs for those that remain becomes more manageable. The history of cash-assistance programs since PRWORA—with a heavy emphasis on caseload reduction and relatively few large-scale workfare programs—suggests that this preference is widely shared.

Finally, even in the liberal camp, views may be mixed. Given the other two unappealing alternatives, many would prefer aid with a work requirement to leaving low-income families with nothing at all. Others may find the aura of unpaid work so distasteful that they cease advocating for the program or try to attach conditions on the work that make them still harder for states to administer and make an eligibility purge inevitable. And public employee unions may be torn between the need to preserve their members' jobs and the desire for a viable safety net should those members become unemployed.

See supra notes 280–85. The offer of full federal funding for expanding FSE&T programs might have tempered the opposition of state-level fiscal conservatives, although states still had to pay half the cost of any reimbursements to FSE&T participation for transportation, protective clothing, and the like, 7 U.S.C. § 2025(h)(2), (3) (2000), and of any program costs exceeding the amount of the federal FSE&T grant, § 2025(h)(1). The key point, however, is that despite all the pro-work rhetoric surrounding PRWORA, the anti-hunger advocates had no natural allies. Indeed, some important parts of the traditional liberal coalition—most obviously, public employee unions whose members could be displaced by workfare participants—recoiled at promoting work programs.
ollowed in the Food Stamp Program, is to focus on supporting as many low-wage workers as possible and hope that this provides the program with enough political cover to allow it also to help the elderly, persons with disabilities, and other persons who, for family or other reasons, are not currently employed.527

The Food Stamp Program’s response to calls for state flexibility also seems the only one likely to be sustainable in the long term. Understanding why this is so requires an examination of states’ motivations. To be sure, state officials, being human, have the full variety of interests and desires that the rest of us do: power, money, acclaim, and so forth. Most importantly, however, state administrators seek to avoid impossible assignments that lead to failures for which they will be blamed.528 Savvy administrators, however, understand that the impossibility of some tasks may not be readily apparent to their political masters or to the general public. They therefore may shape their demands to make them sound more reasonable to the unsophisticated. The food-stamp directors did not expect that a call for greater tolerance for misallocated benefits would elicit much sympathy from the public; they therefore framed their attacks on the Food Stamp Program on the complexity of its means-test and eligibility-determination procedures.529

Rather than responding to these demands as presented, advocates sought to defuse the underlying problem: unreasonable QC pressures. As a result, although Congress did not adopt most of the states’ specific recommendations, they were delighted. Giving states control over the food-stamp benefit structure, as the program’s conservative critics recognized,530 or severely weakening the targeting of its benefits, would have made the program politically indefensible by preventing it from being able to claim credibly to be assuring a mini-

527 This option had not been available to AFDC’s defenders because President Reagan made most low-wage workers ineligible in 1981. Katz, supra note 1, at 286–88.
528 See Super, supra note 53, at 883–88. Thus, states’ hostility toward AFDC sprang in part from the sense that the Family Support Act of 1988 had assigned them to move welfare recipients into paid employment but had left in place programmatic rules that undermined those efforts. Once the program’s national structure began to wobble, states were happy to accept the additional funding and authority that came with block granting.
529 Had the program’s means test been flattened as much as the states proposed, error rates likely would have fallen since states would have many fewer ways in which to make errors. Alternatively, if the states’ demands were blocked or only partially accommodated, administrators could seek to spread the blame for their errors to those who obstructed their calls for simplification.
530 See supra note 156 and accompanying text (discussing critics’ overriding goal of total dismantlement).
mally nutritious diet to recipients. Thus, the safest response to states' demands for flexibility is to identify the specific grievances underlying those demands and to address those grievances. State administrators who are given appealing, positive, and achievable goals and are treated with respect are unlikely to undermine a program.

Finally, an intermediate response also is necessary to allay the public's suspicion of means-tested programs. The public’s antipathy toward taxes makes it impossible to eliminate means tests or make programs universally available. The depth of poverty, on the other hand, makes it irresponsible to acquiesce in the elimination of the basic assistance that these programs provide or limit them to only the most sympathetic populations. A better approach is trying to identify the aspects of a program that are most annoying to the public and least essential to its mission. In the Food Stamp Program’s case, obsessive temporal targeting and the QC system that enforced it had led directly or indirectly to a multitude of problems: an excess of paperwork, low participation by politically appealing low-wage workers, annual reports tarring the program as mismanaged and half the states as incompetent, and angry states counter-attacking the program. Reconceptualizing the program as work support helped separate it from the “welfare” that the public abhorred. Coincidentally, the conversion of food-stamp benefits from bulky, highly visible media to less obvious, electronic media also helped prevent the program from irritating the public on such a regular basis.

Programs making specific functional commitments are much easier for supporters to understand and explain; they also have some protection against shrinkage by attrition. See Super, supra note 47, at 701–03. The states' proposals were not designed to cut the program: Indeed, if taken literally, they would have involved a huge commitment of new funds. But if applied within realistic budgetary constraints, they would have resulted in large increases to some households and substantial cuts to others. The inadequacy of benefits provided to the latter group would reduce the program to providing only an arbitrary amount of benefits—and arbitrary amounts are easy to cut.

Had states’ specific concerns with AFDC been addressed earlier, the liquidation of the national entitlement might have been avoided. See David A. Super, Adversarial Values and the Disentitlement Movement: The Structural Consequences of the New Welfare Agenda 47–49 (2004) (manuscript on file with New York University Law Review) (suggesting that QC-like approach to work requirements could have achieved purposes of promoting work better than actual 1996 welfare legislation) See supra Part II.A.1.a. (describing finite value of temporal targeting).

See supra Part I.A.3 (describing attacks from many different directions that beset program in wake of 1996 welfare law).

More broadly, the Food Stamp Program’s post-PRWORA history suggests that even as scholars are seeking to understand the radical changes in U.S. anti-poverty policy over the past decade, they should remain mindful of the many important continuities. Creative, flexible, pragmatic approaches to functional problems can allow programs to continue to provide needed aid even as the symbolism of public-benefits changes.
Appendix

**TABLE 1: PREFERENCES FOR MEANS-TESTED PROGRAM DESIGN**

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<td>Benefits With Work Requirements</td>
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