

2013

The U.S. Department of Agriculture as a Public Health Agency? A "Health in All Policies" Case Study

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Recommended Citation

Wiley, L. F. (2021). The U.S. Department of Agriculture as a Public Health Agency? A "Health in All Policies" Case Study. *Journal of Food Law & Policy*, 9(1). Retrieved from <https://scholarworks.uark.edu/jflp/vol9/iss1/7>

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THE U.S. DEPARTMENT OF AGRICULTURE AS A PUBLIC
HEALTH AGENCY?
A “HEALTH IN ALL POLICIES” CASE STUDY

*Lindsay F. Wiley**

I. Introduction.....	61
II. Health in All Policies and the Evolving Public Health Response to Obesity.....	64
III. USDA’s Role in Shaping the Food System.....	69
A. <i>Dietary Guidelines</i>	70
B. <i>Agricultural Subsidies and Commodity Market Deregulation</i>	75
C. <i>Nutrition Assistance Programs</i>	82
D. <i>Scholl Meal Programs</i>	91
IV. Conclusion: Toward the Further Development of the Health in All Policies Principle.....	96

I. Introduction

The “war on obesity” is now well into its second decade.¹ What began as an effort to encourage medical doctors to screen and treat patients whose weight put them at risk for health problems² has transformed into a much broader public health campaign to address the root causes of obesity. A growing number of state, territorial and local health departments are currently exploring new ways to promote healthy eating and physical activity.³ At the federal level, the U.S. Centers for Disease Control and

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1. *Former Surgeon General Wages War on Obesity*, CNN.COM *Oct. 29, 1996), http://articles.cnn.com/1996-10-29/health/9610_29_nfm_obesity_1_guidelines-bmi-obesity-new?_s=PM:HEALTH.

2. *See id.*

3. *See* Jennifer L. Pomeranz, *The Unique Authority of State and Local Health Departments to Address Obesity*, 101 AM. J. PUB. HEALTH 1192, 1192-93 (2011).

Prevention (CDC) has made “nutrition, physical activity and obesity” a top priority.⁴

Ultimately, however, a non-health agency has primary authority over what is arguably the most important modifiable determinant of obesity in the United States. The U.S. Department of Agriculture (USDA) plays an enormously important role in shaping our nation’s food system—the food that’s available in stores, restaurants, schools, workplaces, and our homes; how it is produced and sold; how it is consumed and by whom.⁵ And in turn, that food system is crucial to public health—how long people live and how healthy they are, not just as a matter of individual medical treatment but as a matter of population-level causes, patterns, and disparities among and between social and economic groups.⁶

Historically, USDA has principally served the interests of the food and agriculture industries. This is not just a matter of agency capture;⁷ as public health advocates have pointed out, the U.S. Secretary of Agriculture’s statutory mandate includes “duties to foster ‘new or expanded markets’ and move ‘larger quantities of agricultural products through the private marketing system to consumers.’”⁸ Noting that “[w]hile health officials wage a costly war on obesity and diabetes, taxpayers are subsidizing foods that make us fatter,”⁹ a growing coalition of advocates

4. *Winnable Battles: Nutrition, Physical Activity, and Obesity*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/WinnableBattles/Obesity/index.html> (last updated Aug. 7, 2012).

5. See generally BRUCE W. MARION, *THE ORGANIZATION AND PERFORMANCE OF THE U.S. FOOD SYSTEM* (1986).

6. See generally David Kindig & Greg Stoddart, *What is Population Health?*, 93 AM. J. PUB. HEALTH 380 (2003); Mary Story et al., *Creating Healthy Food and Eating Environments: Policy and Environmental Approaches*, 29 ANNUAL REV. OF PUB. HEALTH 253 (2008).

7. For allegations that the USDA has been captured by agribusiness interests, see, e.g., Philip Mattera, *USDA Inc.: How Agribusiness Has Hijacked Regulatory Policy at the U.S. Department of Agriculture*, FOOD & WATER WATCH, July 23, 2004, available at <http://documents.foodandwaterwatch.org/doc/USDAInc.pdf>.

8. Ron Zimmerman, *Lawsuit Says New Dietary Guidelines are Deceptive*, HEARTWIRE (Mar. 10, 2011), <http://www.theheart.org/article/1197321/print.do>. The quoted language is from 7 U.S.C. §1622(e)(1) (“The Secretary of Agriculture is directed and authorized . . . [t]o foster and assist in the development of new or expanded markets (domestic and foreign) and new and expanded uses and in the moving of larger quantities of agricultural products through the private marketing system to consumers in the United States and abroad.”).

9. *For a Healthier Country, Overhaul Farm Subsidies*, SCIENTIFIC AMERICAN (Apr. 19, 2012) <http://www.scientificamerican.com/article.cfm?id=fresh-fruit-hold-the-insulin>.

and commentators have pressured Congress and USDA to reform federal nutrition and agriculture programs in light of public health goals.

This Article investigates the extent to which USDA-administered programs—including dietary guidelines, agricultural subsidies, nutrition assistance, and school meal subsidies—have been (and are being) shaped by cross-sector advocacy. I situate this investigation within a broader global movement to recognize the importance of “Health in All Policies.” Health in All Policies (HiAP) is “a collaborative approach to improve health by incorporating health considerations into decision making in all sectors and policy areas.”¹⁰ It recognizes that “[e]nvironments in which people live, work, study, and play impact health by influencing available opportunities” and that “[p]olicy decisions made by ‘non-health’ agencies play a major role in shaping [those] environments.”¹¹

Increasing collaboration among governmental actors and non-governmental advocacy groups concerned with public health, food policy, poverty, environmental, and agricultural issues in the context of USDA reform provides a useful case study for examining the Health in All Policies principle in action. This Article’s discussion of public health-focused USDA reform seeks to demonstrate that the HiAP approach requires coordinated advocacy and coalition building to exert pressure on the legislative and executive branches of government. I argue that this external pressure should be aimed at producing substantive mandates from the legislature to administrative agencies in “non-health” sectors, rather than simply imposing procedural requirements that health impacts be taken into account in the work of those agencies.

Part II introduces the Health in All Policies principle as the part of the evolving public health response to obesity-related diseases and the expanding scope of public health law. It also raises the concern that the Health in All Policies approach might be in danger of conflation with a particular procedural tool known as Health Impact Assessments. Part III describes the role of USDA-administered programs in shaping the American food system through dietary guidelines, agricultural subsidies, nutrition assistance programs, and school meal subsidies with an emphasis on the role that public interest groups have played in the evolution of these programs. Part IV points to lessons from the evolution of USDA programs for the development of the Health in All Policies principle.

10. CALIFORNIA HEALTH IN ALL POLICIES FACT SHEET (2010), *available at* http://www.sgc.ca.gov/hiap/docs/about/background/HiAP_fact_sheet.pdf; *see also* Adelaide Statement on Health in All Policies, WORLD HEALTH ORGANIZATION (WHO) (2010), *available at* http://www.who.int/social_determinants/hiap_statement_who_sa_final.pdf [hereinafter Adelaide Statement].

11. *Id.*

II. Health in All Policies and the Evolving Public Health Response to Obesity

Until very recently, unhealthy eating habits were almost exclusively viewed as a matter of individual choice. The early years of the war on obesity were heavily influenced by the behavioral model of public health, which emphasized the importance of individual behavior choices (about diet, exercise, smoking, drug and alcohol use, etc.) as the root causes of so-called “lifestyle diseases.”¹² Obesity and chronic disease prevention strategies developed in the 1980s and 1990s relied almost exclusively on public education campaigns and doctor-patient counseling.¹³ USDA and the U.S. Department of Health and Human Services (DHHS) rather mildly encouraged consumers to make healthier choices by promoting dietary guidelines that “focused on individuals and tended to state the obvious.”¹⁴ Clinical practice guidelines emphasized the importance of screening and counseling patients based on their body mass index (BMI).¹⁵

Over time, public concern about the social impacts of unhealthy eating habits has led to a growing role for government regulation based on the newer ecological model of public health.¹⁶ Research establishing that the prevalence of obesity rose sharply during the late 1980s and 90s¹⁷ (a

12. See Lindsay F. Wiley, *Rethinking the New Public Health*, 67 WASH. & LEE L. REV. 207, 219-221 (2012) (describing the rise of the behavioral model of health).

13. *Id.*

14. See Marion Nestle & Michael F. Jacobson, *Halting the Obesity Epidemic: A Public Health Policy Approach*, 115 PUB. HEALTH REPORTS 12, 14 (2000).

15. See, e.g., U.S. Preventive Serv. Task Force, Dep’t of Health & Human Serv., *Guide to Clinical Preventative Services: Report of the U.S. Preventative Serv. task Force, Introduction iv: Patient Education and Counseling For Prevention* (2d ed. 1996), available at <http://www.ncbi.nlm.nih.gov/books/NBK15467/>. BMI is a measure used by doctors and researchers to estimate body fat and gauge risk of developing diseases associated with high levels of body fat. CDC, *CDC VITAL SIGNS: ADULT OBESITY 2* (2011). An individual’s BMI is derived by dividing her weight in kilograms by her height in meters squared. *Id.* For adults, a BMI between 25 and 30 is categorized as overweight, and a BMI above 30 is categorized as obese. *Id.* Obesity is defined differently for children and teens between the ages of two and twenty. Children and teens whose BMI puts them in the 95th percentile for age and sex are classified as obese. CDC, *2000 CDC Growth Charts for the United States: Methods and Developments*, 11 VITAL AND HEALTH STATISTICS 246, available at <http://www.cdc.gov/growthcharts/2000growthchart-us.pdf>. Those between the 85th and 95th percentile are classified as overweight. *Id.* The BMI cut-offs for these percentiles are derived from standardized charts developed by the CDC. *Id.*

16. See Wiley, *supra* note 12 at 221-25 (discussing the shift from the behavioral model to the ecological model).

17. See Katherine M. Flegal et al., *Prevalence and Trends in Obesity Among US Adults: 1999-2008*, 303 J. AM. MED. ASS’N 235 (2010) (finding that the prevalence of

time when “healthy lifestyle” education campaigns were fairly ubiquitous) has prompted policymakers to begin exploring new approaches to fighting the obesity epidemic by reshaping the environments in which individual choices are made.

At the individual level, the causes of obesity are seemingly straightforward: calories in and calories out. But the food a person eats and her level of physical activity are influenced in complex ways by a wide range of social, economic, and environmental determinants.¹⁸ For the most part, our current environment is stacked against healthy eating and physical activity. Researchers characterize our social, food, information, and built environments as “obesigenic,” meaning that “if you go with the flow you will end up overweight or obese.”¹⁹ Cheap, tasty, heavily marketed, high-calorie food is readily available to most Americans, most of the time—in grocery stores, restaurants, schools, workplaces, and homes—whereas fresh and appealing nutrient-rich foods are more expensive and less convenient.²⁰ The ecological model of health emphasizes the importance of these kinds of environmental determinants alongside individual-level genetic, biological, and behavioral determinants.²¹

With regard to the use of law and policy tools for promoting population health, one of the key principles to emerge from the shift to the ecological model of health is “Health in All Policies” (HiAP). “HiAP is a horizontal, complementary policy-related strategy . . . for contributing to population health. The core of HiAP is to examine determinants of health . . . which can be influenced to improve health but are mainly

adult obesity increased in the United States throughout the period from 1976 and 2000, but that between 2000 and 2008, there was no significant change among women and only a slight increase in prevalence among men); Cynthia L. Ogden, *Prevalence of Obesity and Trends in Body Mass Index Among US Children and Adolescents: 1999-2010*, 307 J. AM. MED. ASS’N 483 (2012) (finding that the prevalence of childhood obesity increased in the 1980s and 1990s but there were no significant changes in prevalence between 1999 and 2008).

18. See, e.g., Rebecca M. Puhl & Chelsea A. Heuer, *Obesity Stigma: Important Considerations for Public Health*, 100 AM. J. PUB. HEALTH 1019, 1021 (2010).

“Public health efforts must address the multiple forces contributing to the development and maintenance of obesity and recognize that individual behaviors are powerfully shaped by the obesogenic environment. . . . There is increasing consensus that environmental change is essential to the solution of obesity.” *Id.*

19. Daniel DeNoon, *How Did the Nation Get So Fat?*, WEBMD.COM (May 13, 2012), <http://blogs.webmd.com/webmd-guests/2012/05/how-did-the-nation-get-so-fat.html> (quoting CDC Director Tom Frieden).

20. See, e.g., The Obesity Prevention Source: Toxic Food Environment, HARVARD SCHOOL OF PUB. HEALTH, <http://www.hsph.harvard.edu/obesity-prevention-source/obesity-causes/food-environment-and-obesity/> (last visited Mar. 7, 2013).

21. See Wiley, *supra* note 12, at 222-23.

controlled by policies of sectors other than health.”²² The HiAP principle represents “a reconceptualization of what constitutes health policy” to include “policies in societal domains far removed from traditional health policy.”²³ As one U.S. advocacy organization puts it, “[f]rom agriculture policy that influences the food on our dinner table to national environmental decisions that put us at risk for disease, every choice we make brings us closer to, or moves us further from, our national health goals.”²⁴ By “highlight[ing] the fact that the risk factors of major diseases, or the determinants of health, are modified by measures that are often managed by other government sectors as well as by other actors in society,” the HiAP principle naturally “shift[s] the emphasis . . . from individual lifestyles and single diseases to societal factors and actions that shape our everyday living environments.”²⁵

The HiAP principle is most explicitly recognized at the international level in the World Health Organization’s 2010 Adelaide Statement on Health in All Policies, which calls on “all sectors [to] include health and well-being as a key component of policy development,” and advocates for “a new form of governance where there is joined-up leadership within governments, across all sectors and between levels of government.”²⁶ But the basic concept behind HiAP has been an important part of global health law and policy for decades. In 1986, for example, the World Health Organization’s Ottawa Charter on Health Promotion sought to “put[] health on the agenda of policymakers in all sectors and at all levels, directing them to be aware of the health consequences of their decisions and to accept their responsibilities for health.”²⁷ The HiAP principle has been particularly influential in the European Union, where it has been intimately connected with movements to study and influence the social and environmental determinants of health, on the one hand, and with advocacy

22. Marita Sihto et al., *Principles and Challenges of Health in All Policies*, HEALTH IN ALL POLICIES: PROSPECTS AND POTENTIALS, 4 (Timo Ståhl et al. eds., 2006) available at http://www.euro.who.int/__data/assets/pdf_file/0003/109146/E89260.pdf.

23. David R. Williams & Pamela Braboy Jackson, *Social Sources of Racial Disparities in Health*, 24 HEALTH AFF. 325 (2005).

24. Health in All Policies, ASPEN INSTITUTE, <http://www.aspeninstitute.org/policy-work/health-biomedical-science-society/health-stewardship-project/principles/health-all> (last visited Mar. 7, 2013).

25. HEALTH IN ALL POLICIES: PROSPECTS AND POTENTIALS, Preface, xvi (Timo Ståhl et al. eds., 2006).

26. Adelaide Statement, *supra* note 10.

27. The Ottawa Charter for Health Promotion, WHO (Nov. 21, 1986) available at <http://www.who.int/healthpromotion/conferences/previous/ottawa/en/index1.html>.

efforts surrounding reform of European food and agricultural policy, on the other.²⁸

Although the HiAP principle has gained considerable traction among policymakers and health advocates, it has not been the subject of significant legal analysis or theorization. Law and policy scholars have tended to conflate the HiAP principle with the particular procedural tool known as Health Impact Assessment.²⁹ Health Impact Assessment (HIA) is “a systematic process that uses an array of data sources and analytic methods and considers input from stakeholders to determine the potential effects of a proposed policy, plan, program, or project on the health of a population and the distribution of those effects within the population.”³⁰ In some ways, recognition of the HIA tool among advocates and policymakers seems to be surpassing recognition of the broader HiAP principle.³¹ Some commentators have even subrogated the HiAP principle to the HIA tool. For example, the National Research Council’s Committee on Health Impact Assessments argues that “[f]or more resources to become available to support the development of HIA practice, society as a whole has to recognize the importance of considering health in all policies, programs, plans, and projects to improve quality of life and to protect the health of future generations.”³² It is perhaps not surprising that the HIA tool is

28. See Sihto et al., *supra* note 22, at 6-7 (describing HiAP as “intrinsically linked to the rise of environmental and ecological analysis in the 1970s and 1980s”); *id.* at 53-55, 93-110 (assessing the European Union’s Common Agricultural Policy from a HiAP perspective).

29. See, e.g., Benjamin R. Rajotte et al., *Health in All Policies: Addressing the Legal and Policy Foundations of Health Impact Assessment*, 39 SUPPL. 1 J. L. MED. ETHICS 27 (2011), available at <http://www.aslme.org/media/downloadable/files/links/0/5/05.Rajotte.pdf>; Dylan Scott, *Health Impact Assessments: Bringing Health to All Policies*, GOVERNING.COM (Apr. 26, 2012), <http://www.governing.com/blogs/view/gov-health-impact-assessments-bringing-health-to-all-policies.html>; Janet Collins & Jeffrey P. Koplan, *Health Impact Assessment: A Step Towards Health in All Policies*, 302 J. AM. MED. ASS’N 315 (2009), available at http://www.hiacollaborative.org/downloads/JAMA_HIA_2009.pdf; *Health Impact Assessment (HIA): A Tool to Benefit Health in All Policies*, AM. PUB. HEALTH ASS’N, available at <http://www.apha.org/NR/rdonlyres/171AF5CD-070B-4F7C-A0CD-0CA3A3FB93DC/0/HIABenefitHlth.pdf> (discussing HiAP primarily in the form of the HIA).

30. NATIONAL RESEARCH COUNCIL, COMMITTEE ON HEALTH IMPACT ASSESSMENT, IMPROVING HEALTH IN THE UNITED STATES: THE ROLE OF HEALTH IMPACT ASSESSMENT 15 (2011).

31. See Scott, *supra* note 29 (noting growing interest in HIAs among advocates and policymakers, as evidenced by a major National Health Impact Assessment Meeting attended by more than 400 public health advocates and policymakers in Washington, D.C., in 2012).

32. NATIONAL RESEARCH COUNCIL, *supra* note 30, at 128.

beginning to wag the HiAP dog. Whereas HiAP is a broadly defined and perhaps somewhat amorphous goal, HIAs are a concrete tool, the usefulness of which may be more readily apparent to advocates and policymakers. Furthermore, HIA practice has already begun to generate a community of professionals trained to perform HIAs, who then have a stake in promoting their use.

HIAs are mandated or recommended through legislation in the European Commission,³³ the United Kingdom,³⁴ Thailand,³⁵ Australia,³⁶ New Zealand,³⁷ and elsewhere. Scholars and advocates have argued that HIAs should play a more significant role in policymaking at the federal, state, and local levels in the United States, but thus far they have only been

33. See, e.g., EUROPEAN POLICY HEALTH IMPACT ASSESSMENT – A GUIDE 6 (May 2004), available at http://ec.europa.eu/health/ph_projects/2001/monitoring/fp_monitoring_2001_a6_frep_11_en.pdf.

34. UNITED KINGDOM DEP'T OF HEALTH, HEALTH IMPACT ASSESSMENT OF GOVERNMENT POLICIES 3 (2010), available at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/documents/digitalasset/dh_120110.pdf.

35. See Wiput Phoolcharoen et al., *Development of Health Impact Assessment in Thailand: Recent Experiences and Challenges*, 81 BULLETIN WORLD HEALTH ORGANIZATION 465 (2003), available at <http://www.who.int/bulletin/volumes/81/6/phoolcharoen.pdf>; THAILAND'S RULES AND PROCEDURES FOR THE HEALTH IMPACT ASSESSMENT OF PUBLIC POLICIES, NATIONAL HEALTH COMMISSION OFFICE THAILAND 6-7 (Apr. 2010), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CDEQFjAA&url=http%3A%2F%2Fwww.nationalhealth.or.th%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D203&ei=MkDCUKLEKsrt0gGwo4GICA&usq=AFQjCNERJX2Jbu6OgKt3TrLao9LNlgOtMg (document will automatically download).

36. See HEALTH IMPACT ASSESSMENT GUIDELINES, NAT'L PUB. HEALTH PARTNERSHIP AUSTRALIA vii (Sept. 2001), available at [http://www.health.gov.au/internet/main/publishing.nsf/content/35F0DC2C1791C3A2CA256F1900042D1F/\\$File/env_impact.pdf](http://www.health.gov.au/internet/main/publishing.nsf/content/35F0DC2C1791C3A2CA256F1900042D1F/$File/env_impact.pdf).

37. Louise Signal & Gillian Durham, *Health Impact Assessment in the New Zealand Policy Context*, 15 SOC. POL. J. NEW ZEALAND 11, 11-12 (2000), available at http://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj15/15_pages11_26.pdf.

mandated in a handful of jurisdictions.³⁸ The methodologies on which HIAs rely have been the subject of extensive research and development.³⁹

The HiAP principle has enormous potential to translate the lessons of the ecological model of public health into evidence-based law and policy interventions. But to fulfill this potential, the HiAP principle must be understood as broader and more nuanced than the use of any particular procedure-based tool. The use of HIAs to shape internal agency decision-making has perhaps been underutilized in efforts to reform USDA programs. But cross-sector integration also requires coordinated advocacy and coalition building to exert outside pressure on the legislative and executive branches of government, through lobbying and litigation. I argue that this external pressure should be aimed at producing *substantive* mandates from the legislature to administrative agencies in “non-health” sectors, rather than simply imposing *procedural* requirements that health impacts be taken into account in the work of those agencies.

III. USDA’s Role in Shaping the Food System

USDA administers programs in four basic areas that have enormous influence on obesity-related chronic diseases: dietary guidelines, agricultural subsidies, nutrition assistance programs, and school meal programs. Historically, these programs have primarily served the interests of the American agriculture, food, and beverage industries. USDA programs to dispose of surplus agricultural goods quickly became popular with those industries.⁴⁰ But the success of these programs in alleviating nutritional distress “has consistently been disputed by nutritionists and advocates for the poor.”⁴¹ The early programs focused entirely on what goods were in surplus, with no consideration given to promoting

38. See generally NATIONAL RESEARCH COUNCIL, *supra* note 31; see also LEGAL REVIEW CONCERNING THE USE OF HEALTH IMPACT ASSESSMENTS IN NON-HEALTH SECTORS, SANDRA DAY O’CONNOR COLLEGE OF LAW, available at <http://www.healthimpactproject.org/resources/body/Legal-Review.pdf> (reviewing 36 jurisdictions and finding only four instances of HIA’s being required by law). Note that HIAs are also used to assess private initiatives, but because this Article is focused on the application of HiAP to governmental decision-making, those applications are beyond its purview.

39. See, e.g., JOHN KEMM ET AL., HEALTH IMPACT ASSESSMENT (2004) (providing “an overview of the concepts, theory, techniques, and applications of HIA to aid all those preparing projects or carrying out assessments.”).

40. See, e.g., Michael Lipsky & Marc A. Thibodeau, *Domestic Food Policy in the United States*, 15 J. Health Pol’y, Pol. & L. 319, 321 (2008).

41. *Id.*

availability of nutrient-rich foods.⁴² Efforts to reform these programs, driven by coalitions of advocates across sectors, date back to at least the late 1960s.⁴³ Evolving coalitions of scientists and advocates concerned about hunger, poverty, environmental conservation, public health, and the economic wellbeing of small-scale farming operations have played a role in exerting outside pressure to reform USDA programs.⁴⁴ Early advocacy focused primarily on reform of nutrition assistance programs.⁴⁵ In recent years, reform efforts focused on school meal programs and farm subsidies have taken center stage, with varying degrees of success.⁴⁶

A. Dietary Guidelines

USDA involvement in nutrition dates back to 1902, when the agency promulgated “Principles of Nutrition and Nutritive Value of Food” through its *Farmers’ Bulletin*.⁴⁷ The publication included information on the average protein, fat, carbohydrate, and calorie composition of a long list of foods and warned of the dangers of a diet consisting solely of foods that “furnish too much energy and too little building material.”⁴⁸ USDA first offered comprehensive and specific dietary guidelines in issues of its *Farmers’ Bulletin* published in 1916 and 1917.⁴⁹ These were periodically

42. *Id.*; see also Karen Terhune, *Reformation of the Food Stamp Act: Abating Domestic Hunger Means Resisting “Legislative Junk Food,”* 41 CATH. U.L. REV. 421, 424 (1992) (noting that early programs were nutritionally insufficient because of the scarcity of fruits, vegetables, and meat products); William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with our Nation’s Tax Dollars*, 28 STAN. ENV’T L.J. 213, 280 (2009) (farmers overproduce low nutrition crops, and thus create surpluses of those crops, because “these crops are favored by federal agricultural policy”).

43. See Lipsky & Thibodeau, *supra* note 40, at 321.

44. *Id.*

45. *Id.*

46. *Id.* at 323-24

47. W.O. Atwater, *Principles of Nutrition and Nutritive Value of Food*, UNITED STATES DEP’T OF AGRIC. FARMERS’ BULLETIN No. 142 (1902).

48. *Id.* at 45.

49. Caroline L. Hunt, *Food for Young Children*, UNITED STATES DEP’T OF AGRIC. FARMERS’ BULLETIN No. 717 (1916) (providing the advice of the “best authorities” in a format “specially adapted to the use of mothers who wish some simple and short discussion of the subject expressed in housekeepers’ terms”); Caroline L. Hunt & Helen W. Atwater, *How to Select Foods*, UNITED STATES DEP’T OF AGRIC. FARMERS’ BULLETIN No. 808 (1917) (“tell[ing] very simply what the body needs to obtain from its food for building its tissues, keeping it in good working order, and providing it with fuel or energy for its muscular work” and “suggest[ing] that, by remembering these groups and having them all suitably represented in the daily diet, the housekeeper can

revised to provide advice to “housekeepers” regarding the most economical use of their food budgets.

In 1943, USDA drew on the Recommended Daily Allowances developed by the National Academy of Sciences to create the National Wartime Nutrition Guide, introducing the “Basic Seven” food groups.⁵⁰ The influence of industry lobbying on these guidelines is perhaps most evident in the inclusion of “milk and milk products” and “butter and fortified margarines” as two of the seven food groups.⁵¹ These guidelines were promoted through posters and pamphlets and in demonstrations at local extension schools.⁵² For simplicity’s sake, the Basic Seven were retooled as the “Basic Four” food groups and serving size recommendations were added in a 1956 USDA booklet.⁵³

In 1967, a series of events—including the airing of a documentary called *Hunger in America* on broadcast television—raised awareness about problems of poverty, hunger, and malnutrition in the United States.⁵⁴ The following year, the U.S. Senate created the Select Committee on Nutrition and Human Needs to address these issues.⁵⁵ The committee’s first task was to expand food assistance programs, described below.⁵⁶ But it eventually turned its attention to nutrition guidelines.⁵⁷ In 1977, the Committee published new Dietary Goals for the United States.⁵⁸ The recommendations, which were heavily influenced by the testimony of medical researchers and nutritionists, recommended that Americans reduce their fat, saturated fat, and cholesterol intake.⁵⁹ The guidelines provoked an immediate backlash by the dairy, egg, and cattle industries.⁶⁰ Under

easily plan attractive meals which meet the needs of her family without waste of money or material”).

50. Susan Welsh et al., *A Brief History of Food Guides in the United States*, 27 NUTRITION TODAY 6, 8-9 (1992); see also *The Basic Seven*, NORTH CAROLINA STATE UNIVERSITY HISTORY DEPARTMENT, available at <http://history.ncsu.edu/projects/ncsuhistory/nceats/exhibits/show/nutrition/scarcity/basic-seven>.

51. Welsh et al., *supra* note 50, at 9.

52. *Id.*

53. *Id.*

54. See Terhune, *supra* note 42, at 425 (citing NICK KOTZ, LET THEM EAT PROMISES: THE POLITICS OF HUNGER IN AMERICA (1969)).

55. See S. SELECT COMM. ON NUTRITION AND HUMAN NEEDS, THE FOOD GAP, 91st Cong., 1st Sess., (1969).

56. *Id.* at 21.

57. *Id.* at 36-37.

58. S. SELECT COMM. ON NUTRITION AND HUMAN NEEDS, DIETARY GOALS FOR THE UNITED STATES, 95th Cong., 1st Sess. (1977).

59. *Id.* at 1-2.

60. See Emily J. Schaeffer, *Is the Fox Guarding the Henhouse? Who Makes the Rules in American Nutrition Policy?* 57 FOOD & DRUG L.J. 371, 397-98 (2002).

intense lobbying pressure, the Committee issued a revised version later that year, which significantly softened recommendations regarding fat and cholesterol.⁶¹

Pursuant to a legislative mandate,⁶² the “Dietary Guidelines for Americans” (DGAs) have been jointly published by DHHS and USDA every five years since 1980,⁶³ and are the current basis of much of USDA’s work on nutrition.⁶⁴ Coordination between the agencies is handled by the Office of Disease Prevention and Health Promotion on the DHHS side, and by the Center for Nutrition Policy and Promotion and the Agricultural Research Service on the USDA side.⁶⁵ USDA, DHHS, and other agencies promote the guidelines using the “food pyramid” and more recently “My Plate”—both of which simplify the guidelines and put them in a graphic form that can be reproduced on posters, in school textbooks, on cereal boxes, and more.⁶⁶ These graphic representations have not emphasized the DGAs guidance regarding limiting fat and cholesterol intake, however.

USDA and DHHS have been pressured through litigation to make the methodology they use to revise the DGAs more transparent. In 1999, the Physicians Committee for Responsible Medicine (PCRM), a non-profit organization that promotes preventive medicine, filed suit against USDA and DHHS⁶⁷ alleging that the DGA revision process was conducted “largely in secret, by a committee that included individuals with links to the meat, dairy, and egg industries.”⁶⁸ The court ruled in PCRM’s favor,⁶⁹ and

61. See U.S. SENATE SELECT COMM. ON NUTRITION AND HUMAN NEEDS, *DIETARY GOALS FOR THE UNITED STATES* (2d ed., 1977).

62. 7 U.S.C. § 5341 (West 2012).

63. Previous Guidelines & Reports, HHS, <http://health.gov/dietaryguidelines/pubs.asp#eighties> (last visited Mar. 7, 2013). See also National Nutrition Monitoring and Related Research Act of 1990, Pub. L. No. 101-445, 104 Stat 1034 (1990) (requiring the “secretaries” to issue nutritional guidelines at least every five years).

64. DHHS, *Dietary Guidelines for Americans*, HEALTH.GOV, <http://health.gov/dietaryguidelines/> (last visited Mar. 2, 2013).

65. See DHHS, *History of Dietary Guidelines for Americans*, HEALTH.GOV, <http://www.health.gov/dietaryguidelines/history.htm#6> (last visited Mar. 2, 2013).

66. *USDA Replaces Food Pyramid with ‘MyPlate’ in Hopes to Promote Healthier Eating*, WASHINGTON POST (June 3, 2011), available at http://articles.washingtonpost.com/2011-06-03/national/35236118_1_myplate-food-pyramid-usda-headquarters.

67. See *Physicians Committee for Responsible Medicine v. Glickman*, 117 F. Supp.2d 1 (D.D.C. 2000).

68. See *PCRM Sues USDA Over Deceptive Dietary Guidelines*, PRCM, <http://pcrm.org/good-medicine/2011/springsummer/pcrm-sues-usda-over-deceptive-dietary-guidelines> (last visited Mar. 2, 2013) [hereinafter PCRM Sues].

the 2005 DGA revision process was more transparent as a result. In 2010, the Dietary Guidelines Advisory Council adopted a new method that drew on USDA's Nutrition Evidence Library "to conduct evidence-based, systematic reviews of the research related to the major questions addressed by the DGA."⁷⁰ Evidence profiles for each review were made available to the public online.⁷¹

DHHS and USDA have made progress toward incorporating public health and nutrition goals into the DGAs, but controversy over industry influence continues.⁷² In addition to the scientific reviews described above, the 2010 guidelines were based on public hearings, which "drew thousands of comments from individuals and public health experts, as well as from powerful food industry groups—the Grocery Manufacturers Association, the Sugar Association, the National Milk Producers Federation, and the National Cattleman's Beef Association, among them."⁷³ Critics have argued that the DGAs should be more clear in their advice to consumers. The "key recommendations" of the 2010 DGAs

spell out specific *food components* that Americans need to cut back on—among them, sodium, saturated and trans fat, added sugars, and refined grains. But the document could have been much more direct, telling people which *foods* to avoid—for example, to cut sugary soft drinks, red meat, white bread, French fries, and other American staples.⁷⁴

Notably, the Advisory Committee's experts offer recommendations that guide the DGA development process, but there is not a mechanism for them to provide input regarding the wording of the final document.⁷⁵ These concerns led PCRM once more to file suit against USDA and DHHS

69. *Glickman*, 117 F. Supp.2d at 3 (holding that plaintiffs were entitled to summary judgment on their Federal Advisory Committee Act claim and to the release of some—but not all—sought after documents on their Freedom of Information Act claim).

70. DHHS, Dietary Guidelines, Frequently Asked Questions, HEALTH.GOV, <http://health.gov/dietaryguidelines/faq.asp#faq8> (last visited Mar. 2, 2013).

71. See USDA Nutrition Evidence Library, 2010 Dietary Guidelines Advisory Council NEL Evidence-Based Systematic Reviews, <http://www.nutritionevidencelibrary.com/category.cfm?cid=21> (last updated July 14, 2010).

72. Harvard School of Public Health, The Nutrition Source, New U.S. Dietary Guidelines: Progress, Not Perfection, <http://www.hsph.harvard.edu/nutritionsource/dietary-guidelines-2010/> (last visited Mar. 2, 2013).

73. *Id.*

74. *Id.*

75. *Id.*

over the 2010 DGAs.⁷⁶ PCRM accused the agencies “of using deliberately obscure language regarding foods Americans should avoid” and cited conflicts of interest as the cause.⁷⁷ But this time around the suit was dismissed for lack of standing.⁷⁸

Although the DGAs have moved toward a more evidence-based approach aimed at promoting healthy eating, rather than industry interests, their impact on population health is unclear. Neither USDA nor DHHS is mandated to evaluate the impact of the DGAs on population health. Indeed, comprehensive evaluation would involve considerable methodological challenges, and therefore considerable resources.⁷⁹

Very few Americans actually comply with the DGAs,⁸⁰ but the lack of stringent compliance does not necessarily mean that the DGAs are not influencing consumer choices. Research suggests that healthy eating education campaigns (many of which are based on the DGAs)⁸¹ may have an impact on purchasing decisions about some kinds of foods, but not others.⁸² The DGAs are also incorporated into “Nutrition Facts” labeling of packaged foods,⁸³ which research suggests leads to increased sales of some (but not all) products deemed by researchers to be “more healthful” compared to “standard” counterpart products.⁸⁴ For example, studies of the U.S. food supply over time indicate that consumers have shifted to lower-fat milks, as recommended by the DGAs.⁸⁵ Data regarding the food supply also indicates, however, that per-capita consumption of cheese, a high-fat

76. See PCRM Sues, *supra* note 68.

77. *Id.*

78. Physicians Committee for Responsible Medicine v. Vilsack, 867 S.Supp.2d 24, 26-27 (D.D.C. 2011).

79. See Joanne F. Guthrie & David M. Smallwood, *Evaluating the Effects of the Dietary Guidelines for Americans on Consumer Behavior and Health: Methodological Challenges*, 103 J. AM. DIETETIC ASS'N S42, S48 (2003).

80. Dennis M. Bier et al., *Improving Compliance With Dietary Recommendations: Time for New, Inventive Approaches?*, 43 NUTRITION TODAY 180, available at <http://www.nursingcenter.com/upload/static/403753/nt080015.pdf> (finding that three in one hundred US adults follow all recommendations to consume five servings of fruits and vegetables, to exercise regularly and maintain proper weight, and to abstain from tobacco).

81. See Questions and Answers on the 2010 Dietary Guidelines for Americans, USDA at 8, available at <http://www.cnpp.usda.gov/Publications/DietaryGuidelines/2010/PolicyDoc/QandA.pdf>.

82. Guthrie & Smallwood, *supra* note 79, at S47.

83. See Questions and Answers, *supra* note 81, at 8.

84. See Mario F. Teisl et al., *Measuring the Welfare Effects of Nutrition Information*, 83 AM. J. AGRIC. ECON. 133, 148 (2001).

85. See Guthrie & Smallwood, *supra* note 79, at S47.

dairy product, has increased.⁸⁶ And in spite of decades of promotion of the “Five-A-Day” initiative (recently rebranded as “More Matters”), Americans have not significantly increased their consumption of fruits and vegetables.⁸⁷

B. Agricultural Subsidies and Commodity Market Deregulation

While the Dietary Guidelines are explicitly focused on encouraging healthy eating, other USDA programs arguably have a much greater influence on people’s choices about food.⁸⁸ Agricultural subsidies—adopted and periodically revised through the Farm Bill roughly every four years—and deregulation of the agricultural commodity market have been targeted by commentators for promoting unhealthy eating by subsidizing the low prices of many unhealthy foods.⁸⁹ The result is a one foot on the

86. *Id.*

87. See, e.g., Sarah Stark Casagrande et al., *Have Americans Increased their Fruit and Vegetable Intake? The Trends between 1988 and 2002*, 32 AM. J. PREVENTIVE MED. 257 (2007).

88. The impact of agriculture subsidies on population health has been a matter of dispute. Compare Mike Russo, *Apples to Twinkies: Comparing Federal Subsidies of Fresh Produce and Junk Food*, U.S. PIRG EDUCATION FUND (Sept. 2011), available at <http://www.uspirgedfund.org/sites/pirg/files/reports/Apples-to-Twinkies-web-vUS.pdf> (equating grain, oilseed, and especially corn subsidies with junk food subsidies), with Bradley J. Rickard et al., *Have Agricultural Policies Influenced Caloric Consumption in the United States?*, Working Paper, Charles H. Dyson School of Applied Economics and Management, (Apr. 2012), available at <http://dyson.cornell.edu/research/researchpdf/wp/2011/Cornell-Dyson-wp1112.pdf> (arguing that the elimination of grain and oilseed subsidies has minimal impact on caloric consumption), and Food and Water Watch & The Public Health Institute, *Do Farm Subsidies Cause Obesity? Dispelling Common Myths About the Farm Bill and Public Health* (finding that “the deregulation of commodity markets—not subsidies—has had a significant impact on the price of commodities . . . [while also providing] benefits and incentives to the food industry, including processors, marketers and retailers, and is one of a number of contributing factors impacting the availability of high-calorie processed foods in the marketplace,” and concluding that public health and family farm groups “can find common ground . . . by moving beyond the focus on subsidies and instead advocating for comprehensive commodity policy reform that reduces overproduction and stabilizes price and supply, as well as policies and programs that expand access to healthy food in rural and urban communities”).

89. Tom Karst, *USDA Subsidies Favor Junk Food, Report Says*, THE PACKER (Sept. 28, 2011, 9:24 AM), <http://www.thepacker.com/fruit-vegetable-news/USDA-subsidies-favor-junk-food-report-says-130702458.html>; Mike Russo, *supra* note 88 (noting that since 1995, \$16.9 billion in taxpayer subsidies went to junk food ingredients, whereas only \$262 million has gone to apples); see also Arthur Allen, *U.S. Touts Fruit and Vegetables While Subsidizing Animals that Become Meat*, WASHINGTON POST (Oct. 3, 2011), <http://www.washingtonpost.com/national/health-science/us-touts-fruit-and->

gas, one foot on the break approach whereby some government programs are aimed at encouraging healthier eating, while others subsidize unhealthy options.

Agricultural subsidies have a long history at USDA. During the 1920s, over-planting, increases in mechanization, and more advanced fertilization techniques created a boom in production that led to a tremendous surplus and corresponding price drop.⁹⁰ The election of Franklin D. Roosevelt at the peak of the Great Depression led to the first farm subsidies in 1933 as part of the New Deal.⁹¹

Congress's initial plan was to purchase certain surplus crops in good years and sell them in bad.⁹² In response to previous overplanting problems, the government would also pay farmers to conserve farm land by not growing any crops at all.⁹³ The first comprehensive farm bill, the Agricultural Adjustment Act of 1933, was struck down by the Supreme Court in the final years of the *Lochner* era for exceeding Congress's constitutionally enumerated powers.⁹⁴ In the meantime, more limited (and constitutionally permissible) soil conservation programs were initiated under the Soil Conservation Act of 1935⁹⁵ and the Soil Conservation and Domestic Allotment Act of 1936.⁹⁶ Soil conservation programs provided economic support to farmers and protected land resources from soil erosion by paying farmers to refrain from planting commodity crops viewed as being in oversupply.⁹⁷

vegetables-while-subsidizing-animals-that-become-meat/2011/08/22/glQATFG5IL_story.html.

90. Eubanks II, *supra* note 42, at 218-19.

91. See DANIEL IMHOFF, *FOOD FIGHT: THE CITIZEN'S GUIDE TO THE NEXT FOOD AND FARM BILL 50* (2012).

92. *Id.*

93. *Id.*

94. The law could not be justified as a valid exercise of the Commerce Clause because the Court found that the commerce in question was intrastate and the Court held that it could not be justified as an exercise of the taxing power because its stated purpose was to regulate agricultural production, rather than raise revenue for the United States. See *United States v. Butler*, 297 U.S. 1 (1936); see also Nathan R.R. Watson, *Federal Farm Subsidies: A History of Governmental Control, Recent Attempts at a Free Market Approach, the Current Backlash, and Suggestions for Future Action*, 8 *DRAKE J. AGRIC. L.* 279, 285 (2004).

95. Soil Conservation act of 1935, Pub. L. No. 74-46, 49 Stat. 163 (1935).

96. Soil Conservation and Domestic Allotment Act of 1936, Pub. L. No. 74-461, 49 Stat. 1148 (1936).

97. Robert W. Adler, *Balancing Compassion and Risk in Climate Adaptation: U.S. Water, Drought, and Agricultural Law*, 64 *FLA. L. REV.* 201, 248 (2012).

Congress's second attempt at a comprehensive farm bill, following the "switch in time that saved nine," was more successful.⁹⁸ The Agricultural Adjustment Act of 1938 implemented mandatory price supports and quotas for corn, cotton, and wheat in addition to expanding soil conservation programs.⁹⁹ The 1938 Act also established the Federal Crop Insurance Corporation to subsidize crop insurance premiums.¹⁰⁰ Over the next several decades, Congress adopted a series of agricultural subsidy bills that made minor changes but retained the same basic approach. Over time, these "emergency measures . . . gradually became institutionalized" as the average farm became a mega corporation, and the farm lobby grew in power and influence.¹⁰¹

Modern farm bills have each been authorized for a specified number of years, meaning that if Congress fails to pass a new farm bill to go into effect when the previous one expires, commodity programs and price supports revert to the permanent provisions of New Deal era laws. Although there has been significant stability in agriculture subsidy programs over the years, the process of periodic reauthorization has created space for significant reform when the political conditions for it have been right.

Following mid-term elections in 1994 in which Republicans gained control of both houses of Congress for the first time in four decades, the Federal Agriculture Improvement and Reform Act of 1996¹⁰² (more commonly known as the "Freedom to Farm Act") brought about a major shift toward a free market approach. The 1996 Act

prohibited the federal government from making any further 'deficiency payments' (i.e. commodity price support payments) to farmers, which the government had previously made whenever the price for a given commodity fell below a federally-set floor. In place of deficiency payments, 'production flexibility contracts'

98. *Wickard v. Filburn*, 317 U.S. 111, 124-25 (1942).

99. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31 (1938).

100. Pub. L. No. 75-430, 52 Stat. at 72.

101. IMHOFF, *supra* note 91, at 43-44; *see also* Eubanks II, *supra* note 42, at 221 ("Although well-intentioned at the outset, the Farm Bill's subsidy program has gradually snowballed into a legislative package of subsidized commodities that increasingly benefits the largest of agricultural producers."); *id.* at 224 (recalling Agriculture Secretary Butz telling American farmers to "Get Big or Get Out"); *id.* at 229, fig. 1 (comparing the decline in the number of farms and the rise in the average acreage of a farm between 1900 and 1997).

102. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 896 (1996).

were available to farmers of select commodities [and] gave seven years of fixed payments, [set] to decline each year, until, in theory, farmers were completely weaned off of government price supports by 2002.¹⁰³

In the late 1990s, a downturn in the agricultural commodities market led to a series of ad hoc emergency appropriations for direct payments to bail out the agricultural industry, undermining the plan to wind down subsidies.¹⁰⁴ And in 2002, after Democrats had regained control of the Senate, a new farm bill¹⁰⁵ was passed, retreating from the free market experiment and instituting routine direct payment subsidies. Direct payment subsidies provide payments to grain and oilseed farmers based on their historical acreage and yields, regardless of market conditions.¹⁰⁶ This approach avoided running afoul of international trade laws that prohibit domestic subsidies that create an unfair advantage on the global market. It also created new flexibility for recipients of subsidies to plant a wider range of commodity crops, rather than being compensated based on the specific crop grown. But direct payments essentially amounted to corporate welfare, primarily benefitting large, corporate agribusinesses without any regard to need.¹⁰⁷

Although the 2002 Farm Bill enhanced subsidies for crops that advocates point to as contributing to unhealthy eating, it also instituted new subsidies for “specialty crops,” including fruits and vegetables.¹⁰⁸ The 2002 negotiations saw the emergence of the “Eggplant Caucus,” made up of senators from states with significant, but less powerful agricultural interests (with a focus on specialty crops like eggplants) as well as those from states where voters were particularly interested in environmental conservation.¹⁰⁹ Nonperishable grain and oilseed commodity crops (like wheat, corn, sorghum, barley, oats, cotton, rice, and soybeans) enjoy the most lucrative subsidies under the Farm Bill.¹¹⁰ Fruits and vegetables are

103. Watson, *supra* note 94, at 290.

104. *Id.* at 293.

105. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002).

106. *See* § 103, 116 Stat at 149.

107. *See* EWG Farm Subsidy Database, <http://farm.ewg.org/progdetail.php?fips=00000&progcode=totalfarm&page=conc®ionname=theUnitedStates> (last visited Feb. 28, 2013) (noting that from 1995 to 2011, the top 10 percent of commodity payment recipients were paid 77 percent of commodity payments).

108. Pub. L. No. 107-171, §§ 10601-08, 116 Stat. at 511-13.

109. *The Eggplant Rebellion*, N.Y. TIMES (opinion), Nov. 12, 2001, <http://www.nytimes.com/2001/11/12/opinion/the-eggplant-rebellion.html>.

110. 7 U.S.C. § 8713(b) (2010).

considered “specialty crops” under existing law and do not receive the same benefits as commodity crops.¹¹¹ The eggplant caucus pushed for subsidies for specialty crops and conservation programs as part of a more equitable and balanced farm bill and ultimately played an important role in the bill’s passage.¹¹² Additional programs, including those developed under the Specialty Crops Competitiveness Act of 2004,¹¹³ enhanced subsidies for fruit and vegetable production, primarily through state-administered programs funded through USDA block grants.¹¹⁴

Public health groups also began to play a more prominent role around this time. “The ink was barely dry on the [2002 Farm Bill] when diverse interest groups began to form and ready themselves for serious lobbying” in anticipation of negotiations surrounding the 2008 Farm Bill.¹¹⁵ These efforts coincided with growing awareness of obesity-related health problems and experts across sectors began to link the Farm Bill to the War on Obesity.¹¹⁶ In 2004, The Prevention Institute published “Cultivating Common Ground: Linking Health and Sustainable Agriculture,” which identified opportunities and strategies for cross-sector advocacy with an emphasis on healthy eating alongside more traditional environmental health concerns like antibiotic resistance and occupational hazards for farm workers.¹¹⁷ In 2007, the Institute for Agriculture and Trade Policy released reports linking food and agricultural policy to the obesity epidemic¹¹⁸ and arguing for a “Fair Farm Bill for Public Health.”¹¹⁹ Publication of popular

111. *For a Healthier Country, Overhaul Farm Subsidies*, SCIENTIFIC AMERICAN (Apr. 19, 2012) <http://www.scientificamerican.com/article.cfm?id=fresh-fruit-hold-the-insulin>.

112. *The Eggplant Rebellion*, *supra* note 109..

113. Specialty Crops Competitiveness Act of 2004, Pub. L. No. 108-465, 118 Stat. 3882 (2004).

114. *Id.*

115. Public Health Law Center, *The United States Farm Bill: An Introduction for Fruit and Vegetable Advocates 2* (Jan. 2009), *available at* <http://publichealthlawcenter.org/sites/default/files/resources/phlc-policy-farm-bill.pdf>.

116. *See, e.g.*, Michael Pollan, *The Way We Live Now: The (Agri)Cultural Contradictions of Obesity*, N.Y. TIMES, Oct. 12, 2003 (linking the obesity epidemic to agricultural subsidies).

117. Larry Cohen et al., *Cultivating Common Ground: Linking Health and Sustainable Agriculture*, PREVENTION INSTITUTE, Sept. 2004, at 2, *available at* http://www.preventioninstitute.org/index.php?option=com_jlibrary&view=article&id=67&Itemid=127.

118. Mark Muller et al., *Considering the Contribution of U.S. Food and Agricultural Policy to the Obesity Epidemic: Overview and Opportunities*, INST. FOR AGRIC. & TRADE POL’Y (2007).

119. Heather Schoonover, *A Fair Farm Bill for Public Health*, INST. FOR AGRIC. & TRADE POL’Y (2007), *available at* http://www.iatp.org/files/258_2_98598.pdf.

books like Michael Pollan's *Omnivore's Dilemma* in 2006 and Daniel Imhoff's *Food Fight: A Citizen's Guide to the Next Food and Farm Bill* in 2007 raised public awareness of health and environmental concerns implicated by the negotiation of the 2008 Farm Bill. Food & Water Watch, a nonprofit organization that promotes safe, accessible and sustainable food and water security began to advocate for sweeping farm bill reforms.¹²⁰ The Healthy Farms, Healthy People Coalition was formed to "extend[] issues of healthy nutrition into a broader perspective of agriculture and food systems."¹²¹

The growing coalition among specialty crop and organic farmers, environmental conservationists, and groups concerned with public health has not been without tensions. For example, in addition to fighting for subsidies, specialty crop growers have also exerted their influence to keep the prices of fruits and vegetables high by keeping production low.¹²² Dating back to the negotiation of the 1996 Farm Bill, specialty crop growers pushed for provisions that excluded fruit and vegetable production from the increased flexibility in crop choice offered to large farms receiving commodity crop subsidies.¹²³ Similarly, the emphasis among organic growers and environmental groups on the importance of organic farming methods has not been uniformly supported by public health advocates, many of whom are concerned about the cost, and therefore accessibility, of organic produce, as well as the growing number of calorie dense organic foods with low nutritional value.¹²⁴ As the *Cultivating Common Ground* report noted, "even the organic food industry creates an ever-greater number of chips, high-calorie beverages, instant meals, and other processed foods."¹²⁵

In spite of these tensions, a coalition of organic producers, fruit and vegetable growers, anti-hunger advocates, and environmental and public health groups successfully developed proposals for a dramatically different farm bill in 2008.¹²⁶ But the public interest coalition faced an uphill battle. Special interest groups, overwhelmingly dominated by agriculture, food

120. Food & Water Watch, *Farm Bill 101*, 1 (2012), available at <http://www.foodandwaterwatch.org/tools-and-resources/farm-bill-101/>.

121. Healthy Farms, Healthy People Coalition, <http://hfhpcalition.org/member-updates/> (last visited Mar. 4, 2013).

122. See, e.g., RENEE JOHNSON & JIM MONKE, CONGRESSIONAL RESEARCH SERVICE, ELIMINATING THE PLANTING RESTRICTIONS ON FRUITS AND VEGETABLES IN THE FARM COMMODITY PROGRAMS (2007), available at <http://www.nationalaglawcenter.org/assets/crs/RL34019.pdf>.

123. See generally *id.*

124. See Cohen et al., *supra* note 117, at 6.

125. *Id.* at 13.

126. See, e.g., Schoonover, *supra* note 119, at 7.

and beverage, chemical, and other industries, spent \$173.5 million on 2008 Farm Bill lobbying.¹²⁷

Ultimately, the Food, Conservation, and Energy Act of 2008 (FCEA)¹²⁸ became law after congressional override of President Bush's veto. Reforms in the 2008 Farm Bill were perhaps not as sweeping as the advocacy coalition had hoped, but they were significant nonetheless. A new title was added, focused specifically on fruits and vegetables, horticulture, and organic agriculture.¹²⁹ The Act provided increased funding for specialty crop block grants, as well as a Farmers' Market Promotion Program.¹³⁰ But direct payments and other commodity crop subsidy programs were retained, and although the 2008 Act included a pilot program to add fruit and vegetable production to planting flexibility provisions for farms that receive commodity crop subsidies, the program was limited to production of fruits and vegetables to be sold to canning or processing companies.¹³¹

The 2008 Farm Bill expired in September 2012 without a new farm bill in place. In early 2013, Congress passed a nine-month extension of some provisions of the 2008 Act, but not those providing assistance to fruit and vegetable growers and organic farms.¹³² Direct payment subsidies were left in place, in spite of an earlier agreement between the full Senate and the House Agriculture Committee to eliminate direct payments in favor of expanded crop insurance subsidies.¹³³

Public health advocates remain very much involved in cross-sector advocacy efforts surrounding 2013 Farm Bill negotiations.¹³⁴ Advocates in

127. Food & Water Watch, *Cultivating Influence: The 2008 Farm Bill Lobbying Frenzy*, 1 (2012), available at <http://documents.foodandwaterwatch.org/doc/FarmBillLobby.pdf>

128. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008).

129. Pub. L. No. 110-234, Title X, 122 Stat. at 1335.

130. *Id.*

131. Planting Flexibility for Fruits & Vegetables, NAT'L SUSTAINABLE AGRIC. COALITION, <http://sustainableagriculture.net/publications/grassrootsguide/competitive-markets-commodity-program-reform/planting-flexibility-for-fruits-vegetables/> (last visited Mar. 6, 2013).

132. American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

133. See S. 3240, 112th Cong. (2012); H.R. 6083, 112th Cong. (2012).

134. See, e.g., Patricia Elliot & Amanda Raziano, *The Farm Bill and Public Health: A Primer for Public Health Professionals*, AM. PUB. HEALTH ASS'N 1, 6, available at <http://www.apha.org/NR/rdonlyres/71D6995A-C346-4227-BDE0-DAB37EF5F16E/0/FarmBillandPublicHealth.pdf>; Food & Water Watch, *supra* note 120; Network for Public Health Law, *Public Health Professionals and the Farm Bill*:

favor of subsidy reform have taken renewed hope from widespread, bipartisan interest in deficit reduction. Additionally, commentators have taken the failure of the 2012 Farm Bill effort as a sign of the agricultural industry's waning political influence.¹³⁵ For now, agricultural subsidies remain very much in flux.

C. Nutrition Assistance Programs

Historically, USDA nutrition assistance programs have been intimately intertwined with subsidies for agricultural production. With the passage of the 1933 Act came the Federal Surplus Relief Corporation (FSRC), which purchased surplus commodities and “distribute[d] them to the needy unemployed.”¹³⁶ The Agriculture and Food Act of 1935 empowered USDA to distribute surplus food to charitable organizations, including schools and churches, as well as to households.¹³⁷ Shortly thereafter in 1939, USDA implemented the Food Stamp Plan (FSP).¹³⁸ Under the FSP, low-income individuals could purchase orange stamps that were redeemable for any food item.¹³⁹ For every dollar of orange stamps purchased, program participants would also receive 50 cents worth of blue stamps, which could be redeemed for specified surplus foods.¹⁴⁰ The program, though seen as a success, was discontinued in 1943.¹⁴¹

For years after the end of the first FSP, various legislators attempted to enact another stamp program.¹⁴² When a law authorizing, but not

How to Get Involved (2012), available at http://www.networkforphl.org/_asset/2hj8f8/Farm-Bill-Get-InvolvedFINAL.pdf

135. See, e.g., Caroline Henshaw, *U.S. Farm Lobby Clout Waning: Abares*, DISPATCH, WALL STREET JOURNAL BLOGS, (Oct. 23, 2012, 2:21 AM), <http://blogs.wsj.com/dispatch/2012/10/23/u-s-farm-lobby-clout-waning-abares/?KEYWORDS=agriculture>.

136. H.R. REP. NO. 73d-520, at 4. See also Federal Emergency Relief and Civil Works Program: Hearing on H.R. 7527 Before the H. Subcomm. on Appropriations, 73rd Cong. 53-54 (1934) (statement of Harry L. Hopkins, Administrator, Federal Emergency Relief Administration, and Civil Works Administration) (describing the structure and activity of the FSRC).

137. Lipsky & Thibodeau, *supra* note 40, at 321.

138. A Short History of SNAP, USDA FOOD AND NUTRITION SERVICE, <http://www.fns.usda.gov/snap/rules/Legislation/about.htm>. This plan was initiated in large part due to America's entry into World War II. Agricultural surpluses were decimated by the war effort and as many as 40% of draftees were rejected for being malnourished. IMHOFF, *supra* note 94, at 50.

139. A Short History of SNAP, *supra* note 138.

140. *Id.*

141. *Id.*

142. *Id.*; see also IMHOFF, *supra* note 94, at 50 (noting that resistance to food assistance programs stemmed in part from fear of socialism).

requiring the Secretary of Agriculture to do just that finally passed in 1959, the Eisenhower administration declined to exercise the authority it was granted.¹⁴³ It was not until a 1961 executive order by President Kennedy that the program was reborn on an experimental basis.¹⁴⁴ Like its predecessors, the pilot program subsidized the purchase of surplus foods by low-income households.¹⁴⁵ The success of the pilot program, and the emergence of powerful anti-poverty organizing efforts¹⁴⁶ eventually led to the passage of the Food Stamp Act in 1964 as part of President Lyndon Johnson's War on Poverty.¹⁴⁷

Though the 1964 Food Stamp Act aimed to "promote the general welfare, . . . safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households,"¹⁴⁸ its first stated goal was "[t]o strengthen the agricultural economy."¹⁴⁹ Like all food assistance programs before it, it was not tied to nutritional guidelines in any way.¹⁵⁰ Since the 1964 law, the FSP has been a staple of the Farm Bill and has been periodically revised and reauthorized alongside agriculture subsidies.¹⁵¹

Shortly after the revival of the FSP, anti-hunger groups like the National Council on Hunger and Malnutrition, founded by Dr. Jean Mayer, played an important role in reforming the program.¹⁵² Mayer brought health experts, nutritionists, agricultural representatives, and the government to the table to discuss improvements to the program.¹⁵³ But these advocates faced a number of obstacles, including budget constraints

143. A Short History of SNAP, *supra* note 138.

144. *Id.*

145. IMHOFF, *supra* note 94, at 51.

146. See generally BARBARA CRUIKSHANK, THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS (1999) (describing the emergence of "the poor" as a diverse, but coherent interest group around the time of Lyndon Johnson's War on Poverty).

147. *Id.*

148. The Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703 (1964).

149. § 1, 78 Stat. 703.

150. IMHOFF, *supra* note 94, at 51 (2012).

151. For a detailed list of legislative and administrative modifications, see Short History of SNAP, *supra* note 138.

152. *Nutrition Professor to be Head of National Hunger Research Council*, THE HARVARD CRIMSON, Jan. 8, 1969, available at <http://www.thecrimson.com/article/1969/1/8/nutrition-professor-to-be-head-of/>.

153. Robert McFadden, *Jean Mayer, 72, Nutritionist Who Led Tufts, Dies*, N.Y. TIMES (Jan. 2, 1993), <http://www.nytimes.com/1993/01/02/us/jean-mayer-72-nutritionist-who-led-tufts-dies.html>.

and poor working relationships with midlevel USDA bureaucrats.¹⁵⁴ Eventually, advocates shifted focus to apply pressure on Congress directly.¹⁵⁵ The Senate Select Committee on Nutrition and Human Needs, relying on data provided by public interest advocates, held hearings chronicling the failings of the existing food stamp program.¹⁵⁶ The resulting pressure on the Nixon administration led to the implementation of significant reforms, with an emphasis on reducing the price of coupons and more generous entitlements.¹⁵⁷

As hunger issues became the focus of increased mainstream media coverage, public interest continued to grow. The Community Nutrition Institute began publishing a weekly report of changes in law and regulation that affected the food stamp program.¹⁵⁸ The Food Research and Action Center (FRAC) was established as a public interest law firm and lent significant litigation prowess to the cause.¹⁵⁹ The two groups successfully lobbied USDA, and when that failed, often filed suit against the Food and Nutrition Service (FNS), earning several key victories.¹⁶⁰

In addition to reforming the FSP, Congress established a new nutrition assistance program focused on meeting the needs of low-income pregnant and nursing women, infants, and young children (WIC). When WIC was first established by Congress as a pilot program in 1972,¹⁶¹ USDA initially declined to implement it, leading FRAC to sue USDA for release of appropriated funds.¹⁶² USDA argued that WIC would duplicate its existing efforts under the Commodity Supplemental Food Program, a direct distribution program that provided surplus commodities to pregnant

154. Some of the difficulty in dealing with USDA agents was caused by the advocacy groups' unrelenting criticism of existing programs and characterization of the USDA as uncaring. Jeffrey M. Berry, *Consumers and the Hunger Lobby*, 34:3 FOOD POL'Y & FARM PROGRAMS 68, 72 (1982).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 72-73.

160. *Id.* at 73; *see also* FRAC History, FRAC, <http://frac.org/about/frac-programs-and-initiatives/> (last visited Mar. 10, 2013).

161. National School Lunch Act Amendments of 1972, Pub. L. No. 92-433, 86 Stat 726 (1972).

162. FRAC History, *supra* note 160; VICTOR OLIVEIRA ET AL., USDA ECONOMIC RESEARCH SERVICE, FOOD ASSISTANCE AND NUTRITION RESEARCH REPORT NO. 27, THE WIC PROGRAM: BACKGROUND TRENDS, AND ISSUES 7 (2002), *available at* http://www.ers.usda.gov/media/327914/fanrr27c_1_.pdf

women, infants, and children.¹⁶³ In 1973, a federal judge ordered USDA to implement the program.¹⁶⁴

Unlike other USDA programs, which have historically had the dual purpose of improving nutrition and supporting agriculture, from the start WIC was solely focused on health. When Congress made the program permanent in 1975,¹⁶⁵ its stated purpose was “to provide supplemental nutritious food as an adjunct to good health during . . . critical times of growth and development in order to prevent the occurrence of health problems.”¹⁶⁶

In most states, WIC recipients receive vouchers that can be exchanged for specifically approved food items at authorized retailers. From the start, WIC was restricted to “supplemental foods,” initially defined as those containing “nutrients known to be lacking in the diets of populations at nutrition risk, in particular foods containing high quality protein, iron, calcium, vitamin A, and vitamin C.”¹⁶⁷ The legislation specified that “[t]he contents of the food package shall be made available in such a manner as to provide flexibility, taking into account medical and nutritional objectives and cultural eating patterns.”¹⁶⁸ The initial food package approved by USDA included milk, cheese, eggs, fruit juice, iron-fortified adult and children’s cereals, and infant formula.¹⁶⁹

In many ways, WIC has been a model of integration among nutrition assistance, social services, and health services, with WIC agencies serving as important points of contact where mothers and families can be referred to other state services.¹⁷⁰ The 1975 law included an allowance for funds to be used for nutrition education programs for WIC recipients.¹⁷¹ A few years later, Congress directed that nutrition education must be provided to all WIC recipients and that no less than one-sixth of appropriated funds must be used for this purpose.¹⁷² The 1978 law also required state WIC

163. See Eileen Kennedy & Edward Cooney, *Development of the Child Nutrition Programs in the United States*, 131 J. NUTRITION 431S (2001).

164. OLIVEIRA, *supra* note 162.

165. National School Lunch Act and Child Nutrition Act of 1966 Amendments of 1975, Pub. L. No. 94-105, 89 Stat. 511 (1975).

166. Pub. L. No. 94-105, § 17(a).

167. § 17(g)(3).

168. *Id.*

169. USDA FOOD AND NUTRITION SERVICE, WIC FOOD PACKAGES POLICY OPTIONS STUDY, FINAL REPORT (June 2011), *available at* <http://www.fns.usda.gov/Ora/menu/Published/WIC/FILES/WICFoodPackageOptions.pdf> at ix.

170. OLIVEIRA ET AL., *supra* note 162, at 10.

171. Pub. L. No. 94-105, § 17(g)(4), 89 Stat. at 520-21.

172. Child Nutrition Amendments of 1978, Pub. L. No. 95-627, § 17, 92 Stat. 3603 (1978).

agencies to submit annual reports to USDA describing their plans “to coordinate operations under the program with special counseling services[, including] the expanded food and nutrition education program, family planning, immunization, prenatal care, well-child care, alcohol and drug abuse counseling, child abuse counseling, and with the food stamp program.”¹⁷³

Meanwhile, the FSP quickly became a political football. During the Carter administration, several key FNS appointments went to leaders in the hunger lobby, leading to the elimination of user fees for participation in the food stamp program.¹⁷⁴ During the Reagan administration, however, the primary focus of USDA reform efforts shifted to preventing abuse of nutrition assistance programs by recipients.¹⁷⁵

In the 1980s, USDA also reinvigorated direct distribution programs to dispose of foods created using surplus commodities—including the particularly notorious “government cheese”—held by the Commodity Credit Corporation. USDA began the Temporary Emergency Food Assistance Program (TEFAP) on its own initiative in 1981 and it was eventually made permanent by Congress in 1983.¹⁷⁶ Federal funds were made available to states, which were responsible for storing and distributing food directly to recipients. The program, now referred to as EFAP, was ultimately integrated into the 1990 Farm Bill.¹⁷⁷

Over time, nutrition and public health advocates have pressured USDA to incorporate a greater emphasis on *nutrition*—and less emphasis on commodities dumping—into the FSP. “While hunger advocates continue to fight to make sure food reaches populations in distress, a bitter irony remains: Farm Bill programs [including food stamps] make sure Americans are fed, but not necessarily nourished.”¹⁷⁸ Here too, advocates have noted the disconnect between USDA’s dietary guidelines and accompanying promotional materials and the unhealthy effects of its other programs: “Despite USDA’s calls for balanced diets packed with nutrients through gimmicks such as the USDA Food Pyramid, the actual practices of the Farm Bill ‘nutrition’ programs illustrate that these programs have

173. § 17(f)(1), 92 Stat. 3603.

174. Berry, *supra* note 154, at 73.

175. *Id.*

176. Temporary Emergency Food Assistance Act of 1983, Pub. L. No. 98-8, 97 Stat. 35 (1983).

177. Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, 104 Stat. 3359 (1990).

178. IMHOFF, *supra* note 94, at 55.

become nothing more than a way to dump cheap calories from corn and other commodity crops that have no other useful purpose.”¹⁷⁹

In 1999, the DGAs were incorporated into the FSP, albeit in a rather limited way. USDA’s Center for Nutrition Policy and Promotion revised the Thrifty Food Plan—a suggested market basket that forms the basis of food stamp allotments—to meet the recommendations of the DGAs. The Thrifty Food Plan and the DGAs also form the basis of the Food Stamp Nutrition Education Program, which provides nutrition education to FSP recipients.¹⁸⁰

In the 2008 Farm Bill, in an effort to combat the stigma associated with food stamps, Congress changed the name of the FSP to the Supplemental Nutrition Assistance Program (SNAP).¹⁸¹ At around the same time, in a move that would arguably *increase* stigma,¹⁸² a growing number of policymakers began calling for restrictions on the use of SNAP benefits to purchase unhealthy foods and beverages.

Several state and city governments have explored proposals to restrict the use of SNAP benefits. Although SNAP is administered by the states, it is governed by federal regulations and thus state and city governments are barred from instituting new restrictions without a waiver from USDA. In 2004, USDA denied a request from the state of Minnesota to waive federal regulations and allow the state to prohibit the purchase of candy and soda with food stamp benefits.¹⁸³ In 2010, New York City requested a waiver to ban the use of SNAP benefits for the purchase of sodas and other sugary beverages, which USDA also denied.¹⁸⁴ And in February 2013, the

179. Eubanks II, *supra* note 42, at 274-75 (internal quotation and citation omitted).

180. USDA CENTER FOR NUTRITION POLICY AND PROMOTION, THE THRIFTY FOOD PLAN: EXECUTIVE SUMMARY 1, 3 (1999); USDA CENTER FOR NUTRITION POLICY AND PROMOTION, RECIPES AND TIPS FOR HEALTHY, THRIFTY MEALS 1 (2000).

181. Food, Conservation, and Energy Act of 2008, Pub L. No. 110-234, 122 Stat. 923, 1092 (2008).

182. Food Research and Action Center, A Review of Strategies to Bolster SNAP’s Role in Improving Nutrition as well as Food Security, <http://frac.org/wp-content/uploads/2011/06/SNAPstrategies.pdf> (last updated Jan. 2013) (“Purchasing restrictions likely would increase confusion and stigma at grocery check-out, potentially causing a decline in SNAP participation that could worsen food insecurity and increase obesity risk among this vulnerable group.”).

183. U.S. Dep’t of Agriculture, Food and Nutrition Service, Letter to Maria Gomez, Assistant Commissioner, Economic and Community Support strategies, Minnesota Department of Human Services (May 4, 2004), *available at* http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/15364.pdf.

184. U.S. Dep’t of Agriculture, Food and Nutrition Service, Memo to Elizabeth Berlin, Executive Deputy Commissioner, New York State Office of Temporary and Disability Assistance (Aug. 19, 2011), *available at* <http://www.foodpolitics.com/wp-content/uploads/SNAP-Waiver-Request-Decision.pdf>.

Director of South Carolina's Department of Health and Environmental Control proposed restricting the use of SNAP benefits to the list of approved items used for the WIC program and indicated that the state's Department of Social Services would seek a waiver from USDA in the near future.¹⁸⁵ USDA officials continue to express skepticism regarding the appropriateness of restrictions, arguing that incentives to encourage healthy eating are a preferable alternative.¹⁸⁶

Reformers interested in limiting the use of SNAP benefits to healthy options have pointed to the WIC program as an example.¹⁸⁷ WIC's explicit health focus is evident in the evolution of USDA regulations governing WIC food packages. For example, in 1978, Congress directed USDA "to the degree possible" to "assure that the fat, sugar, and salt content of the prescribed foods is appropriate," though the agency's response was limited to restricting the sugar content of eligible cereals.¹⁸⁸ In 2005, the Institute of Medicine released a report at the request of USDA recommending major changes to the WIC food packages in light of "two, sometimes conflicting, goals: improving dietary quality and food security while also promoting a healthy body weight that will reduce the risk of chronic diseases."¹⁸⁹ The resulting regulations, which went into effect in 2009, include new whole-grain products, restrict adults and children over age two to reduced-fat milk, provide cash-value vouchers to give recipients flexibility to purchase fruits and vegetables according to seasonality, and offer additional benefits for breastfeeding mothers.¹⁹⁰

185. Meg Kinnard, *DHEIC Chief: Restrict Food Stamp Items, Cut Obesity*, THE STATE, Feb 6, 2013, <http://www.thestate.com/2013/02/06/2621322/dhec-chief-restrict-food-stamps.html#.URuIKx03J9E>.

186. Monique Williams, *USDA Says SC Faces Uphill Battle to Change SNAP*, ABC COLUMBIA, at <http://www.abccolumbia.com/news/local/SC-Faces-Uphill-Battle-to-Change-SNAP-200291971.html> (Mar. 27, 2013).

187. Marion Nestle, *Who Benefits Most from Food Stamps*, FOODPOLITICS (June 13, 2012), <http://www.foodpolitics.com/2012/06/who-benefits-most-from-food-stamps-follow-the-money/> ("At present, SNAP recipients have few restrictions on what they can buy with their benefit cards. In contrast, participants in the Women, Infants, and Children program (WIC), which is not a farm bill program, can only use their benefits to buy foods of high nutritional value. The idea of requiring SNAP recipients to do the same has split the advocacy community.")

188. Nutrition Amendments of 1978, Pub. L. No. 95-627, § 17(f)(11), 92 Stat. 3603 (1978).

189. INSTITUTE OF MEDICINE, WIC FOOD PACKAGES: TIME FOR A CHANGE x (2005), available at http://www.nap.edu/catalog.php?record_id=11280.

190. VICTOR OLIVEIRA & ELIZABETH FRAZAO, U.S. DEP'T. OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, THE WIC PROGRAM: BACKGROUND, TRENDS, AND ECONOMIC ISSUES 45 (2009), available at <http://www.ers.usda.gov/media/159295/err73.pdf>.

Health-focused reform of the WIC food packages has had a positive impact on the availability of healthy foods in WIC-authorized stores, particularly in lower-income areas.¹⁹¹ Because WIC-approved retailers are required to carry the foods included in WIC packages, the benefits are enjoyed by WIC participants (who make up about 50% of all infants born in the United States, 25% of children under five, 29% of pregnant women, and 26% of postpartum women)¹⁹², as well as by non-participants who shop in the same stores.

The issue of SNAP restrictions has prompted a rift between anti-hunger organizations, some of which have vehemently opposed restrictions on the use of SNAP benefits, and public health organizations, some of which have come out in favor of restrictions. Noting that “[i]t makes no sense for government food-assistance dollars, intended to improve the nutritional health of at-risk Americans, to support the consumption of products we know to be unhealthy,” influential food journalist Michael Pollan has also weighed in.¹⁹³

FRAC, an anti-hunger organization that has played a major role in past FSP reforms, has argued that “those suggesting strategies aimed uniquely at keeping poor people from the normal streams of decision-making and commerce bear a burden of justifying that targeting.”¹⁹⁴ FRAC has also pointed to compelling evidence that the food purchases of SNAP beneficiaries are, if anything, slightly healthier than those of non-participants, in spite of the difficulties that many low-income people have in accessing fresh and appealing produce.¹⁹⁵ FRAC echoes the conclusion of USDA’s 2007 report on proposed restrictions: “as the problems of poor food choices, unhealthy diets, and excessive weight characterize all segments of American society, the basis for singling out low-income food

191. See Tatiana Andreyeva et al., *Positive Influence of the Revised Special Supplemental Nutrition Program for Women, Infants, and Children Food Packages on Access to Healthy Foods*, 112 J. ACADEMY OF NUTRITION & DIETETICS 850, 855 (2012) (finding a 39% improvement in healthy food supply scores—which measure the availability, variety, prices, and quality of healthy foods—for WIC-authorized stores in lower-income areas following the implementation of the new WIC package).

192. Tatiana Andreyeva, *Effects of Revised Food Packages for Women, Infants, and Children (WIC) in Connecticut*, 27(3) CHOICES 1 (2012), available at www.choicesmagazine.org/magazine/pdf/cmsarticle_254.pdf.

193. Michael Pollan, *Farmer in Chief*, N.Y. TIMES (Oct. 9, 2008), http://www.nytimes.com/2008/10/12/magazine/12policy-t.html?pagewanted=all&_r=0.

194. Food Research and Action Center, *supra* note 182, at 13.

195. *Id.*

stamp recipients and imposing unique restrictions on their food choices is not clear.”¹⁹⁶

Pro-restriction commentators have pointed to FRAC’s collaboration with food industry groups “to assemble a loose coalition of food industry lobbyists and anti-hunger groups opposed to restrictions on food stamps” coordinated by a lobbyist under contract with the Snack Food Association.¹⁹⁷ They have pointed to food and beverage industry lobbying against state reform efforts—such as a 2012 Florida bill sponsored by Republican State Senator Ronda Storms, which proposed restrictions on the use of SNAP benefits—as evidence that “improvements” to SNAP face an uphill battle.¹⁹⁸ On the other hand, the accusation that Storms was simply “attacking poor people”¹⁹⁹ gains credence from the fact that her bill would also have prohibited recipients of federal cash assistance from making EBT withdrawals at strip clubs, casinos, and bars.²⁰⁰ Images of welfare and food stamp recipients living high on the hog at the expense of good, honest taxpayers have long played a role in the politics of nutrition assistance.

Anti-hunger groups have argued that the pro-restriction reform movement puts the entire program at risk at a time when major budget cuts are on the table as part of 2012-13 Farm Bill negotiations.²⁰¹ Indeed, a 2008 USDA report on the relationship between Food Stamps and Obesity

196. USDA, IMPLICATIONS OF RESTRICTING THE USE OF FOOD STAMP BENEFITS – SUMMARY 7 (2007), available at <http://www.fns.usda.gov/ora/menu/Published/snap/FILES/ProgramOperations/FSPFoodRestrictions.pdf>.

197. Michele Simon, *Food Stamps: Follow the Money*, EATDRINKPOLITICS, June 2012, at 11, available at <http://www.eatdrinkpolitics.com/wp-content/uploads/FoodStampsFollowtheMoneySimon.pdf>.

198. *Id.* at 12-13.

199. Mark Bittman, *Regulating Our Sugar Habit*, N.Y. TIMES OPINIONATOR (Feb. 26, 2012), <http://opinionator.blogs.nytimes.com/2012/02/26/regulating-our-sugar-habit/>.

200. See Katie Sanders, *Ronda Storms’ Food Stamp Law Affects Cash Assistance Too*, POLITIFACT FLORIDA, Feb. 10, 2012, <http://www.politifact.com/florida/article/2012/feb/10/ronda-storms-food-stamp-law/> (noting that in spite of Storms’ claims that her proposed restriction on TANF withdrawals was necessary to combat abuse of the system, an audit of Florida EBT transactions found that less than one percent of transactions took place at liquor stores, strip clubs, bowling alleys, bars and bingo parlors).

201. See, e.g., Marion Nestle, *Do Food Stamps Need More Restrictions?*, THE ATLANTIC, Jun. 14, 2012, <http://www.theatlantic.com/health/archive/2012/06/do-food-stamps-need-more-restrictions/258493/> (“Anti-hunger advocates fear that any move to restrict benefits to healthier foods, or even to evaluate the current food choices of SNAP recipients, will make the program vulnerable to attacks and budget cuts.”).

discussed *cuts to benefits* as a possible policy response to evidence that obesity risk may be higher among certain groups of SNAP participants.²⁰²

D. School Meal Programs

Federal school meal programs originated in the 1930s. Early federal efforts focused on providing financial assistance to local school districts to hire workers to prepare and serve lunches in schools.²⁰³ USDA got involved in 1935 and the emphasis shifted from job creation to subsidization of agriculture. USDA's Federal Surplus Commodities Corporation began purchasing surplus meat, dairy, and wheat products and donating them to needy families and schools.²⁰⁴

In 1946, Congress passed the National School Lunch Act to promote the "the health and well-being of the Nation's children and to encourage the domestic consumption of nutritious agricultural commodities."²⁰⁵ The Act established the National School Lunch Program (NSLP) on a permanent basis.²⁰⁶ To facilitate the program, the Secretary of Agriculture possessed authority to (1) supply schools with surplus food purchased as part of agricultural subsidy programs, (2) distribute funds to schools based on the number of program meals served, and (3) establish nutritional guidelines for meals served under the program.²⁰⁷ Since 1966,²⁰⁸ USDA

202. MICHELE VER PLOEG & KATHERINE RALSTON, USDA ECONOMIC RESEARCH SERVICE, *FOOD STAMPS AND OBESITY: WHAT DO WE KNOW?* 1, 25 (Mar. 2008) (noting that evidence regarding the connection between low-income status and obesity had "[led] policymakers and researchers to question whether the Food Stamp Program might have been too successful in boosting food consumption so that participants eat too many calories and gain weight" and referring to "reducing the overall benefit level" as a possible change in policy).

203. Gordon W. Grunderson, USDA Food and Nutrition Service, *The National School Lunch Program Background and Development*, http://www.fns.usda.gov/cnd/lunch/AboutLunch/ProgramHistory_4.htm (last visited Mar. 4, 2013). This assistance was initially offered via the Civil Works Administration and the Federal Emergency Relief Administration and was aimed chiefly at job creation. It continued into the 1940s under the Works Projects Administration. *Id.*

204. *Id.* For a discussion of the ongoing role of commodities dumping in USDA-administered school meal programs, see J. Amy Dillard, *Sloppy Joe, Slop, Sloppy Joe: How USDA Commodities Dumping Ruined The National School Lunch Program*, 87 OR. L. REV. 221 (2008).

205. National School Lunch Act, Pub. L. No. 79-396, 60 Stat. 230 (1946).

206. Grunderson, *supra* note 209.

207. *Id.*; See also 42 U.S.C.A. § 1758(a) (Supp. 1976) (describing the standards as they applied in 1976).

208. Child Nutrition Act of 1966, Pub. L. No. 89-642, 80 Stat. 885 (1966).

has also supported the School Breakfast Program (SBP), made permanent by Congress in 1975.²⁰⁹

During the 1970s, USDA periodically promulgated updated nutritional standards for school meal programs to bring them closer to conforming to federal dietary guidelines.²¹⁰ But a major shift occurred in 1981, when Congress cut funding for school meal programs by 25% as part of the first Reagan budget.²¹¹ The same year, USDA proposed regulations in light of the budget cuts that would have cut portion sizes and allowed schools to count ketchup and pickle relish toward the requirement for vegetable servings.²¹² FRAC publicized the proposal—generating national controversy over “ketchup as a vegetable” that still resonates today—and the regulation was ultimately withdrawn.²¹³

In 1994, Congress required for the first time that nutritional guidelines for the NSLP and SBP must be aligned with the Dietary Guidelines for Americans.²¹⁴ The change was prompted by a report finding that many school meals were dramatically inconsistent with the DGAs.²¹⁵ The following year, USDA issued new regulations instituting food-based menu planning—which effectively increased the quantities of fruits, vegetables, and whole grains required—and establishing specific minimum standards for key nutrients and calories.²¹⁶ These changes were quickly

209. National School Lunch Act and Child Nutrition Act of 1966 Amendments of 1975, Pub. L. No. 94-105, 89 Stat. 511 (1975).

210. For example, in the 1970s, USDA amended the definition of “milk” to allow participating schools to serve low-fat or skim milk alongside whole milk; 38 Fed. Reg. 21777, removed butter and fortified margarine as part of the school lunch meal pattern; 41 Fed. Reg. 23695, and required that school lunches provide one-third of the Recommended Dietary Allowances for X over the course of a week. Fed. Reg. 37166.

211. Food Stamp Act of 1977 Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 358 (1981).

212. James C. Miller III, *The Early Days of Regan Regulatory Relief and Suggestions for OIRA's Future*, 63 ADMIN. L. REV. 93, 99 (2011) (describing withdrawal of “the ‘ketchup is a vegetable rule’ . . . by order of the President himself”).

213. *See id.*; FRAC, *supra* note 160.

214. Healthy Meals for Healthy Americans Act of 1994, Pub. L. No. 103-448, § 106(b), 108 Stat. 4699, 4702 (1994).

215. *See* JOHN BURGHARDT & BARBARA DEVANEY, USDA FOOD AND NUTRITION SERVICE, *THE SCHOOL NUTRITION DIETARY ASSESSMENT STUDY* (1993) (finding that NSLP and SBP meals did not meet recommendations for total fat and unsaturated fat, sodium, or carbohydrates).

216. National School Lunch Program and School Breakfast Program, 60 Fed. Reg. 31188 (June 13, 1995).

undone in 1996²¹⁷ by a Republican-controlled Congress seeking to give schools “flexibility to serve meals children will eat.”²¹⁸

In 2004, Congress directed USDA to issue new guidance to state and local authorities “to increase the consumption of foods . . . that are recommended for increased serving consumption in the most recent Dietary Guidelines for Americans.”²¹⁹ But the Act was silent with regard to foods and ingredients recommended for reduced consumption, such as saturated fat and sodium. The Act also required school districts to develop local school wellness policies to promote healthy eating and physical activity.²²⁰ The Act directed USDA, DHHS, and the Department of Education to provide technical assistance to state and local authorities with regard to establishing healthy school nutrition environments, reducing childhood obesity, and preventing diet-related chronic diseases.²²¹

In 2008, the Institute of Medicine—an independent, non-profit organization that provides guidance on health-related matters—released a report produced at the request of USDA recommending sweeping changes to the nutritional guidelines for federal school meal programs.²²² Two years later, Congress passed The Healthy, Hunger-Free Kids Act (HHFKA), once again directing USDA to “establish standards [for school meal programs] that are consistent with the most recent Dietary Guidelines for Americans.”²²³ The regulations specify requirements for fruit, vegetable, and whole-grain offerings and restrict saturated fat, cholesterol, and sodium in school meals.²²⁴ Notably, the Act also provides for regulatory authority over foods sold to students outside of the meal programs.²²⁵

Implementation of stringent nutrition standards has proven politically difficult, however. Critics have expressed concerns about the increased

217. Healthy Meals for Children Act, Pub. L. No. 104-149, 110 Stat. 1379 (1996) (authorizing the use of the pre-1995 school meal pattern and any other “reasonable approach” to meal planning and prohibiting the Secretary of Agriculture from requiring a school to conduct or use nutrient analysis).

218. H.R. REP. NO. 104-561, at 4 (1996) (to accompany H.R. 2066).

219. Child Nutrition and WIC Reauthorization Act of 2004, Pub. L. No. 108-265, § 103, 118 Stat. 729, 732 (2004).

220. § 204, 118 Stat. at 780.

221. *Id.*

222. See INST. OF MED., NUTRITION STANDARDS AND MEAL REQUIREMENTS FOR NATIONAL LUNCH AND BREAKFAST PROGRAMS: PHASE I. PROPOSED APPROACH FOR RECOMMENDING REVISIONS (Dec. 2008).

223. 42 U.S.C. § 1779(b)(1)(C)(i) (2012).

224. 7 C.F.R. § 210.10(b)(3)(iii)-(iv) (2012).

225. 42 U.S.C. 1779(b)(1)(B) (applying agency regulations to “all foods sold [] outside the school meal programs, [] on the school campus; and [] at any time during the day”).

costs to schools,²²⁶ wasted food,²²⁷ and decreased participation in the school lunch program.²²⁸ Lobbying around the HHFKA and USDA regulations has been substantial.²²⁹ Two particularly contentious issues revolve around potatoes and tomatoes. One of the less funded but more vocal constituencies has been the National Potato Council, which has enlisted Sen. Susan Collins to be a spokesperson against the new regulations.²³⁰ Considered a starchy vegetable, regulations sought to limit school servings to one cup per week. Though Agriculture Secretary Tom Vilsack described the regulation as supporting the consumption of other vegetables,²³¹ the Senate blocked the proposal by amending USDA's appropriations bill to prohibit the Department from setting "any maximum limits on the serving of vegetables in school meal programs."²³² The nutritional guidelines now indicate that additional servings of vegetables may be provided.²³³

Similarly, a regulation was proposed that would end tomato paste's long-standing privileged status. Tomato paste had been given more nutritional credit by volume than other vegetable pastes or purees, with one-eighth of a cup of paste counting as a half-cup of vegetables; all other

226. Isabelle Dills, *School lunches will be healthier, cost more*, NAPA VALLEY REGISTER (July 13, 2012, 8:00 PM), http://napavalleyregister.com/news/local/school-lunches-will-be-healthier-cost-more/article_cb7b9226-cd4f-11e1-bfb1-001a4bcf887a.html.

227. Lauren Ritchie, *Wasted school food will increase because of federal requirement*, ORLANDO SENTINEL (Feb. 22, 2012), http://articles.orlandosentinel.com/2012-02-22/news/os-lk-lauren-ritchie-wasted-school-food-20120222_1_school-lunch-hunger-free-kids-act-lunch-ladies.

228. Howard Fischer, *Legislation would allow public schools to end free lunches*, EAST VALLEY TRIBUNE, http://www.eastvalleytribune.com/arizona/article_3b97e2dc-413a-11e1-a1d6-001871e3ce6c.html (last updated Mar. 16, 2012, 6:20 PM).

229. See generally Lipsky & Thibodeau, *supra* note 40; see also Ron Nixon, *School Lunch Proposals Set Off a Dispute*, N.Y. TIMES (Nov. 1, 2011), http://www.nytimes.com/2011/11/02/us/school-lunch-proposals-set-off-a-dispute.html?_r=2&pagewanted=1&adxnlnx=1320339603-Axm554brdl7zLs6wMBxWTQ.

230. Phil Galewitz, *Potato Lobby Turns Up The Heat In School Lunch Battle*, NPR (Oct. 6, 2011, 9:24 AM), <http://www.npr.org/blogs/thesalt/2011/10/05/141091119/potato-lobby-turns-up-the-heat-in-school-lunch-battle>.

231. *Id.*

232. Robert Pear, *Senate Saves the Potato on School Lunch Menus*, N.Y. TIMES (Oct. 18, 2011), <http://www.nytimes.com/2011/10/19/us/politics/potatoes-get-senate-protection-on-school-lunch-menus.html?ref=us>.

233. The regulation's footnote reads: "Larger amounts of these vegetables may be served." 7 C.F.R. § 210.10 n. c.

pastes and purees received credit only for the actual volume served.²³⁴ The new regulations sought to close this special loophole for tomato paste, which allowed schools to satisfy their vegetable requirement by serving pizza.²³⁵ The proposed rule was eventually prevented by the House agriculture appropriations bill,²³⁶ and the final regulations indicate that “[a]ll vegetables are credited based on their volume as served, except that 1 cup of leafy greens counts as ½ cup of vegetables and tomato paste and puree are credited based on calculated volume of the whole food equivalency.”²³⁷

As of this writing, USDA was assessing nearly 250,000 comments submitted in response to the agencies proposed nutritional standards for foods sold to students outside of the school meal programs—through vending machines, snack bars, and a la carte meal lines.²³⁸ Nutrition advocates have expressed concern that the proposed regulations leave open a loophole that would allow schools to serve unhealthy options like pizza and French fries on a daily basis in the a la carte line even though their inclusion in school meals that are part of the meal program would be more limited.²³⁹ Advocates have also argued that the proposed regulations with regard to the sale of high-calorie, low-nutrient drinks to students don’t do

234. Jill U. Adams, ‘*Pizza vegetable*’ controversy is hot potato, L.A. TIMES (Nov. 28, 2011), <http://articles.latimes.com/2011/nov/28/health/la-he-school-lunch-nutrition-20111128>.

235. *Id.*

236. Allison Aubrey, *Pizza as a Vegetable? It Depends on the Sauce*, NPR (Nov. 15, 2011, 6:49 PM), <http://www.npr.org/blogs/thesalt/2011/11/15/142360146/pizza-as-a-vegetable-it-depends-on-the-sauce>. The republican controlled appropriations committee commented that the provisions were designed to “prevent overly burdensome and costly regulations” and to “provide greater flexibility for local school districts to improve the quality of meals in the [NSLP].” HOUSE APPROPRIATIONS COMMITTEE, SUMMARY: FISCAL YEAR 2012 APPROPRIATIONS “MINI-BUS” (Nov. 14, 2011), available at http://appropriations.house.gov/uploadedfiles/11.14.11_minibus_-_detailed_summary.pdf; Sarah Kiff, *No, Congress did not declare pizza a vegetable*, WONKBLOG (Nov. 21, 2011, 9:15 AM), http://www.washingtonpost.com/blogs/ezra-klein/post/did-congress-declare-pizza-as-a-vegetable-not-exactly/2011/11/20/gIQABXgmhN_blog.html (arguing a smaller serving of tomato paste is comparable in nutritional value to a larger portion of fruits such as apples or oranges).

237. 7 C.F.R. § 210.10(c)(2)(iii) (2012).

238. Nirvi Shah, *USDA Sifts Comments on School Vending Machines, ‘A La Carte’ Items*, EDUCATION WEEK (April 19, 2013) at <http://www.edweek.org/ew/articles/2013/04/18/29vending.h32.html>; USDA Food and Nutrition Service, National School Lunch Program and School Breakfast Program: Nutrition Standards for All Foods Sold in School as Required by the Healthy, Hunger-Free Kids Act of 2010, available at <http://www.fns.usda.gov/cga/020113-snacks.pdf>.

239. See Shah, *supra* note 246.

enough to restrict beverages that are a major contributor to childhood obesity.²⁴⁰

IV. Conclusion: Toward the Further Development of the Health in All Policies Principle

The task of reorienting USDA nutrition and agricultural programs in light of public health goals is daunting and far from finished, but the story of USDA program reform to date is an impressive and instructive one. Political scientists who studied USDA in the 1950s and 60s found that it

epitomized an ‘iron triangle’ bureaucracy. It had close relationships with the agriculture committees in Congress and with the many interest groups representing farmers. The three sides of the triangle worked together in harmony behind the scenes to formulate national agricultural policy. There were many mutual interests: sizeable profits and reduction of market risks for farmers, reelection of farm-state congressmen, and growing budgets and responsibilities for the Department of Agriculture. Common interests and frequent contact among the major participants—career USDA bureaucrats, political appointees in the department, congressmen, staffers on the agriculture committees, and lobbyists—made for comfortable and effective working relationships. Indeed, the actors seemed interchangeable as many moved from one corner of the triangle to another.²⁴¹

In the late 1960s and 1970s, public interest groups in the areas of environmental protection, consumer affairs, and nutrition, played an important role in weakening the strength of the iron triangle of agricultural policymaking.²⁴² Public health groups—which have been fairly late to the party—joined this loose coalition during 2008 and 2012 farm bill negotiations that broke down divisions among silos focusing on public health, organic farming, and environmental conservation. But mounting tension between public health and anti-hunger groups over SNAP restriction proposals threatens to alienate key players like FRAC, whose track record on USDA reform is far more impressive than that of any public health group.

240. See Shah, *supra* note 246.

241. Berry, *supra* note 154.

242. *Id.*

In light of the disconnect between public health aims and USDA's mandated commitment to expanding agricultural markets, some commentators have proposed that nutrition programs should be removed from USDA's purview altogether.²⁴³ Other advocates have sought to use Health Impact Assessments to influence USDA decision-making with regard to nutrition programs.²⁴⁴ But both of these approaches fail to give due credit to the success of coalitions among public health, environmental, anti-hunger groups, and others in exerting external pressure on Congress and the administration, including through resort to litigation in the courts.

The USDA case study points to the need for further development of the HiAP principle and the various administrative law tools that might be used to advance its goals. HIAs are, after all, merely a "decision-support tool"— "intended to support decision-making in choosing between options" by "predicting the future consequences of implementing different options."²⁴⁵ Although a requirement that an agency or other body must conduct HIAs can be imposed by an external authority (as is the case, for example, in the European Community under the 1997 Amsterdam Treaty), their operation is primarily focused on an *internal*, process-based consideration of health impacts. By contrast, the history of health-focused reform of USDA programs suggests that other approaches (lobbying the legislature for substantive mandates directing an agency to promulgate rules with health goals in mind, bringing litigation against the agency to force compliance with statutory mandates or restrictions) might be equally, if not more effective.

The current controversy over restrictions on SNAP benefits points to a potential problem with emphasis on HIAs. By narrowing the focus of

243. See, e.g., Dillard, *supra* note 210, at 251 ("As a first step, the NSLP should be taken away from USDA control and moved to a suitable agency like the Department of Education or Health and Human Services. The Secretary of Agriculture, whose primary responsibility is to support farmers and ensure food safety should not attempt to oversee the health and well-being of schoolchildren.").

244. See, e.g., Health Impact Project, Supplemental Nutrition Assistance Program HIA, <http://www.healthimpactproject.org/hia/us/supplemental-nutrition-assistance-program-hia> (last visited Apr. 7, 2013) (describing an ongoing project whereby the Illinois Public Health Institute will conduct a Health Impact Assessment to "inform the Illinois General Assembly's deliberations on legislative proposals to seek a waiver from USDA to ban the use of Supplemental Nutrition Assistance Program (SNAP) benefits for purchasing sugar-sweetened beverages"); Health Impact Project, Initial Findings: Health Impact Assessment of the Supplemental Nutrition Assistance Program, <http://www.healthimpactproject.org/resources/body/Health-Impact-Project-Farm-Bill-SNAP-HIA-Initial-Findings-01-23-13.PDF> (last visited Apr. 7, 2013).

245. European Observatory on Health Systems and Policies, *The Effectiveness of Health Impact Assessment*, at xix (Matthias Wismar et al. eds., 2007), available at http://www.euro.who.int/_data/assets/pdf_file/0003/98283/E90794.pdf.

policymaking on health risks and benefits, the HIA process may actually threaten cross-sector coalition building efforts. In using HIAs to assess proposals to restrict the use of SNAP benefits for the purchase of sugar-sweetened beverages, for example, one public health organization is conducting

a balanced, science-driven assessment of the potential health benefits—such as a lower risk of obesity, tooth decay, and diabetes—and risks, including reduced participation in SNAP by eligible families, hunger, mental health impacts related to social exclusion and restriction of freedom of choice, and the potential for such policies to add to the stigma associated with SNAP participation.²⁴⁶

This approach, while well intentioned and perhaps quite valuable, might threaten coalitions between public health groups and anti-hunger groups. It takes the concerns of anti-hunger groups (about stigma, restriction of choice, and social exclusion) into account, but only insofar as they can be articulated as health risks, an approach that may not resonate with groups that view dignity and liberty concerns as paramount. As a concrete tool for implementing the HiAP approach, HIAs have their place. But their narrowness cannot be overlooked. The broader HiAP principle is deserving of more attention from legal scholars and advocates interested in furthering the translation of the ecological model of public health into action. It provides an imminently useful framework for public interest advocates seeking to leverage health concerns in their efforts to reform programs in a wide range of sectors using a variety of legal tools.

246. See, e.g., Health Impact Project, *supra* note 252.