

SNAP EXCLUSIONS AND THE ROLE OF CITIZEN PARTICIPATION IN POLICY-MAKING



BY BRIAN HUTLER AND ANNE BARNHILL*

Abstract: This essay uses a specific example—proposals to exclude sugary drinks from the Supplemental Nutrition Assistance Program (SNAP)—to explore some features of the contemporary U.S. administrative state. Dating back to the Wilsonian origins of the U.S. administrative state there has been uncertainty about whether we can and should separate politics and administration. On the traditional view, the agencies are to be kept separate from politics—technocratic and value-neutral—although they are indirectly accountable to the president and Congress. The SNAP exclusions example shows, however, that agencies often must make complex and controversial decisions on their own, decisions that go beyond value-neutral technocratic administration. When authorizing legislation has multiple goals, as we’ll argue is the case in the SNAP example, an agency will have to choose between conflicting statutory mandates. Moreover, as the SNAP example shows, agencies often face complex normative questions of ethics and justice that go beyond the question of how to balance competing aims. The appropriate response to the SNAP exclusions example is not to keep politics out of administrative decision-making, but to develop procedures that allow ethical and political questions to be addressed in agency policy-making, consistent with overarching commitments to fairness and democracy.

KEY WORDS: administrative state, democracy, agency capture, democratic legitimacy, political participation, Supplemental Nutrition Assistance Program (SNAP), overnutrition, public health

I. INTRODUCTION

This essay highlights a flaw in the U.S. administrative state by examining a specific policy issue and the disagreement that surrounds it: whether to exclude sugary drinks from the Supplemental Nutrition Assistance Program (SNAP). The SNAP program, administered by the Department of Agriculture (USDA), is the nation’s largest food assistance program, benefiting over 40 million people. The question of whether SNAP funds may be used to purchase sugary beverages such as soda has been much discussed by public health scholars and officials, as well as by anti-hunger and anti-poverty advocates. On the one hand, it seems wrong for a government program aiming to promote nutrition to subsidize—and implicitly promote—consumption of sugary drinks with no nutritional value and detrimental effects on health. On the other hand, excluding sugary drinks from SNAP strikes some as demeaning and risks stigmatizing SNAP

* Berman Institute of Bioethics, Johns Hopkins University, brianhutler@jhu.edu, ; Berman Institute of Bioethics, Johns Hopkins University, abarnhi1@jhu.edu, . We would like to thank the other contributors to this volume for their invaluable comments and discussion of our paper.

participants, exacerbating the very structural injustice that SNAP should help remedy.

Our goal here, however, is not to evaluate the SNAP exclusion debate on its merits. We will not take sides on the question of whether sugary drinks ought to be excluded from SNAP. (One of us has written on this issue elsewhere.¹) Instead, we will investigate a more structural question—how this sort of policy question should be resolved, and who should be able to participate in the decision-making process. In practice, the decision whether to exclude sugary drinks from SNAP has fallen to the USDA. The USDA has not supported exclusions, refusing even to grant cities and states a waiver from the normal rules in order to experiment with exclusions for a limited period of time. The USDA's refusal has been widely criticized by public health officials and scholars, even as it finds support from anti-hunger and anti-poverty advocacy groups. What is troubling to us is that the USDA has not meaningfully engaged with the normative arguments for and against SNAP exclusions on their merits; or at least, if these normative arguments have influenced the USDA decision-making about SNAP, there is no way to know that from the outside.

The SNAP exclusion example illustrates the fact that administrative agencies are often tasked with making policy decisions that raise complex questions of ethics and justice. When authorizing legislation has multiple goals, as in the SNAP example, an agency will have to choose between conflicting statutory mandates. Moreover, agencies often face complex questions of ethics and justice that go beyond the question of how to balance competing aims—such as the concerns about stigma and disrespect mentioned above. But, like the USDA, administrative agencies are typically not able (or not willing) to engage in public discussion about these normative questions directly.

In this essay, we argue that the USDA's failure to engage transparently with the normative arguments for and against SNAP exclusions represents a flaw in the administrative state. In a democracy, policy choices that raise complex questions of ethics and justice should be resolved whenever possible through public discussion. In the case of SNAP exclusions, there is a robust and ongoing public debate that speaks to the underlying aims and values—the very sort of public discussion to which democratic institutions ought to be sensitive. Failing to provide normative justification for its decision risks capture by special interests, is an apparent democratic deficit, and is an artificially limited information base on which to make policy decisions. In short, the breakdown between agency policy-making and

¹ Anne Barnhill, "Impact and Ethics of Excluding Sweetened Beverages From the SNAP Program," *American Journal of Public Health* 101, no. 11 (2011): 2037–43; Anne Barnhill and Katherine F. King, "Evaluating Equity Critiques in Food Policy: The Case of Sugar-Sweetened Beverages," *The Journal of Law, Medicine and Ethics* 41, no. 1 (2013): 301–309; Anne Barnhill, "Do Sugary Drinks Undermine the Core Purpose of SNAP?" *Public Health Ethics* 12, no.1 (2019): 82–88.

the civic discussion represents, at best, a problematic missed opportunity, and at worst, a loss of democratic legitimacy.

What is needed is a way for administrative agencies to respond to, and engage with, public normative discussion surrounding policy choices. In short, we will argue that we need to democratize the administrative state. Having made this argument, we will consider the feasibility, advantages, and disadvantages of three possible approaches: decentralization, stakeholder input, and citizen juries.

II. THE SNAP EXCLUSIONS DEBATE

The Supplemental Nutrition Assistance Program (SNAP), formerly known as the Food Stamp Program, is the United States' largest food assistance program. In 2018, SNAP was a \$65 billion program that provided food assistance for 40 million Americans, giving them an average monthly benefit of \$125/person.² SNAP assistance can be used to purchase any food from participating stores, with only a few exceptions (alcohol, hot foods, and foods meant to be eaten in the store).³

According to USDA data, 9.3 percent of SNAP assistance is used to purchase sweetened beverages (which include sugary soft drinks, energy drinks, sweetened tea, and so on).⁴ That doesn't sit well with many public health officials and advocates, given the link between sugary drink consumption and caloric consumption, weight gain, obesity, diabetes, and hypertension, among other health conditions.⁵ They argue that SNAP should be modified to

² Food and Nutrition Service, United States Department of Agriculture, "Supplemental Nutrition Assistance Program Participation and Costs," (2019) <https://fns-prod.azureedge.net/sites/default/files/pd/SNAPsummary.pdf>

³ Food and Nutrition Service, United States Department of Agriculture, "What Can SNAP Buy?" <https://www.fns.usda.gov/snap/eligible-food-items>

⁴ Anahad O'Connor, "In the Shopping Cart of a Food Stamp Household: Lots of Soda," *The New York Times*, January 13, 2017, sec. Well. <https://www.nytimes.com/2017/01/13/well/eat/food-stamp-snap-soda.html>.

⁵ Barnhill, "Impact and Ethics of Excluding Sweetened Beverages"; J. Lynch and E. Bassler, "SNAP Decisions Health Impact Assessment: Proposed Illinois Legislation to Eliminate Sugar-Sweetened Beverages from the Supplemental Nutrition Assistance Program (SNAP)" (Chicago: Illinois Public Health Institute, 2014), 17–18. See also: David S Ludwig, Susan J. Blumenthal, and Walter C. Willett, "Opportunities to Reduce Childhood Hunger and Obesity: Restructuring the Supplemental Nutrition Assistance Program (the Food Stamp Program) Restructuring the SNAP Program." *Journal of the American Medical Association* 308, no. 24 (2012): 2567–68. <http://jama.jamanetwork.com/article.aspx?articleid=1487507&sf8186873=1>.

Kelly D. Brownell and David S. Ludwig, "The Supplemental Nutrition Assistance Program, Soda, and USDA Policy: Who Benefits?" *Journal of the American Medical Association* 306, no. 12 (2011): 1370–71. <http://archotol.jamanetwork.com/article.aspx?articleid=1104422>;

Andrew Fisher, *Big Hunger: The Unholy Alliance between Corporate America and Anti-Hunger Groups* (Cambridge, MA: MIT Press, 2017), 105–41; Marlene B. Schwartz, "Moving Beyond the Debate Over Restricting Sugary Drinks in the Supplemental Nutrition Assistance Program," *American Journal of Preventive Medicine* 52, no. 2 (2017): S199–205; Jennifer L. Pomeranz and Jamie F. Chriqui, "The Supplemental Nutrition Assistance Program: Analysis of Program Administration and Food Law Definitions," *American Journal of Preventive Medicine* 49, no. 3 (2015): 428–36; Robert Paarlberg, Dariush Mozaffarian, Renata Micha, and Carolyn Chelius,

exclude sugary drinks from the foods eligible for purchase with SNAP assistance. Such an exclusion, they argue, would reduce SNAP participants' sugary drinks consumption and thereby improve their health.

But in the eyes of proponents, excluding sugary drinks is not just a way to leverage a government program (that is, SNAP) to accomplish a laudable aim (that is, improving public health). The exclusion would make SNAP more effective at accomplishing *its own aims*, which include improving the nutrition and health of SNAP participants.⁶ Furthermore, because sugary drinks have no positive nutritional value (unlike, for example, milk or fruit juice), excluding them would in no way reduce the nutritional quality of SNAP participants' diets. Excluding sugary drinks merely eliminates a source of excess sugar and calories. Proponents also maintain that excluding sugary drinks would make SNAP more efficient,⁷ as expenditures on sugary drinks are seen as a significant inefficiency in the program and a massive and inappropriate public subsidy of the soda industry.⁸

Given its putative public health benefits, excluding sugary drinks from SNAP has been broadly (though not universally) embraced by the public health community. There is also significant public support (69 percent) for excluding sugary drinks from SNAP, according to a 2012 survey.⁹ There is also broad interest among state officials in excluding sugary drinks from SNAP, and more than a dozen states have sought to exclude sugary drinks from the foods eligible for purchase with SNAP assistance, with these efforts originating with city mayors, in state agencies, and in state legislatures.¹⁰

However, states do not have the authority to remove sugary drinks from SNAP. State agencies administer the program at the state level, enrolling eligible participants and distributing benefits, but the United States Department of Agriculture (USDA) administers the SNAP program, consistent with SNAP's authorizing legislation (the Farm Bill, which is renewed every five years or so, most recently as the Agriculture Improvement Act of 2018). States do not have the authority to change the foods eligible for purchase with SNAP assistance, and must petition the USDA for approval. The USDA has always denied states' requests.¹¹

"Keeping Soda in SNAP: Understanding the Other Iron Triangle," *Society* 55, no. 4 (2018): 308–17.

⁶ Barnhill, "Impact and Ethics of Excluding Sweetened Beverages From the SNAP Program"; Lynch and Bassler, "SNAP Decisions Health Impact Assessment"; Nicole M. V. Ross and Douglas P. MacKay, "Ending SNAP-Subsidized Purchases of Sugar-Sweetened Beverages: The Need for a Pilot Project," *Public Health Ethics* 10, no. 1 (2017): 62–77.

⁷ Barnhill, "Impact and Ethics of Excluding Sweetened Beverages From the SNAP Program"; Lynch and Bassler, "SNAP Decisions Health Impact Assessment."

⁸ O'Connor, "In the Shopping Cart of a Food Stamp Household: Lots of Soda."

⁹ Michael W. Long, Cindy W Leung, Lilian WY Cheung, Susan J Blumenthal, and Walter C Willett, "Public Support for Policies to Improve the Nutritional Impact of the Supplemental Nutrition Assistance Program (SNAP)," *Public Health Nutrition* 17, no. 1 (2014): 219–24.

¹⁰ Pomeranz and Chriqui, "The Supplemental Nutrition Assistance Program: Analysis of Program Administration and Food Law Definitions"; Paarlberg et al., "Keeping Soda in SNAP."

¹¹ Paarlberg et al., "Keeping Soda in SNAP."

For example, in 2010 the New York State Office of Temporary and Disability Assistance (the state agency that administers SNAP) petitioned the USDA for permission to try out excluding sugary drinks from SNAP. More precisely, they asked to conduct a demonstration project in which sugary drinks would be excluded from SNAP in New York City for a period of two years, with the effects of the exclusion being monitored and evaluated. The proposed demonstration project was jointly developed by the OTDA and the New York City Department of Health and Mental Hygiene, under the direction of New York City Mayor Michael Bloomberg. The USDA denied New York's request.¹²

In its 2011 denial of New York's request, and in a prior denial in 2007, the USDA cited various concerns with SNAP exclusions, including: the feasibility of educating retailers and ensuring their compliance; the difficulty in determining which products would be excluded; the effort needed to identify, evaluate, and track new products; and problems with how the 2011 demonstration program would have been evaluated.¹³ The USDA also questioned the effectiveness of excluding sugary drinks at reducing sugary drink consumption, since SNAP participants could simply use their other, non-SNAP funds to purchase sugary drinks.¹⁴ The USDA has also claimed that excluding new foods could cause confusion and stigma at the checkout,¹⁵ and that this increased embarrassment and stigma would drive down program participation rates and thereby reduce the program's overall effectiveness.¹⁶

Advocates of SNAP exclusions have rejected many of these concerns as speculative or unsupported by existing evidence,¹⁷ or as concerns that "could likely be addressed through straightforward administrative measures, public health surveillance, and quasi-experimental research."¹⁸ Proponents of SNAP exclusions also point out that pilot studies like the one proposed by New York are meant to assess exactly these kinds of

¹² J. Shahin, Associate Administrator, Supplemental Nutrition Assistance Program, USDA, Letter to Elizabeth Berlin, Executive Deputy Commissioner, New York State Office of Temporary and Disability Assistance, August 19, 2011, <http://www.foodpolitics.com/wp-content/uploads/SNAP-Waiver-Request-Decision.pdf>.

¹³ Shahin, Letter to Elizabeth Berlin; USDA Food and Nutrition Service, "Implications of Restricting the Use of Food Stamp Benefits," <https://fns-prod.azureedge.net/sites/default/files/FSPFoodRestrictions.pdf>; Paarlberg et al., "Keeping Soda in SNAP"; Anne Barnhill and Katherine F. King, "Ethical Agreement and Disagreement about Obesity Prevention Policy in the United States," *International Journal of Health Policy and Management* 1, no. 2 (2013): 117.

¹⁴ USDA, "Implications of Restricting the Use of Food Stamp Benefits."

¹⁵ The thought here, presumably, is that SNAP participants will try to purchase newly excluded foods with their SNAP debit card, will be told at the checkout that they can't purchase those foods using SNAP, and will thereby be be outed as SNAP participants, causing embarrassment.

¹⁶ USDA, "Implications of Restricting the Use of Food Stamp Benefits."

¹⁷ Barnhill, "Impact and Ethics of Excluding Sweetened Beverages From the SNAP Program"; Pomeranz and Chriqui, "The Supplemental Nutrition Assistance Program: Analysis of Program Administration and Food Law Definitions."

¹⁸ Brownell and Ludwig, "The Supplemental Nutrition Assistance Program, Soda, and USDA Policy."

unknowns. For example, Pomeranz and Chriqui note that the “very purpose of a pilot program would be to empirically test and study” assumptions, such as the assumption that SNAP participants’ sugary drink consumption wouldn’t drop because they would use other funds to buy sugary drinks.¹⁹

Even after the USDA’s high-profile rejection of New York’s request in 2011, local and state officials persevered. For example, in 2013, the mayors of eighteen American cities said it was “time to test and evaluate approaches limiting SNAP’s subsidization of products, such as sugar-sweetened beverages, that are contributing to obesity,” in a letter to Congressional leadership.²⁰ In August 2017, a group of officials from state agencies in twenty states wrote a letter to the USDA and Congress proposing a series of changes to SNAP, including allowing states to exclude sugary drinks and candy.²¹

The USDA’s rejection of SNAP exclusions continued under the Trump administration, albeit with new notes added in:

Early in 2017, Representative Doug LaMalfa, a California Republican and member of the House agriculture committee, approached Secretary Sonny Perdue to ask for a promise that USDA would approve any state waiver request for an SSB restriction if endorsed by that state’s legislature. Five different state legislatures at the time were actively considering bills to force such a request—Arkansas, Florida, Mississippi, New Mexico, and Tennessee (all but New Mexico under full Republican control). The LaMalfa request was refused by Secretary Perdue, who said he didn’t want USDA to become part of a “nanny state.” Perdue repeated this phrase when responding to a question at a public hearing before the House agriculture committee in May 2017.²²

In 2018, the USDA denied a request from Maine to exclude sugary drinks and candy from SNAP.²³

A. Ethical and justice-based objections to SNAP exclusions

While the public health community is largely (though not entirely) in favor of excluding sugary drinks from SNAP, the anti-hunger and anti-poverty community has been largely opposed.²⁴

¹⁹ Pomeranz and Chriqui, “The Supplemental Nutrition Assistance Program: Analysis of Program Administration and Food Law Definitions,” 430.

²⁰ Letter from Mayors to John Boehner and Nancy Pelosi, June 18, 2013, http://www.nyc.gov/html/om/pdf/2013/snap_letter_to_house_6_18_13.pdf.

²¹ Paarlberg et al., “Keeping Soda in SNAP.”

²² *Ibid.*, 311.

²³ *Ibid.*

²⁴ Fisher, “SNAP’s Identity Crisis”; Schwartz “Moving Beyond the Debate”; Paarlberg et al., “Keeping Soda in SNAP.”

The anti-hunger community raises both practical and ethical objections to SNAP exclusions. The practical objections echo the USDA's concerns, for example that excluding new foods could cause confusion, embarrassment and stigma at the checkout, and that this would drive down participation in SNAP.²⁵ The anti-hunger community has also raised ethical and justice-based objections. SNAP exclusions are claimed to be demeaning, disrespectful, and infantilizing, and to unfairly target SNAP participants. For example, anti-hunger advocate Joel Berg, then of the New York City Coalition Against Hunger, critiqued the New York SNAP exclusion proposal in this vein: "[L]imiting the consumer choice of adults in SNAP is a horrible idea ... Beyond sending the appalling message to low-income Americans that they are uniquely unsuited to make decisions about what is best for their own health, banning certain foods in the SNAP program will fail to meet the anti-obesity objectives of proponents."²⁶ Similar concern was voiced in the popular press, in this case *The Los Angeles Times*: "But the purpose of the program is to aid people in need, not dictate their every mouthful in ways that most Americans would never allow to be imposed on themselves ... Infantilizing food stamp recipients, and making lifestyle choices for them that aren't made for other Americans, is a demeaning and, most likely, ineffective way to ensure a healthier populace."²⁷

Infusing these objections is recognition that restricting SNAP participants' choices by excluding sugary drinks has symbolic meaning and has an expressive effect: it sends the message that SNAP recipients make bad food choices and so the government must interfere to ensure that they make better choices. This is taken to be infantilizing and demeaning.²⁸ Furthermore, when only one population group (low-income people on SNAP) has their choices limited, it raises questions of fairness and social equality. Why are SNAP participants being singled out for control and demeaning treatment?²⁹ The Food Research and Action Center, a prominent anti-hunger advocacy group, describes SNAP exclusions in these terms:

Too often such "singling out" of the poor emanates from a frustration about the inability to deal with the problem more broadly. And too often it emanates from a stereotypical belief that the culture or behavior among the poor is different and dysfunctional Avoiding singling

²⁵ Food Research and Action Center, "A Review of Strategies To Bolster SNAP's Role in Improving Nutrition as Well as Food Security," February 2017, <https://frac.org/wp-content/uploads/SNAPstrategies.pdf>.

²⁶ Joel Berg, "Food Stamps Soda Ban: The Wrong Way to Fight Obesity," *Huffington Post*, December 6, 2010, http://www.huffingtonpost.com/joel-berg/food-stamps-soda-ban-the_b_791863.html.

²⁷ "Wait a New York minute!" Editorial, *Los Angeles Times*, October 15, 2010, <http://articles.latimes.com/2010/oct/15/opinion/la-ed-soda-20101015>.

²⁸ For more discussion, see Barnhill and King, "Evaluating Equity Critiques" and Schwartz "Moving Beyond the Debate."

²⁹ *Ibid.*; Paarlberg et al., "Keeping Soda in SNAP."

out poor people based on misconceptions or exaggerations is just one reason restricting SNAP is the wrong path.³⁰

Lurking in the background of SNAP exclusions is the longstanding critique that public assistance programs micromanage the choices and lives of low-income people in a disrespectful, demeaning, and unjust way; SNAP exclusions are seen as just the latest instance.³¹ Marlene Schwartz sympathetically captures the orientation and ethical concern underlying some advocates' opposition:

the advocates for leaving SNAP alone are not defending the value of sugary drinks; they are defending the value of being in control of how you spend your money. If the fundamental mission of your work is to protect the basic rights and dignity of people living in poverty, it makes sense that you would not agree with any policy that exerted control over how some citizens spend their money just because they are poor.³²

While the main line of ethical critique is focused on the symbolic value of being denied food choice, some objections focus on the experienced value of sugary drink consumption. Consuming sugary drinks has hedonic, personal, and social value for people. Limiting SNAP participants' sugary drinks consumption is limiting an experience that has value for them.³³

Advocates of sugary drink exclusions point out that SNAP already restricts the foods eligible for purchase: SNAP cannot be used to purchase food from restaurants, prepared foods that are ready to eat (such as foods from a grocery store deli), or alcohol. Don't these exclusions already restrict the choice of SNAP participants, and prevent them from purchasing foods that would have value to them? Is this choice restriction demeaning? If not, then why is it demeaning or otherwise unacceptable to exclude an additional kind of product?

More fundamentally, SNAP provides structured assistance that can be used to purchase food; it does not provide cash assistance for people to spend as they see fit. Thus the program is not structured so as to maximize choice, but to accomplish specific goals (such as reducing hunger, malnutrition, and poverty). Thus the program is already premised on the notion

³⁰ FRAC, "A review of strategies to bolster SNAP."

³¹ Emily Badger, "What Kansas gets wrong when it tries to control what poor people can do with welfare," *The Washington Post*, April 17, 2015, <http://www.washingtonpost.com/news/wonk/wp/2015/04/17/the-double-standard-of-making-the-poor-prove-theyre-worthy-of-government-benefits/>.

³² Schwartz, "Moving Beyond the Debate," 203.

³³ Barnhill and King, "Evaluating Equity Critiques"; See also the quotes expressing the value of consuming sugary drinks in Paarlberg et al. "Keeping Soda in SNAP," 312.

that it is appropriate for public assistance programs to be structured so as to accomplish specific aims, rather than being structured so as to maximize people's choice. If the basic structure of the program is acceptable—if providing structured food assistance is not unacceptably demeaning or choice-limiting—why would it be unacceptable to add a small amount of additional structure to the program (that is, excluding sugary drinks) so that the program better accomplishes its aims?

Notably, even while opponents object to SNAP exclusions as demeaning and unfair, the public health arguments for SNAP exclusions also implicate ethics and social justice. Infusing public health efforts to promote healthy behavior, including healthy dietary patterns, is the conviction that protecting public health is a basic ethical responsibility of governments, that improving people's health will improve their welfare and is thus ethically good, and that preventable disease and mortality is an injustice that should be addressed.³⁴ Improving the health of SNAP participants will also help chip away at health disparities (that is, higher rates of overweight, obesity, diet-related illness, and premature mortality among some racial/ethnic minorities and low-income people), and thus strikes a blow for equity and social justice. Thus disagreement about SNAP exclusions is underlaid with normative disagreement, with both proponents and opponents perceiving ethics and social justice to be on their side.³⁵

Notably, the issue of SNAP exclusions has pitted the public health and anti-hunger communities against each other, and generated significant mistrust and bad blood.³⁶ Anti-hunger community opponents of SNAP exclusions don't always trust that proponents of SNAP exclusions have SNAP participants' interests at heart, even if they profess to.³⁷ On the other side, some proponents have accused anti-hunger opponents of SNAP exclusions of conflicts of interest. The anti-hunger community receives significant financial support from the food industry, and opposition to SNAP exclusions is seen as part of a broader set of policy positions embraced by major anti-hunger organizations that align with the food industry's interests.³⁸ Members of Congress from both parties have also been criticized for having financial ties with the soda industry and been accused of conflicts of interest on this issue.³⁹

³⁴ See, for example: Dan E. Beauchamp, "Public Health as Social Justice," *Inquiry: A Journal of Medical Care Organization, Provision and Financing* 13, no. 1 (1976): 3–14; Ruth Faden and Sirine Shebaya, "Public Health Ethics," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2010, <http://plato.stanford.edu/archives/sum2010/entries/publichealth-ethics/>.

³⁵ Fisher, "SNAP's Identity Crisis"; Barnhill and King, "Ethical Agreement and Disagreement about Obesity Prevention Policy in the United States," *International Journal of Health Policy and Management* 1, no. 2 (2013): 117. <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3937920/>.

³⁶ Schwartz, "Moving Beyond the Debate"; Fisher, "SNAP's Identity Crisis."

³⁷ Schwartz, "Moving Beyond the Debate."

³⁸ Fisher, "SNAP's Identity Crisis"; Marion Nestle, *Soda Politics: Taking on Big Soda (And Winning)* (New York: Oxford University Press, 2015), 220–21.

³⁹ Nestle, *Soda Politics*, 224; Paarlberg et al., "Keeping Soda in SNAP."

B. Disagreement about the aims of SNAP

Along with having specific practical and ethical objections to SNAP exclusions, the anti-hunger and anti-poverty community may have a fundamentally different conception of the SNAP program and its aims than the public health community.⁴⁰ A primary public health argument for excluding sugary drinks is that including them undermines SNAP's effectiveness as a nutrition program, because sugary drinks have no positive nutritional value and merely make diets nutritionally worse. But many in the anti-poverty and anti-hunger community see SNAP not as a nutrition program, but as a program meant to lift low-income people out of poverty and to ensure they have enough food. The Food Research and Action Center, for example, writes that SNAP "plays a critical role in reducing hunger, malnutrition, and poverty, and improving family security, child and adult health, employment, and other outcomes."⁴¹ Other anti-hunger advocates also argue that SNAP is primarily an anti-poverty or anti-hunger program, and only secondarily a nutrition program, or not a nutrition program at all.⁴²

If SNAP is seen as an anti-hunger and anti-poverty program, not a nutrition program, any change to the program that undermines those aims makes the program less effective. So, for example, if excluding sugary drinks from SNAP causes SNAP participants to spend more of their other, non-SNAP funds on sugary drinks, this will undermine the program's effectiveness at lifting participants out of poverty. If excluding sugary drinks from SNAP increases stigma, and this reduces participation in the program, the exclusion will undermine the program's effectiveness at ensuring low-income people have enough food to eat and at lifting them out of poverty.

On the other side, the public health community sees SNAP as a nutrition program. In particular, as Andrew Fisher has documented, the public health community has sought to "redefine what it meant for SNAP to be a nutrition program, beyond its traditional accomplishments in reducing hunger, to one of prevention of chronic diseases."⁴³ When the Food Stamp Program began in the 1960s, hunger and undernutrition were prevalent in the United States, and overnutrition and obesity were not. Over the past forty years, overweight and obesity rates have increased dramatically, overnutrition has become a major cause of disease and premature death, and making dietary patterns healthier has become a top public health priority. The public health community has tried to help SNAP, the country's largest food

⁴⁰ Fisher, "SNAP's Identity Crisis"; Barnhill, "Do Sugary Drinks Undermine the Core Purpose of SNAP?" *Public Health Ethics*, February 15, 2018. <https://doi.org/10.1093/phe/phy002>.

⁴¹ Food Research and Action Center, "Supplemental Nutrition Assistance Program (SNAP)," <https://frac.org/programs/supplemental-nutrition-assistance-program-snap>.

⁴² Fisher, *Big Hunger*, 110, 125.

⁴³ *Ibid.*, 113.

assistance program, keep pace, and to shift SNAP's focus from preventing undernutrition to also preventing overnutrition. If SNAP is a program aimed at improving nutritional outcomes, then there would be no reason to subsidize the consumption of sugary beverages that have negative nutritional value.

C. *Competing legislative aims of SNAP*

So what actually *is* the aim of SNAP? Is there a legally authoritative way to settle that question? In short, the answer is “no.” One place to look for the purposes of a federal government policy is the explicit statement made by Congress in authorizing the policy. But the problem is that the legislative goals and purposes of SNAP are multiple, and the authorizing legislation does not tell the USDA how to prioritize the aims of SNAP when they conflict.

In particular, SNAP's authorizing legislation identifies both “alleviat[ing] hunger” and “raising levels of nutrition among low-income households.”⁴⁴ When this language was originally used to authorize the Food Stamp Program, “hunger” or caloric deficit was the primary cause of malnutrition in the country. Improving nutrition entailed alleviating hunger and vice versa. In the present context, however, overconsumption is now a primary cause of malnutrition. The statute also says that an additional goal of SNAP is to promote a “more orderly marketing and distribution of foods.”⁴⁵

The USDA, in administering SNAP, is clearly bound by these broad aims, but the catch is that these aims conflict. Excluding sugary drinks or other unhealthy foods from SNAP may promote nutrition outcomes for some. It may also improve the efficiency of the program: allowing sugary drinks in the program may be seen as a significant inefficiency, as the government is spending billions of dollars on foods with little or no nutritional value. Thus excluding sugary drinks promotes some of the aims of SNAP. On the other hand, exclusions could exacerbate hunger and poor nutrition, particularly if people are less inclined to utilize SNAP in light of the exclusions. Furthermore, as the USDA contends, excluding additional foods may be administratively burdensome and lead to inefficiency in the marketing and retailing of various food items.⁴⁶ Thus excluding sugary drinks may undermine some of the aims of SNAP.

How should the USDA balance these conflicting aims? The text of the authorizing legislation itself does not resolve this issue, and does not specify how to balance competing statutory aims when they conflict. Where else might we turn to resolve this issue? A second legally authoritative source

⁴⁴ 7 U.S.C. § 2011.

⁴⁵ *Ibid.*

⁴⁶ U.S. Department of Agriculture. Food and Nutrition Service, “Implications of restricting the use of Food Stamp Benefits,” March 1, 2007, <https://www.fns.usda.gov/implication-restricting-use-food-stamp-benefits>.

would be the interpretation of the law made by the agency tasked with implementing it—here, the USDA. In practice, courts will often defer to the agency's interpretation of authorizing statutes, a posture often referred to as *Chevron* deference, taken from a 1984 Supreme Court case.⁴⁷

The USDA's own understanding of the aims of SNAP provides no additional illumination. In a report describing the SNAP program, the USDA highlights SNAP's role in reducing food insecurity and improving nutrition.⁴⁸ For example: "SNAP alleviates hunger and improves nutrition by increasing the food purchasing power of low-income households, enabling them to obtain a more nutritious diet by preparing food at home."⁴⁹ The USDA also emphasizes the anti-poverty effect of SNAP, noting "that SNAP would lift 3.9 million Americans—including 1.7 million children—out of poverty if its benefits were included in the official measures of income and poverty."⁵⁰ Thus, again, the USDA's own interpretation of the overarching goals of SNAP fails to resolve the SNAP exclusion debate.

D. Congressional inaction

Congress could help to resolve the SNAP exclusions debate by passing legislation that speaks directly to the issue. For example, Congress could allow states to try out exclusions, or state clearly what food items should be included or not included in SNAP. But so far Congress has not done so. SNAP is included in the Farm Bill, which is reauthorized every four or five years, and the issue of SNAP exclusions came up during Congressional debate on the Farm Bill in 2013 and 2017–2018. In 2013, as Pomeranz and Chriqui note, "Senators Harkin and Coburn attempted to amend the Farm Bill to allow SNAP demonstration projects in two states to promote the purchase of healthier food. The amendment failed to pass, so the Senators urged the USDA to engage in two demonstration projects on its own ... The USDA rejected this request."⁵¹ Also in 2013, "Representative Phil Roe (R-TN), a medical doctor, introduced a Healthy Food Choices Act that would have allowed only healthful choices in SNAP ... Roe was not a member of the House Agriculture Committee, where his proposal languished with no action taken."⁵²

In 2017, the House committee on agriculture had a hearing on excluding sugary drinks from SNAP, at which "one committee member after another speculated about what might go wrong. A restriction might be insulting to

⁴⁷ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

⁴⁸ Food and Nutrition Service, United States Department of Agriculture, "Building a Healthy America: A Profile of the Supplemental Nutrition Assistance Program," April 2012, <https://fns-prod.azureedge.net/sites/default/files/BuildingHealthyAmerica.pdf>.

⁴⁹ *Ibid.*, 2.

⁵⁰ *Ibid.*, 3.

⁵¹ 113th Cong., 77 Cong. Rec. S3909-3912 (2013); 430. Jennifer L. Pomeranz, and Jamie F. Chriqui, "The Supplemental Nutrition Assistance Program: Analysis of Program Administration and Food Law Definitions," *American Journal of Preventive Medicine* 49, no. 3 (2015): 428–36.

⁵² Paarlberg et al., "Keeping Soda in SNAP," 311.

the poor; it might result in only a small diet quality improvement; it might impose unacceptable hardships on retailers.”⁵³ Also in 2017, several Republican members of the House agriculture committee raised the issue of excluding sugary drinks from SNAP, as part of a broader discussion of potential changes to the SNAP program. As Paarlberg et al. tell it: “At least one Republican on the Committee, Representative John Faso (R-NY), did prepare draft language on a stand-alone SSB restriction in 2017, but the American Beverage Association learned of Faso’s move and reacted with discouraging telephone calls to committee members.”⁵⁴ Democratic members of the committee were unanimously opposed to excluding sugary drinks from SNAP. The Republican chair of the House Agriculture Committee did not take up the amendment, and although Faso introduced the amendment later in the legislative process, it ultimately died.

Observers of SNAP politics diagnose multiple forces at play in Congressional inaction on SNAP exclusions: the effect of lobbying by the soda industry on Congress, the effect of campaign contributions from soda industry PACs on Congress, the effect of financial support from the soda industry on the anti-hunger community, the influence of anti-hunger advocates with Democrats in Congress, and institutional inertia.⁵⁵ Another source of inaction is that some Democrats in Congress and some in the anti-hunger community are hesitant to criticize the SNAP program, even as part of an effort to improve it, because they don’t want to lend credence to the conservative critique that SNAP is wasteful, and don’t want to fuel conservative efforts to shrink the size of SNAP or restrict eligibility.⁵⁶

III. TAKEAWAYS FROM THE SNAP EXCLUSIONS EXAMPLE

We believe that the SNAP exclusions debate is illustrative of a number of potential flaws in administrative decision-making. Much like the USDA in this example, administrative agencies will often be tasked with making policy decisions that raise complex questions of ethics and justice. These questions fall to the agencies because of Congressional ambiguity, inactivity, or inattention—and given the current political environment, it may be unrealistic to expect Congress to resolve all of these questions. And yet, we are not satisfied with the status quo. In this section, we identify a number of potential problems with this status quo.

First, it illustrates the potential for the real (or perceived) capture of agencies. Administrative law scholars have expressed concerns about the capture of independent agencies by political or interest-based groups,⁵⁷ but

⁵³ Ibid..

⁵⁴ Ibid., 312

⁵⁵ Nestle, *Soda Politics: Taking on Big Soda*; Paarlberg et al., “Keeping Soda in SNAP.”

⁵⁶ Schwartz, “Moving Beyond the Debate; Paarlberg et al., “Keeping Soda in SNAP.”

⁵⁷ Rachel E. Barkow, “Insulating Agencies: Avoiding Capture through Institutional Design,” *Texas Law Review* 89, no. 1 (2010): 15–80.

some of these concerns are also relevant to cabinet-level agencies, such as the USDA. In the case of SNAP, some members of the public health community are concerned that the USDA has been captured by some combination of big soda companies and anti-hunger groups, who are themselves beholden to the food industry, which provides them with financial support.⁵⁸ This corporate interest may or may not have influenced the USDA, but there is no way to verify its intentions or motivations. Coupled with the concern that Congressional action (or inaction) also reflects the influence of the soda industry rather than effective policy design or the will of the people, the system as a whole may appear unresponsive and corrupt.⁵⁹

A second takeaway from the SNAP example concerns the technocratic versus not-merely-technocratic role of administrative agencies. In making a decision about SNAP exclusions, the USDA has to decide how to balance competing statutory aims. The legislative goals and purposes of SNAP are multiple, and the authorizing legislation does not tell the USDA how to prioritize the aims of SNAP when they conflict. It seems that those who claim that SNAP has anti-poverty and anti-hunger aims are correct. But those who contend that SNAP has the aim of producing good nutritional outcomes also have a plausible claim. How should the SNAP program be designed to mutually pursue all of these aims? If any of these aims come into conflict, which ones should be prioritized and to what extent? Congress did not provide sufficient guidance to resolve these issues, so the USDA was left to decide. Thus one takeaway from this example is that when legislation has multiple, competing aims, agencies must decide how to balance these aims. Thus, in contrast with a traditional view that agencies solely make technocratic, value-neutral decisions, this example illustrates that agencies have a broader role.

A third observation is that the SNAP exclusions issue has involved ongoing, inconclusive debate in Congress about a politically and ethically controversial issue. This illustrates a potential role for administrative agencies: to make difficult and controversial decisions when Congress would rather avoid the heat. It also makes plain the tough spot this puts agencies in: they have to make a difficult and normatively controversial decision without clear guidance from Congress.

Fourth, we see that even though the issue of SNAP exclusions implicates normative issues (raising questions such as: Are exclusions demeaning? Do they unduly limit choice?), the USDA's rationale for its decision did not engage with these issues. The USDA denied multiple states' requests to exclude sugary drinks from SNAP, and offered reasons in defense of its decision, such as the efficiency of the program, program participation, and

⁵⁸ Fisher, *Big Hunger*, pp. 105–107.

⁵⁹ Mark Tushnet, Mark A. Graber, Sanford Levinson, and Adrian Vermeule, "The Administrative State: Law, Democracy, and Knowledge," in *The Oxford Handbook of the U.S. Constitution*, Mark Tushnet, Mark A. Graber, and Sanford Levinson, eds., (New York: Oxford University Press, 2015), <https://doi.org/10.1093/oxfordhb/9780190245757.013.13>.

the like. There was ongoing debate about these normative issues in the popular press, in academic journals, among advocates, in city council meetings, and even in Congress. Yet the USDA's rationale for its decision did not reflect this discourse. Perhaps the USDA's internal decision-making involved grappling with these issues, but their public rationale did not reflect that. Another option is that intra-agency decision-making did not involve grappling with these normative issues. Either way, the USDA's silence on these normative issues strikes us as problematic.

Whether to exclude sugary beverages from SNAP is a normative political question of the sort that, in a democracy, ought to be resolved through citizen input and collective decision-making. The ongoing debate about SNAP exclusions in the media, academia, advocacy community, and among policymakers is exactly the sort of civic engagement and public discourse that we should value in a well-functioning democracy. And yet, all of this public deliberation had no opportunity to input into the actual intra-agency decision-making process—or at least, if it did influence the intra-USDA decision-making process, that is not evident from the outside.

Many democracy theorists have argued that the legitimacy of government law and policy requires that it be the appropriate output of democratic decision-making processes, including electing representatives, voting in referenda, and engaging in public political discourse.⁶⁰ The SNAP program is funded by coercively enforced government taxation, and is an important part of a complex government scheme for subsidizing agricultural production, distribution, and consumption of agricultural product.⁶¹ On this view, because taxation and the national system of food production and distribution directly impact all citizens, all citizens should have an opportunity to shape these policies through public discussion and political participation.

Against this line of argument, one might respond that the democratic legitimacy of Congress pervades administrative judgments, so there's no democratic accountability issue. That is, the initial legislative grant of authority by Congress to an administrative agency also transferred Congress's authority to make legitimate democratic decisions. Moreover, Congress (as democratic representative of the citizens) retains the right to modify the authorizing legislation, thereby resolving or shaping the policy choices that fall under agency authority. Still, a democratic legitimacy theorist might argue that such Congressional delegation often represents a problematic abdication of responsibility.

But even if the legitimacy of the SNAP exclusions policy does not depend on direct citizen input into the decision-making process, it still seems true

⁶⁰ See, for example, Joshua Cohen, "Deliberation and Democratic Legitimacy," in James Bohman and William Rehg, eds., *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press: 1997), 67; David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton, NJ: Princeton University Press, 2009).

⁶¹ Cf. Adam Sheingate, *The Rise of the Agricultural Welfare State: Institutions and Interest Group Power in the United States, France, and Japan* (Princeton, NJ: Princeton University Press, 2003).

that more citizen input would arguably be better, from a democratic point of view, than less input. The values and preferences that citizens hold about anti-hunger, anti-poverty, and nutrition-promotion should have some bearing on the decision-making and policy formation of a democratic government, even if legitimacy does not require it. The conception of social justice and ethical interrelationships that ought to shape society should be sensitive, at least in part, to the values and beliefs that citizens actually hold. Moreover, citizen-stakeholders can contribute needed information about the impact of the policy, and the likely results of exclusion versus nonexclusion.

In short, the SNAP example shows an agency failure to meaningfully engage with the ongoing public debate surrounding a controversial policy issue that implicates issues of ethics and social justice—and this is problematic. That debate drew in a wide range of government officials, public health ethicists, activists, and ordinary citizens, discussing the merits of SNAP exclusions in council meetings, classrooms, and op-ed pages. What we lack is a mechanism for this democratically valuable public discussion to enter into the relevant decision-making processes. If decisions about normatively complex policies fall to an administrative agency such as the USDA, the agency should have some mechanism in place to ensure that it responds to and engages with the public's views and adequately assesses the relevant issues of ethics and social justice.

IV. POSSIBLE SOLUTIONS

It seems that the USDA has either failed to consider and engage with the public debate about the ethics and politics questions related to SNAP exclusions, or it has resolved these questions non-transparently, without publicly explaining where it lands on those issues or explaining why its rejection of SNAP exclusions is justified given the constellation of normative arguments for and against. Both of these scenarios are problematic, for the reasons described in the previous section.

There is a longstanding discussion among scholars about whether politics can and should be kept out of administration.⁶² But the SNAP exclusions debate presents an example in which such separation simply does not seem desirable or possible. The appropriate response, we will suggest, is not to keep politics out of administrative decision-making, but instead, to develop procedures that allow ethical and political questions to be addressed in agency policy-making, consistent with overarching commitments to fairness and democracy. In this section, we describe and evaluate three possible procedures to help agencies effectively evaluate these normative

⁶² This literature is vast, but see for example, James H. Svara, "The Politics-Administration Dichotomy Model as Aberration," *Public Administration Review* 58 no. 1 (1998): 51–58; and Patrick Overeem, "The Value of The Dichotomy: Politics, Administration, and the Political Neutrality of Administrators," *Administrative Theory and Praxis* 27, no. 2 (2005): 311–29.

considerations: decentralization of policy-making, stakeholder input, and citizen juries.

A. Decentralization

The first and perhaps easiest solution is for federal agencies to allow more opportunities for decentralized policy-making, by allowing states and local communities to modify national policies within certain boundaries. For example, the USDA might allow cities and states to experiment with SNAP exclusions individually, as requested by New York City's former Mayor Michael Bloomberg. Decentralization raises worries about national administrability, which might be difficult to overcome in some situations. However, decentralization also allows policy-makers to build up a knowledge and experience base, and to "beta test" new policy proposals before rolling them out nationwide. This "beta testing" can include assessing ethical and social justice issues. In the case of SNAP exclusions, for example, a city or county could implement a sugary drink exclusion and then evaluate whether it increases stigma, reduces program participation rates, is experienced as demeaning, or undermines public support for the SNAP program.

B. Stakeholder input

The second possible solution is to incorporate the perspectives and feedback of stakeholders into agency decision-making. SNAP has a number of core stakeholders, including SNAP recipients, food producers and distributors, and the grocers who accept SNAP payments, as well as secondary stakeholders such as public schools and local public health officials.

Direct feedback from SNAP participants may prompt a more informed debate about the underlying ethical and social justice issues. Do SNAP participants interpret SNAP exclusions as demeaning and infantilizing, or not? If they are seen as demeaning and infantilizing, can this be remedied? Do SNAP participants value having the choice to purchase sugary drinks with SNAP, or is this not a valued choice for some groups of SNAP participants? Having SNAP participants speak to these normative issues directly may be more illuminating and productive than having the ethical debate occur via advocates on both sides claiming to represent their perspectives or interests. While we have some data suggesting that SNAP recipients are split on the issue—Long et al. found that 54 percent would support excluding sugary drinks from SNAP—we lack a holistic understanding of what foods and food choices SNAP recipients value and why.⁶³ More information here could be very helpful in assessing the ethics and justice of SNAP exclusions.

⁶³ Michael W. Long, Cindy W Leung, Lilian WY Cheung, Susan J Blumenthal, and Walter C Willett. "Public Support for Policies to Improve the Nutritional Impact of the Supplemental Nutrition Assistance Program (SNAP)," *Public Health Nutrition* 17, no. 1 (2014): 219–24.

In addition to informing assessment of ethical and social justice issues, direct feedback from SNAP stakeholders could speak to the program's design more generally, helping to identify the program's failings or limitations, and how it might be made more effective. This information could help the USDA and other state and local agencies modify SNAP to better achieve the program's multiple statutory goals simultaneously. Generally speaking (beyond the specific example of SNAP), efforts to encourage healthy eating and prevent overweight/obesity suffer from an effectiveness crisis: the evidence base for interventions and policies is often weak, the evidence of their effectiveness is mixed, and those policies that are effective often have only a small effect.⁶⁴ Some public health researchers have suggested that we need a new paradigm for healthy eating and obesity prevention efforts, one that involves communities from the get-go in identifying opportunities to change eating behavior and designing approaches that work within the context of that community.⁶⁵ A possible use of stakeholder groups is to convene them at the community level and have them engage in this kind of policy design process, not just to engage in deliberation about predetermined policy options.

There is a history of stakeholder participation in agency decision-making. Advisory boards composed of local citizens played a prominent role in many of the New Deal-era government programs, including projects commissioned by the Tennessee Valley Authority.⁶⁶ Similarly, Community Action Agencies formed an important component of President Lyndon Johnson's "war on poverty" in the 1960s.⁶⁷ A number of cities—including New York, Los Angeles, Chicago, Philadelphia, Cleveland, and Kansas City—established "poverty boards" composed of "representatives of the poor" who helped to design policy interventions aimed at

⁶⁴ Emily Stachera, Jeremy Petch, and Timothy Caulfield. "Obesity Is Killing Us. So Why Can't We Do Anything about It?" *Healthy Debate*, February 25, 2016; Garrath Williams, "The IDEFICS Intervention: What Can We Learn for Public Policy?" *Obesity Reviews* 16 Supplement, no. 2 (2015): 151–61.

⁶⁵ A more traditional research and policy design paradigm is to test interventions for effectiveness in one context and then scale-up interventions that are effective, replicating those interventions in other contexts. However, these new contexts are often relevantly different in ways that researchers don't recognize, and interventions that were effective in one context often fail to be effective in another. A new approach to policy design is to use "systems approaches" at the community level to understand the community-level systems within which eating occurs and to identify leverage points where interventions might change eating behavior. See Steven Allender, Andrew D. Brown, Kristy A. Bolton, Penny Fraser, Janette Lowe, and Peter Hovmand, "Translating Systems Thinking into Practice for Community Action on Childhood Obesity," *Obesity Reviews* 20 (2019): 179–84.

⁶⁶ The canonical text about citizen participation in the TVA was written by its Chairman, David E. Lilienthal, *TVA: Democracy on the March* (New York: Harper and Brothers, 1944). For an overview of the history of citizen participation in agency decision-making, see William Simonsen and Mark D. Robbins, *Citizen Participation In Resource Allocation* (New York: Routledge, 2018).

⁶⁷ For an overview of this program, see Peter Marris and Martin Rein, *Dilemmas of Social Reform: Poverty and Community Action in the United States*, 2nd ed. (New York: Routledge, 1967).

alleviating poverty.⁶⁸ More recently, from 1995 until 2002 the Environmental Protection Agency ran a program titled “Project XL” (short for “eXcellence in Leadership”) designed to harness the collaboration of state and local governments, as well as corporations, nonprofit groups, and neighborhood and community organizations in order to create innovative “environmental and public health protection.”⁶⁹ Although not widely implemented, some observers argued that it displayed significant promise.⁷⁰

Finally, in his first term in office, President Barack Obama called on agency heads to implement “a system of transparency, public participation, and collaboration.”⁷¹ He later specified that agency rule-making should be based on “the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.”⁷² While the Obama Administration did work with a variety of stakeholder groups to craft policy, Obama’s call for collaboration did not lead to any permanent shift in administrative law or procedure.

It is fair to say that these historical examples of stakeholder participation have met with mixed results. Even with formal procedures in place, the perspectives of stakeholder are sometimes ignored by agencies. Stakeholder participation has also caused infighting between rival interest groups. The Community Action Agencies of the 1960s, for example, were arguably undermined by such infighting and the lack of clear vision and oversight at the national level.⁷³ Stakeholder participation can also force the agencies to agree to compromises that do not, ultimately, reflect the best overall policy choice.

More generally, direct stakeholder participation could increase, rather than diminish, the risks that an agency’s policy decisions will be captured by special interests. Moreover, including stakeholders could undermine effective policy design, insofar as stakeholders will push for policy decisions that reflect their best interests rather than the public interest. Another issue is that large groups of stakeholders will require some form of informal representation, and there may be no way for all SNAP recipients to participate directly in the decision-making process. So how can we determine who is

⁶⁸ See Don R. Bowen and Louis H. Masotti, “Spokesmen for the Poor: An Analysis of Cleveland’s Poverty Board Candidates,” *Urban Affairs Quarterly* 4, no. 1 (1968): 98–108.

⁶⁹ See “Project XL,” <https://archive.epa.gov/projectxl/web/html/index.html>.

⁷⁰ See Barbara Murdock, Carol Wiessner, and Ken Sexton, “Stakeholder Participation in Voluntary Environmental Agreements: Analysis of 10 Project XL Case Studies,” *Science, Technology and Human Values* 30, no. 2 (2005): 223–50.

⁷¹ Memorandum for the Heads of Executive Departments and Agencies, Transparency and Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009).

⁷² Exec. Order No. 13,563, § 2, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011).

⁷³ For a somewhat critical account of Community Action Agencies, see Daniel P. Moynihan, *Maximum Feasible Misunderstanding: Community Action in the War on Poverty* (New York: Free Press, 1969).

the appropriate representative for this large and diverse group of people?⁷⁴ We also worry that stakeholder participation raises a democratic accountability issue, insofar as it is not the public as a whole that participates, but just stakeholders who have an opportunity to influence policy decisions. On the other hand, horizontal participation by stakeholders is arguably a form of direct democracy that helps to add legitimacy and accountability to government decision-making in general.⁷⁵ As Jody Freeman has argued, “multi-stakeholder processes” have value because they can be “sites at which regulatory problems are redefined, innovative solutions devised, and institutional relationships rethought in ways that are likely to increase both quality and legitimacy.”⁷⁶ In this case, the participation of SNAP recipients and other stakeholders could add needed legitimacy to the USDA’s decision regarding exclusions.

In short, stakeholder participation is a potentially valuable tool for augmenting the knowledge base on which an agency designs and assesses policy options (including but not limited to assessing the attendant ethical and social justice issues). It is not, however, a magic-bullet solution for avoiding agency capture, for ensuring democratic legitimacy, or for making the best overall policy choice.

C. Citizen juries

The third solution goes beyond stakeholders to include members of the public (who may or may not be stakeholders) in the agency decision-making process. On this approach, randomly selected citizens would be asked to serve on “juries” tasked with evaluating the ethical and political merits of a policy proposal. Including a cross-section of all citizens in the decision-making process may result in better representation of a broader range of normative perspectives than would otherwise feature in agency decision-making. Moreover, citizen juries may be less susceptible to capture, especially if, like juries on a criminal or civil trial, they are confidential advisory groups that are convened for a relatively short period of time. Finally, direct citizen involvement would arguably lend greater democratic legitimacy to agency decision-making, especially with respect to ethical and political issues. Much like typical juries in the judicial context, citizen juries act as representatives of their fellows, and act on behalf of the whole community. But unlike typical juries, the citizens who do not serve on a given jury have

⁷⁴ For a discussion of informal political representation, see Wendy Salkin, *Informal Political Representation: Normative and Conceptual Foundations* (Dissertation, Philosophy Department, Harvard University, 2018).

⁷⁵ See, for example, Jody Freeman, “The Private Role in the Public Governance,” *New York University Law Review* 75, no. 3 (2000): 543–675 (arguing that “aggregate” accountability produced through the “horizontal negotiation” of public and private actors is an important alternative to the vertical accountability that dominates the traditional understanding of administrative law).

⁷⁶ Jody Freeman, “Collaborative Governance in the Administrative State,” *UCLA Law Review* 45, no. 1 (1997): 7.

other mechanisms of democratic participation at their disposal to modify the resulting policy, such as asking Congressional to change the authorizing legislation to permit or prohibit sugary drink exclusions.

What might citizen participation look like in practice? A number of legal scholars and theorists have proposed mechanisms specifically designed to allow for direct public participation in administrative decision-making.⁷⁷ For example, David Arkush has proposed a “citizen jury” model, according to which administrative agencies could convene boards composed of one thousand or more randomly selected citizens.⁷⁸ Such juries could be convened physically, or, perhaps more feasibly, by making use of virtual or web-based interaction. Beth Simone Noveck, for example, proposed an online version of this deliberative form of citizen participation, which she calls “Unchat”—a chat-room-like software program that could allow citizens to participate in a virtual “town hall” meeting.⁷⁹ On both of these proposals, citizen juries would be provided with relevant information regarding a policy question, and would be tasked with answering binary or multiple-choice questions. The citizen jury model would likely work best if the jury is presented with two clearly different policy options—for instance, whether to exclude sugary beverages from SNAP or not—both of which are easy to understand, and either of which would be easy for the agency to implement.

Richard Pildes and Cass Sunstein have described a slightly different citizen participation model, based on a number of social science experiments in which citizen focus groups were employed by government agencies and private entities to evaluate policy choices.⁸⁰ Like the larger juries described above, these small groups were typically composed of randomly selected citizens rather than stakeholders. The participants are educated on the issues, and asked to discuss the pros and cons of proposed policy changes. Often the participants are provided with relevant information in advance of any formal meetings, and the process of deliberation can be spread out over the course of several weeks or months. According to Pildes and Sunstein, these small-group deliberations can be conducive to resolving complex and technical questions. Moreover, the experiments found that participants frequently changed or updated their initial views in light of the information presented to them and the conversation with fellow participants.

⁷⁷ Reeve T. Bull, Attorney Advisor to the Administrative Conference of the United States has helpfully canvassed a number of specific proposals. Reeve T. Bull, “Making the Administrative State Safe for Democracy: A Theoretical and Practical Analysis of Citizen Participation in Agency Decisionmaking,” *Administrative Law Review* 65, no. 3 (2013): 611–64.

⁷⁸ David J. Arkush, “Direct Republicanism in the Administrative Process,” *George Washington Law Review* 81, no. 5 (2013): 1458–1528.

⁷⁹ Beth Simone Noveck, “Designing Deliberative Democracy in Cyberspace: The Role of the Cyber-Lawyer,” *Boston University Journal of Science and Technology Law* 9, no. 1 (2003): 1–91.

⁸⁰ Richard H. Pildes and Cass R. Sunstein, “Reinventing the Regulatory State,” *University of Chicago Law Review* 62, no. 1 (1995): 1–129.

James Fishkin describes similar results from experiments conducted in the UK involving a hybrid large- and small-group deliberation approach.⁸¹ On Fishkin's model, a large group of randomly selected citizens are provided information in advance, and then also given presentations by experts. Then, the participants are divided into small groups, which he also labels "citizen juries," for discussion and deliberation. Like Arkush's large-scale citizen jury model, Fishkin's hybrid approach allows for broad-based participation. And like Pildes and Sunstein, participants may get the benefit of deliberation and interaction with their fellows. Fishkin also found that citizens updated their positions in light of their new information and discussion. However, even with the deliberative component, the large scale likely prevents citizens on Fishkin's model from engaging in complex or technical decisions, or making their own proposals.

In short, we think that citizen juries or focus groups, while still largely untested, could be an important addition to agency decision-making procedure, one that improves agency assessment of normative policy issues and reduces the chance of capture.

V. CONCLUSIONS

This essay has examined the issue of excluding sugary drinks from SNAP as a window into the United States administrative state. There are different ways to tell the story of SNAP exclusions. From one perspective, it is an administrative state success story: the vagueness of the authorizing legislation in combination with the USDA's wise stewardship has prevented the public health community from hijacking a program that serves multiple aims. From another perspective, the saga of SNAP exclusions is not a success story. The SNAP exclusions case illustrates features of the administrative state that have troubled theorists, in particular special interests (in this case, the soda industry) potentially influencing agencies and Congress in ways that may undermine effective policy design.⁸² And despite the USDA repeatedly denying exclusion requests, the public health community and the public health officials are not willing to let it go, in part because the USDA's reasons for rejecting SNAP exclusions are not accepted on the merits. Congress could resolve the issue by passing legislation allowing states to try out exclusions or by ruling out exclusions, but has failed to do so.

Given Congressional inactivity, it will often fall to administrative agencies to make policy decisions that rest on complex ethical and political judgments. In the case of SNAP exclusions, the USDA has failed to adequately justify its decision—and to dispel the appearance of capture—in a

⁸¹ James S. Fishkin, "The Televised Deliberative Poll: An Experiment in Democracy," *The Annals of the American Academy of Political and Social Science* 546, no. 1 (1996): 132–40.

⁸² Tushnet, Graber, Levinson, and Vermeule, "The Administrative State: Law, Democracy, and Knowledge."

way that ought to satisfy participants in the SNAP exclusion debate. We believe that the USDA's failure in this case represents a systematic flaw in the U.S. administrative state, a flaw that may require general reforms that go beyond the narrow issue of SNAP exclusions. There may be no silver bullet solution to this complex problem, but we have suggested a few possible fixes, including decentralization of policy-making, stakeholder input, and citizen juries, each of which has certain advantages and disadvantages. Whether or not any of these specific proposals prove workable, however, we believe that some reform is needed, especially given the prospect of Congressional inactivity and the increasing importance of administrative agencies in the future.

*Political Philosophy and Philosophy of Law, Berman Institute of Bioethics,
Johns Hopkins University, USA*

*Political Philosophy and Public Health Ethics, Berman Institute of Bioethics
Johns Hopkins University, USA*