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# The Problem with Public Charge

**ABSTRACT.** The United States has long excluded immigrants who are likely to become a "public charge." But while the exclusion has remained unchanged, the nation has changed around it, further blurring its unclear meaning. As public benefits replaced poorhouses, Congress and the courts left the administrative state to reconcile public charge with evolving commitments to public welfare.

This Note seeks to identify the causes of public charge confusion by mapping the exclusion's administrative history. A field-guidance document from 1999 marks the only comprehensive effort to reconcile public charge with contemporary grants of benefits. Archived emails, memos, and drafts reveal the causes, scope, and character of the preceding interagency negotiations, as well as a yet-unidentified interagency relationship I term "zero-sum asymmetry," whereby one agency completes its statutory mission at the expense of another's. The guidance's core compromise—a distinction between cash and supplemental benefits—mitigated but could not eliminate this dynamic. Reading the archived negotiations in light of public charge's history, I offer a more compelling account of what public charge requires.

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> "THEY ARE PUBLIC CHARGES NOW OR PUBLIC PROBLEMS. THEY ARE PROBLEMS NOW."
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> - WILFORD J. FORBUSH[1]

## INTRODUCTION

When a noncitizen applies for a green card, or seeks to enter the United States, they must show that they are not "likely at any time to become a public charge."[2] This, the public charge exclusion, aims to stop noncitizens from entering and remaining in the country if they are likely to require some unspecified degree of public assistance.[3] It has remained virtually unchanged since the first general federal immigration statute was enacted in 1882.[4] In every immigration statute since, Congress has kept the "public charge" language in place with little indication of how that language ought to be understood by courts, officials, and the public.[5]

But while the language of the exclusion has remained the same for over a century, the country's commitments to those within its borders have changed. The United States transitioned from a welfare system of state-funded poorhouses and private charitable organizations to one characterized by federal

1. *Legalization of Illegal Immigrants: Hearing Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 97th Cong. 41 (1981) (statement of Wilford J. Forbush, Deputy Assistant Secretary for Health-Operations, Public Health Service, Department of Health & Human Services).

2. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, § 212(a)(15), 66 Stat. 163, 183 (codified as amended at 8 U.S.C. § 1182(a)(4)(A) (2018)).

3. *Id.*; *see* 8 U.S.C. § 1601(1) (2018) ("Self-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes.").

4. An Act to Regulate Immigration, Pub. L. No. 47-376, §§ 1-5, 22 Stat. 214, 214 (1882); *see* HIDETAKA HIROTA, EXPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY 3 (2017).

5. *See* An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens Under Contract or Agreement to Perform Labor, Pub. L. No. 51-551, § 1, 26 Stat. 1084, 1084 (1891) (changing the exclusion to those "likely to become a public charge"); An Act to Regulate the Immigration of Aliens into the United States, Pub. L. No. 57-162, § 2, 32 Stat. 1213, 1214 (1903); An Act to Regulate the Immigration of Aliens into the United States, Pub. L. No 59-96, § 2, 34 Stat. 898, 899 (1907); An Act to Regulate the Immigration of Aliens to, and the Residence of Aliens in, the United States, Pub. L. No. 64-301, § 3, 39 Stat. 874, 876 (1917); INA § 212(a)(15) (codified as amended at 8 U.S.C. § 1182(a)(4)(A) (2018)); Immigration Act of 1990, Pub. L. No. 101-649, §§ 601(a)(a)(4), 602(a)(a)(5), 104 Stat. 4978, 5072, 5081.

grants of public benefits.[6] Since the 1930s, Congress has endeavored to improve public welfare by empowering agencies to administer benefits to eligible people.[7] By the end of the twentieth century, different agencies administered Medicaid and Medicare,[8] Social Security,[9] and the Food Stamp Program.[10]

For decades, no federal restrictions denied eligibility for benefits programs on the basis of citizenship.[11] But beginning in the 1970s, a noncitizen's eligibility for benefits became largely dependent on their immigration status.[12] Federal immigration law divides noncitizens into three categories: lawful permanent residents (LPRs),[13] who have been granted green cards and intend to live in the United States permanently; temporary residents,[14] such as students or business

6. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 146-78, 206-73 (1986); Torrie Hester, Hidetaka Hirota, Mary E. Mendoza, Deirdre Moloney, Mae Ngai, Lucy Salyer & Elliott Young, *Historians' Comment: DHS Notice of Proposed Rule "Inadmissibility on Public Charge Grounds,"* IMMIGRANT L. CTR. MINN. 6-7 (Oct. 5, 2018), https://www.ilcm.org/wp-content/uploads/2018/10/Historians-comment-FR-2018-21106.pdf [https://perma.cc/22MY-9Z5X].

7. JERRY L. MASHAW, RICHARD A. MERRILL, PETER M. SHANE, M. ELIZABETH MAGILL, MARIANO-FLORENTINO CUELLAR & NICHOLAS R. PARRILLO, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS 7 (8th ed. 2019). Administrative law developed in response, determining how these statutes empowered and bound the agencies they created. Richard A. Epstein, *The Role of Guidance in Modern Administrative Procedure: The Case for De Novo Review*, 8 J. LEGAL ANALYSIS 47, 52-53 (2016).

8. 42 U.S.C. § 1395 (2018) (Medicare); *id.* § 1396 (Medicaid).

9. *Id.* § 1381a; *see* Joel F. Handler, *"Constructing the Political Spectacle": The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 921 (1990); *see also* KATZ, *supra* note 6, at 261 (describing the expansion of benefits spending in the 1960s and 1970s).

10. Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703; COMM. ON EXAMINATION OF THE ADEQUACY OF FOOD RESOURCES AND SNAP ALLOTMENTS, NAT'L RESEARCH COUNCIL, SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM: EXAMINING THE EVIDENCE TO DEFINE BENEFIT ADEQUACY 27-32 (Julie A. Caswell & Ann L. Yaktine eds., 2013) (describing the program's origin in 1939 as well as many of the program's subsequent forms).

11. *See* Cybelle Fox, *Unauthorized Welfare: The Origins of Immigrant Status Restrictions in American Social Policy*, 102 J. AM. HIST. 1051, 1053, 1060 fig.2 (2016) ("When the modern welfare state was established in 1935 no federal laws barred noncitizens, even unauthorized immigrants, from social assistance."). Still, many immigrants' access to these benefits was functionally impeded by residency or occupational requirements, as well as racial discrimination by local officials. *Id.* at 1057.

12. *See* ALISON SISKIN, CONG. RESEARCH SERV., RL33809, NONCITIZEN ELIGIBILITY FOR FEDERAL PUBLIC ASSISTANCE: POLICY OVERVIEW *passim* (2016); *see also* Fox, *supra* note 11, at 1053 (describing the development of immigration-status restrictions on public benefits beginning in the 1970s).

13. *See* INA § 201(a) (codified as amended at 8 U.S.C. § 1151(a) (2018)).

14. *See id.* § 101(15) (codified as amended at 8 U.S.C. § 1101(a)(15) (2018)) (defining temporary residents or "nonimmigrant aliens").

travelers; and undocumented people.[15] The scope of benefits available to each group has changed over time as Congress has adjusted eligibility requirements.[16]

The public charge determination — whether someone is "likely at any time to become a public charge" and therefore excludable — applies when a noncitizen is (1) applying for a visa to come to the United States;[17] (2) seeking physical admission to the United States;[18] or (3) seeking a green card through adjustment of status (AOS), the process by which temporary legal residents and some undocumented people already residing in the United States can apply for LPR status.[19] Despite already living in the United States when they apply, AOS applicants must demonstrate that they do not trigger any grounds of inadmissibility at the time of their adjustment of status, thereby becoming subject to the public charge ground once again. Thus, in practice, the public charge determination affects three groups of people: (1) people abroad applying for immigrant visas from U.S. consulates; (2) some LPRs returning from a trip outside the United States;[20] and (3) temporary residents and undocumented people applying for AOS, unless specifically exempted.[21]

Enforcement of the public charge exclusion today falls to two agencies. Consular officers in the Department of State (DOS), stationed abroad at U.S.

15. *See id.* § 237(a) (codified as amended at 8 U.S.C. § 1227(a) (2018)) (providing for the deportation of certain noncitizens); *see also* T. ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA, MARYELLEN FULLERTON & JULIET P. STUMPF, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 269-70 (8th ed. 2016) (describing immigrants, nonimmigrants, and those "without lawful immigration status").

16. Eligibility criteria are usually determined by federal statute, although they are often shaped by agencies and states. Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL'Y 89, 99-101 (2002). Today, undocumented people are ineligible for the vast majority of federal public benefits. *See* Randy Capps, Mark Greenberg, Michael Fix & Jie Zong, *Policy Brief: Gauging the Impact of DHS' Proposed Public-Charge Rule on U.S. Immigration*, MIGRATION POL'Y INST. 6, 10-11 (Nov. 2018), https://www.migrationpolicy.org/research/impact-dhs-public-charge-rule-immigration [https://perma.cc/H6CT-MYAC].

17. INA § 212(a)(4)(A) (codified as amended at 8 U.S.C § 1182(a)(4)(A) (2018)).

18. *Id.*

19. *Id.* § 245(a)(2) (codified as amended at 8 U.S.C. § 1255 (2018)); *see* ABIGAIL F. KOLKER & BEN HARRINGTON, CONG. RESEARCH SERV., R45313, IMMIGRATION: FREQUENTLY ASKED QUESTIONS ABOUT "PUBLIC CHARGE" 3 (2018).

20. The determination only affects Lawful Permanent Residents (LPRs) who come within certain criteria, such as being absent from the United States continuously for 180 days. INA § 101(a)(13)(C) (codified as amended at 8 U.S.C. § 1101(a)(13)(C)(ii) (2018)).

21. The exemptions include refugees, asylees, and victims of certain crimes. *Id.* § 209(c) (codified as amended at 8 U.S.C. § 1159 (2018)); KOLKER & HARRINGTON, *supra* note 19, at 4-5 (identifying "[w]ho is exempt from public charge determinations of inadmissibility").

embassies, apply the determination to prospective immigrants.[22] Immigration officers within the Department of Homeland Security (DHS) make the determination both at the border when admitting noncitizens and when adjudicating AOS applications.[23] Benefits-granting agencies[24] have no role in immigration enforcement and therefore take no part in the determination. Conversely, DOS and DHS, the immigration agencies enforcing the exclusion,[25] take no role in determining eligibility for benefits.

In making the determination, agency officers are instructed to consider the "totality of [the] circumstances" to decide whether a person is likely to become a public charge in the future.[26] As part of the totality-of-the-circumstances test, officers look at the noncitizen's history of receiving public benefits.[27] They are also statutorily required to consider, at a minimum, "age; health; family status; assets, resources, and financial status; and education and skills."[28] Consular officers making the determination have near-complete discretion over the decision,[29] and there is no appeals process for a denial.[30] Similarly, it is very difficult to appeal a denial of AOS by an immigration officer.[31] Crucially, the officer does not consider benefits use to determine whether a person *has become* a public

22. *See* KOLKER & HARRINGTON, *supra* note 19, at 3 n.24.

23. *See Public Charge Fact Sheet*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Sept. 22, 2020), https://www.uscis.gov/news/public-charge-fact-sheet [https://perma.cc/EXG3-LUGM].

24. These include the Department of Health and Human Services (HHS), the Social Security Administration (SSA), and the Department of Agriculture (USDA).

25. Prior to 2003, DHS's authority rested with the Immigration and Naturalization Service (INS).

26. *Public Charge Fact Sheet*, *supra* note 23.

27. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R43220, PUBLIC CHARGE GROUNDS OF INADMISSIBILITY AND DEPORTABILITY: LEGAL OVERVIEW 8-10 (2017). When an officer looks at benefit receipt to assess whether someone is "likely to become a public charge," they are not determining whether a person was *eligible* for those benefits—by definition, if the noncitizen lawfully received the public benefit, they were, in fact, eligible for it.

28. INA § 212(a)(4)(B)(i) (codified as amended at 8 U.S.C. § 1182(a)(4)(B)(i) (2018)). Affidavits of support—legally enforceable contracts where a third-party citizen or lawful permanent resident takes financial responsibility for the applicant—weigh in the noncitizen's favor and are sometimes required, such as for family-sponsored and certain employment-based applicants. *Id.* § 212(a)(4)(B)(ii)-(C)(ii) (codified as amended at 8 U.S.C. § 1182(a)(4)(B)(ii)-(C)(ii) (2018)); *see also Affidavit of Support*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-of-support [https://perma.cc/6FV2-2T47].

29. *See* Kerry v. Din, 576 U.S. 86 (2015).

30. Donald S. Dobkin, *Challenging the Doctrine of Consular Nonreviewability in Immigration Cases*, 24 GEO. IMMIGR. L.J. 113, 114 (2010).

31. *See* 8 C.F.R. § 245.2(a)(5)(ii) (2020) (stating that "[n]o appeal lies from the denial of an application," although the applicant may renew their application); KOLKER & HARRINGTON, *supra* note 19, at 10.

charge. Rather, the officer looks at past receipt of benefits, among other factors, to determine whether a noncitizen will *later become* a public charge. The question of which public benefits will factor into the public charge determination thus becomes centrally relevant for noncitizens seeking AOS or admission to the United States.[32]

In 2018, the Trump Administration DHS proposed a rule contemplating a drastic expansion of the grounds for public charge exclusion.[33] It proposed that officers making the public charge determination consider past receipt of Medicaid, Supplemental Nutrition Assistance Program benefits, and subsidized housing, among other previously ignored benefits.[34] The rule threatened to chill access to benefits for millions of people, causing immense harm.[35] Notably, few noncitizens were likely to be excluded on the basis of their benefits receipt under the rule, because most of those subject to the public charge determination lack

**32.** A different provision of immigration law provides that someone who "has become a public charge" within five years after entry is deportable. *See* INA § 237(a)(5) (codified as amended at 8 U.S.C. § 1227(a)(5) (2018)). Virtually no one has been deported under this retroactive provision since the 1950s. *See infra* notes 117-122 and accompanying text.

**33.** Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (Oct. 10, 2018) (to be codified in scattered parts of 8 C.F.R.).

**34.** *Id*. at 51,166-74.

**35.** *See* Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501, 538 (2018) ("The proposed regulations . . . represent the gravest threat to medical assistance, food assistance, and disability assistance for immigrants and their families since the 1996 Welfare Reform Act."); Tara Watson, *Inside the Refrigerator: Immigration Enforcement and Chilling Effects in Medicaid Participation*, 6 AM. ECON. J. 313, 314 (2014); Leah Zallman, Karen E. Finnegan, David U. Himmelstein, Sharon Touw & Steffie Woolhandler, *Implications of Changing Public Charge Immigration Rules for Children Who Need Medical Care*, JAMA PEDIATRICS, July 1, 2019, at 5 ("[M]illions of children in need of medical care are at risk of losing benefits owing to the proposed changes . . . likely contribut[ing] to child deaths and future disability."); Hamutal Bernstein, Dulce Gonzalez, Michael Karpman & Stephen Zuckerman, *One in Seven Adults in Immigrant Families Reported Avoiding Public Benefit Programs in 2018*, URB. INST. 12-14 (May 2019), https://www.urban.org/sites/default/files/publication/100270/one_in_seven_adults_in_immigrant_families_reported_avoiding_publi_7.pdf [https://perma.cc/C2FK-XFMY]; Capps et al., *supra* note 16, at 4; *Changes to "Public Charge" Inadmissibility Rule: Implications for Health and Health Coverage*, KAISER FAM. FOUND. 4-5 (Aug. 12, 2019), http://files.kff.org/attachment/Fact-Sheet-Changes-to-Public-Charge-Inadmissibility-Rule-Implications-for-Health-and-Health-Coverage [https://perma.cc/9UTR-JKYF]; Leighton Ku, *New Evidence Demonstrates that the Public Charge Rule Will Harm Immigrant Families*, HEALTH AFF. BLOG (Oct. 9, 2019), https://www.healthaffairs.org/do/10.1377/hblog20191008.70483 [https://perma.cc/882L-KDMB]; Holly Straut-Eppsteiner, *Documenting Through Service Provider Accounts Harm Caused by the Department of Homeland Security's Public Charge Rule*, NAT'L IMMIGR. L. CTR. 2 (2020), https://www.nilc.org/wp-content/uploads/2020/02/dhs-public-charge-rule-harm-documented-2020-02.pdf [https://perma.cc/ABR9-YV2N].

access to most of the relevant benefits.[36] After the requisite notice-and-comment period, the rule was finalized in August 2019.[37] Litigation ensued; federal courts enjoined implementation of the rule,[38] those injunctions were lifted,[39] and the rule is currently in partial effect.[40]

President-elect Joe Biden has promised to "[r]everse Trump's public charge rule."[41] But the Trump rule did not come to occupy an empty space. It replaced a field-guidance document[42] published in 1999 by the INS, DHS's predecessor,[43] which governed the administration of the exclusion until the Trump rule took

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**36.** Randy Capps, Julia Gelatt & Mark Greenberg, *The Public-Charge Rule: Broad Impacts, but Few Will Be Denied Green Cards Based on Actual Benefits Use*, MIGRATION POL'Y INST. (Mar. 2020), https://www.migrationpolicy.org/news/public-charge-denial-green-cards-benefits-use [https://perma.cc/7635-UP4U].

**37.** Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,297 (Aug. 14, 2019) (to be codified in scattered parts of 8 C.F.R.).

**38.** Casa de Md., Inc. v. Trump, 414 F. Supp. 3d 760, 767 (D. Md. 2019); Cook Cty. v. McAleenan, 417 F. Supp. 3d 1008, 1014 (N.D. Ill. 2019); New York v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 334, 340 (S.D.N.Y. 2019); City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs., 408 F. Supp. 3d 1057, 1073 (N.D. Cal. 2019); Washington v. U.S. Dep't of Homeland Sec., 408 F. Supp. 3d 1191, 1199, (E.D. Wash. 2019). The injunctions in Washington and the Northern District of California were stayed, City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs., 944 F.3d 773, 780-81 (9th Cir. 2019), as was the Maryland injunction, Casa de Md., Inc. v. Trump, No. 19-2222, 2020 BL 13034 (4th Cir. Jan. 14, 2020).

**39.** *See* New York v. U.S. Dep't of Homeland Sec., 974 F.3d 210 (2d Cir. 2020) (lifting a nationwide injunction on the rule's implementation). The Supreme Court lifted two preliminary injunctions in early 2020, allowing the rule to go into force, until federal district courts again enjoined its implementation later the same year. *See* Wolf v. Cook Cty., 140 S. Ct. 681 (mem.) (2020) (lifting the District of Illinois's state-wide injunction); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (mem.) (2020) (lifting S.D.N.Y.'s nationwide injunction); New York v. U.S. Dep't of Homeland Sec., No. 1:19-cv-07777-GBD, 2020 WL 4347264 (S.D.N.Y. July 29, 2020) (reinstating an injunction).

**40.** As of the time of writing, the Ninth Circuit has enjoined implementation in eighteen states and the District of Columbia. City & Cty. of San Francisco v. U.S. Citizenship & Immigration Servs., No. 19-17213 (9th Cir. Dec. 2, 2020). For a timeline of litigation, including litigation of the companion Department of State (DOS) public charge rule, see *Public Charge Timeline*, IMMIGRANT LEGAL RESOURCE CTR. (Sept. 14, 2020), https://www.ilrc.org/sites/default/files/resources/2020.09.14_public_charge_timeline.pdf [https://perma.cc/2G68-W5TR].

**41.** *The Biden Plan for Securing Our Values as a Nation of Immigrants*, BIDEN FOR PRESIDENT, https://joebiden.com/immigration [https://perma.cc/P9Q6-HX5X].

**42.** Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28,689 (Mar. 26, 1999) [hereinafter 1999 Guidance].

**43.** Department of Homeland Security (DHS) took over INS functions in 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, §§ 402(3), 441, 116 Stat. 2135, 2177-78, 2192.

effect in February 2020.[44] Issued over a century after the exclusion was first enacted, the 1999 guidance provided the first comprehensive account of what "public charge" means, how to apply it, and which benefits would "count" against a noncitizen or instead be ignored by immigration officers. Previously, no uniform federal policy identified which public benefits would and would not "count" in the public charge determination. The guidance stated that while "cash" benefits would count against a noncitizen, "non-cash," or "supplemental," benefits like Medicaid, food stamps, and subsidized housing would not.[45]

Despite a robust literature on the public charge exclusion, little attention has been paid to its administrative history — especially the 1999 guidance. Recent work has highlighted the exclusion's discriminatory application,[46] criticized the Trump rule's inconsistency with historical practice,[47] and identified its devastating effects on public health.[48] But there is a less-known parallel story: how the regulatory state has attempted to reconcile public charge with evolving legal commitments to provide for those in need.[49]

In this Note, I argue that the public charge exclusion has always stood in tension with another government aim — to provide for those, including newcomers, in need of assistance. This tension has contributed to a public charge enforcement regime characterized by overreach and inconsistency, largely unguided by any coherent doctrine. The development of contemporary benefits programs has placed the regulatory priorities of exclusion and assistance in direct

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**44.** MANUEL, *supra* note 27, at 7-8 (describing how the guidance has apparently remained U.S. immigration policy since 1999, even after DHS took over for Immigration and Naturalization Service (INS), and "continue[s] to be cited as an authoritative source"); *see* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,133 (proposed Oct. 10, 2018) (to be codified in scattered parts of 8 C.F.R.) ("[United States Citizenship and Immigration Services] has continued to follow the 1999 Interim Field guidance in its adjudications, and DOS has continued following the public charge guidance set forth in the [Foreign Affairs Manual].").

**45.** 1999 Guidance, *supra* note 42, at 28,692-93.

**46.** Cori Alonso-Yoder, *Publicly Charged: A Critical Examination of Immigrant Public Benefit Restrictions*, 97 DENV. L. REV. 1, 6-8 (2019); Anna Shifrin Faber, Note, *A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation*, 108 GEO. L.J. 1363, 1369-80 (2020); *see also* Lisa Sun-Hee Park, *Perpetuation of Poverty Through "Public Charge,"* 78 DENV. U. L. REV. 1161, 1171-72 (2001) (describing the discriminatory effects of the public charge exclusion in the 1990s).

**47.** Hammond, *supra* note 35, at 518-27; Hester et al., *supra* note 6, at 1.

**48.** Medha D. Makhlouf, *The Public Charge Rule as Public Health Policy*, 16 IND. HEALTH L. REV. 177, 198-208 (2019).

**49.** *See* Patricia Russell Evans, "Likely to Become a Public Charge," Immigration in the Backwaters of Administrative Law, 1882-1933 (1987) (unpublished Ph.D. dissertation, George Washington University) (on file with author). Evans's dissertation focuses on an earlier era of public charge enforcement, but she arrives at a similar conclusion: a lack of institutional consensus on what "public charge" meant led to inconsistent enforcement. *Id.* at 231-58.

competition. As a result, any public charge determination that considers benefits receipt necessarily impedes the public-welfare aims of benefits regimes, by deterring noncitizens from receiving benefits for which they are lawfully eligible.

A reversal of the Trump rule should mean, at the very least, a return to the compromise of the 1999 guidance. But there is a better option short of congressional action: a rule that prohibits the consideration of all benefits receipt in the inadmissibility determination, carving public benefits out of the totality-of-the-circumstances test. Such a rule would be wise policy and consistent with immigration law.

Part I charts the limited and fraught efforts of Congress, courts, and agencies to define "public charge" in relation to evolving commitments to public welfare. I identify the one instance in which Congress considered a distinction that might guide the public charge determination, and contend that this distinction and its related regulations house the most coherent "doctrine" public charge has.

In Part II, I map the causes and development of the 1999 guidance using archival documents from the National Archives and Records Administration (NARA) website.[50] I analyze the interagency negotiations preceding the guidance, including how the Clinton Administration used Congress's distinction between cash and supplemental benefits to broker a compromise between sets of agencies with competing regulatory priorities.

In Part III, I theorize what I call "zero-sum asymmetry"—the interagency relationship characterizing the modern administration of public charge. In doing so, I build on and complicate existing theories of interagency relationships and conflict. I proceed by suggesting, as the Department of Health and Human Services (HHS) did in the guidance negotiations, that a rule prohibiting the consideration of all lawful benefits would be permissible and prudent. I conclude by observing that public charge may be fundamentally incompatible with firmer and more recent commitments to those in need.

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50. In this Note, I rely on archival documents from the series "Cynthia Rice's Subject Files" available for download as PDFs in the National Archives Catalog. Search Results for *Cynthia Rice's Subject Files*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov [https://perma.cc/248N-LL2F] (search for "Welfare - Immigrants - Public Charge"). "Cynthia Rice served in the Clinton Administration as Special Assistant to the President for Domestic Policy from February 1997 to the end of the administration (January 2001)." *Cynthia Rice's Subject Files*, NAT'L ARCHIVES CATALOG, https://catalog.archives.gov/id/647851 [https://perma.cc/6BQR-CZC4]. Each document title begins with "Welfare - Immigrants - Public Charge" followed by a unique combination of a roman numeral and a number. To identify archival sources from this collection, I will use the following system: (PC [Roman Numeral] [[Number]] [Page number within PDF]).

## I. THE HISTORICAL INTERPRETATION AND APPLICATION OF PUBLIC CHARGE

In this Part, I consider public charge's interpretation and application from 1882 to the 1990s. Public charge's history reveals a provision in search of a coherent doctrine, plagued by inconsistent enforcement and in tension with other government aims. Early interventions by Congress and the Supreme Court attempting to clarify the scope of the exclusion only contributed to the confusion. As benefits regimes replaced poorhouses, the administrative state hesitantly addressed the growing tensions between exclusion and assistance regimes. Congress, meanwhile, began an unbroken pattern of using eligibility criteria to control immigrants' access to benefits, rather than the public charge exclusion. In Section I.E, I identify Congress's only statement addressing how federal benefits regimes interact with public charge—the Special Rule in the Immigration Reform and Control Act of 1986 (IRCA)—and suggest that its distinction has formed the basis of a modern, and flawed, public charge "doctrine."

### *A. Origins: The Poorhouse and the Head Tax*

Versions of the public charge exclusion existed in the "poor laws" of most colonies and early states, which aimed to prevent the immigration of poor people.[51] Seaboard states like New York and Massachusetts passed laws excluding those likely to receive relief or become a "burden or charge."[52] Local officials enjoyed broad discretion in enforcing these and other immigration restrictions,[53] while the federal government played only a limited role in regulating immigration until the final quarter of the 1800s.[54]

Congress first enacted "public charge" language in the 1882 Immigration Act, the first federal law to regulate general immigration.[55] Even at this early stage, two regulatory aims stood in tension, as reflected in two provisions of the 1882 Act. While the Act prohibited the landing of "any convict, lunatic, idiot, or any

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**51.** *See* HIROTA, *supra* note 4, at 68-69. For an examination of poor laws and early state and colonial public charge policy, see Hester et al., *supra* note 6, at 2-3.

**52.** E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965, at 390-92 (1981). Delaware similarly passed legislation in 1740 to limit the migration of those "who, by reason of age, impotence or indigence, have become a heavy burthen and charge." *Id.* at 392.

**53.** *See* HIROTA, *supra* note 4, at 3 (describing the "massive discretionary power" of state officials in New York and Massachusetts to enforce state immigration laws).

**54.** ALEINIKOFF ET AL., *supra* note 15, at 6.

**55.** *See* HUTCHINSON, *supra* note 52, at 410, 412; SHARON D. MASANZ, CONG. RESEARCH SERV., 70-108, HISTORY OF THE IMMIGRATION AND NATURALIZATION SERVICE 7 (1980).

person unable to take care of himself or herself without becoming a public charge,"[56] it also created a public fund "for the care of immigrants arriving in the United States, [and] for the relief of such as are in distress."[57] The fund was driven by a federal "head tax" on steamship companies to reimburse states for the financial burden of caring for destitute immigrants, who often relied upon "state or local hospitals or almshouses."[58] In upholding the tax, the Supreme Court understood assistance to be a central aim of the Act, calling it "humane" and "highly beneficial to the poor and helpless immigrant."[59]

At this time, local institutions funded by charitable organizations and state governments performed the nation's social-welfare function (albeit poorly), while the federal government played little role.[60] Those in need often sought aid from almshouses, asylums, and poorhouses.[61] State charity boards directed money to these institutions, which housed the poor and sick for extended stays.[62] The 1882 Act's public fund to supplement state welfare expenditures suggests that mere receipt of any such assistance was insufficient to render one a public charge, since these funds aimed to reimburse the costs of *accepted* immigrants. Furthermore, it demonstrates that Congress was legislating with two objectives in mind—first, "provid[ing] charitable assistance to newcomers,"[63] and second, excluding noncitizens likely to need such assistance.

The statutory scheme in place today formed shortly thereafter. In 1891, Congress amended the 1882 Act to exclude "[a]ll idiots, insane persons, paupers or

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**56.** Immigration Act of 1882, Pub. L. No. 47-376, § 2, 22 Stat. 214, 214. Although Congress first considered the national exclusion of public charges in 1835, it declined to legislate until growing anti-Chinese sentiment spurred bipartisan support for a general-purpose federal immigration law, followed shortly thereafter by the Chinese Exclusion Act. *See* ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 270-72 (1990); HIROTA, *supra* note 4, at 189 (identifying "exclusion sentiment" as the decisive factor in the Immigration Act's passage); *see also* JANE PERRY CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 105 (1931) (attributing the impetus for the legislation to the failure of state attempts at a head tax); HUTCHINSON, *supra* note 52, at 410, 412 (describing the nativist sentiments that spurred early discussion of excluding likely public charges).

**57.** Immigration Act of 1882 § 1.

**58.** Evans, *supra* note 49, at 93, 100. States lobbied for the tax after the Supreme Court struck down state-level head taxes. *Id.* at 78-84; *see* HIROTA, *supra* note 4, at 180-204.

**59.** Edye v. Robertson (*Head Money Cases*), 112 U.S. 580, 590 (1884).

**60.** *See* Hester et al., *supra* note 6, at 2-3. *See generally* KATZ, *supra* note 6 (describing various sources of funding for charitable organizations serving the poor).

**61.** *E.g.*, Patrick T. Collins, *Guide to the Almshouse Records*, CITY BOS. ARCHIVES & RECS. MGMT. DIVISION, https://www.cityofboston.gov/Images_Documents/Guide%20to%20the%20Almshouse%20records_tcm3-30021.pdf [https://perma.cc/WSW6-4LYX] (explaining in a historical note the history of the Boston almshouse).

**62.** *See* KATZ, *supra* note 6, at 3-112.

**63.** HIROTA, *supra* note 4, at 182.

persons *likely to become a public charge*."[64] The 1891 Act also centralized control of immigration—formerly a loose state-federal coordination effort—in a federal Bureau of Immigration with sole authority to enforce all immigration laws, including inspection and exclusion.[65] In 1903, Congress provided for a separate ground of deportation,[66] creating the bifurcated public charge framework in place today: a backward-looking deportation determination (has this person *become* a public charge?)[67] and a forward-looking prospective exclusion determination (are they *likely* to become a public charge?).[68]

### *B. 1890s-1920s: Inconsistent Enforcement*

Few immigrants were actually excluded or deported in the decades following the 1891 Act.[69] But of those excluded, public charges made up a majority from 1892 to 1920.[70] Public charge deportations were also relatively common. From 1911 to 1920, public charges made up 33% of all deportations, and 12% from 1921 to 1930.[71]

Though the federal government assumed direct control over immigration by statute in 1891, it failed to establish a sufficient immigration bureaucracy to enforce its new laws.[72] During the turn of the century, waves of immigrants,

64. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084 (emphasis added).

65. *See* MASANZ, *supra* note 55, at 9.

66. Immigration Act of 1903, Pub. L. No. 57-162, § 20, 32 Stat. 1213, 1218 ("[W]ho shall be found a public charge therein, from causes existing prior to landing, shall be deported.").

67. The deportation provision has been virtually unenforced since *Matter of B.* in 1948. *In re* B., 3 I. & N. Dec. 323 (B.I.A. Oct. 28, 1948); *see infra* notes 113-122 and accompanying text.

68. Further amendments in 1903, 1907, and 1910 left this statutory scheme intact. *See* HUTCHINSON, *supra* note 52, at 413.

69. DANIELS, *supra* note 56, at 274 (noting as illustrative that in 1905, "the first single year in which a million immigrants arrived, deportations and exclusions combined also reached a new high . . . which represented barely more than 1 percent of the total").

70. Hester et al., *supra* note 6, at 3; *Public Charge Provisions of Immigration Law: A Brief Historical Background*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 14, 2019), https://www.uscis.gov/history-and-genealogy/our-history/public-charge-provisions-of-immigration-law-a-brief-historical-background [https://perma.cc/4TUT-5JJP] [hereinafter *Historical Background of Public Charge*]; *see also* IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1995 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 166 (1997) [hereinafter 1995 INS STATISTICAL YEARBOOK] (listing data for total INS exclusions and deportations by cause through 1984).

71. 1995 INS STATISTICAL YEARBOOK, *supra* note 70, at 170 (listing data for "Aliens Excluded by Cause" through 1984); *Historical Background of Public Charge*, *supra* note 70, at tbl.1.

72. *See* USCIS History Office & Library, *Overview of INS History*, U.S. CITIZENSHIP & IMMIGR. SERVS. 4 (2012), https://www.uscis.gov/sites/default/files/document/fact-sheets/INSHistory.pdf [https://perma.cc/B9PR-J3D7] [hereinafter *Overview of INS History*].

primarily from Europe, sought admission to the United States.[73] But "as late as 1902, there still was no significant bureaucracy in place" to manage the influx,[74] and even in 1906 the Bureau of Immigration's national headquarters employed only twenty-five people.[75] A series of immigration acts starting in 1907 granted the Bureau increased responsibility and authority.[76] But well into the 1920s, the Bureau pleaded yearly for more funding to match the scope of its task.[77]

Immigration officials during this period applied both public charge grounds—exclusion and deportation—with astonishing inconsistency.[78] They made exclusion determinations "at different times in different ways," often for noncitizens who did not fall into different, more specific excludable categories.[79] Similarly, public charge "was shaken . . . as though with a large pepper shaker" on "practically every deportation case."[80] After the Immigration Act of 1924 directed consular officers abroad to make the determination when issuing visas,[81] they appeared no more consistent in their inadmissibility determinations than domestic immigration officers. Interpretations of the clause varied by consulate and by individual officer, and efforts to standardize the determination were fraught.[82]

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**73.** *See* DANIELS, *supra* note 56, at 121-212.

**74.** Evans, *supra* note 49, at 112.

**75.** *See* MASANZ, *supra* note 55, at 12.

**76.** *See id.* at 18-39. From 1891 to 1903, authority to regulate immigration resided within the Treasury Department (first as the Office of Superintendent of Immigration and then the Bureau of Immigration). In 1903, the Immigration Bureau was transferred to the Department of Commerce and Labor and briefly merged with the newly created Federal Naturalization Service in 1906, before splitting with this agency in 1913 and coexisting with it in the new Department of Labor until 1933. *Overview of INS History*, *supra* note 72, at 4-5.

**77.** *See* MASANZ, *supra* note 55, at 38.

**78.** By 1931, the exclusion was "a veritable catch-all, vague and uncertain in its meaning, difficult of interpretation for administrative officials and often impossible of comprehension for the alien." CLARK, *supra* note 56, at 103; *see also* Leo M. Alpert, *The Alien and the Public Charge Clauses*, 49 YALE L.J. 18, 38 (1939) (calling for "a thorough and reasoned overhauling" of public charge).

**79.** *See* Evans, *supra* note 49, at 6. Evans further identifies a widespread general practice of excluding "unmarried pregnant women" using public charge until 1903. *Id.* at 159.

**80.** CLARK, *supra* note 56, at 78-79.

**81.** Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, § 2(f), 43 Stat. 153, 154; *see* Office of the Historian, *Administrative Timeline of the Department of State: 1920-1929*, U.S. DEP'T ST., https://history.state.gov/departmenthistory/timeline/1920-1929 [https://perma.cc/E2MB-ZMMJ].

**82.** *See* S. REP. NO. 81-1515, at 349-50 (1950) (describing how "different consuls, even in close proximity with one another, have enforced standards highly inconsistent with one another"); Evans, *supra* note 49, at 176-83. The shift of decisionmaking authority abroad also weakened judicial oversight. *Id.* at 183.

Judicial review offered negligible value in regularizing determinations.[83] Around the turn of the twentieth century, federal courts often heard immigration cases relating to questions of law.[84] But they proved hesitant to second-guess the fact-specific public charge determinations of immigration officials.[85] Furthermore, the Supreme Court refused to import substantive constitutional protections to immigration proceedings.[86] With no other guidance or statutory definition, courts struggled to review public charge determinations with any consistency.[87] The outcome — deportation, or permission to stay in the country — often "depend[ed] on the particular judicial district in which the interpretation [was] made."[88]

The only Supreme Court opinion to address the meaning of public charge came in the 1915 case *Gegiow v. Uhl*.[89] The Court construed the term narrowly, holding that the exclusion provision did not prevent admission of an immigrant on public charge grounds merely because "the labor market in the city of his immediate destination is overstocked."[90] Justice Holmes, writing for the Court, interpreted the term in light of its surrounding statutory language: "'Persons likely to become a public charge' are mentioned between paupers and professional beggars. . . . The persons enumerated in short are to be excluded on the ground of permanent personal objections accompanying them irrespective of local conditions."[91] The Court's gloss was modest but significant. Although it made no attempt at a general definition, it characterized a "public charge" as someone with a lasting, intrinsic propensity for neediness.

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**83.** *See* CLARK, *supra* note 56, at 75 ("[C]ourts and administrative officials vie with one another in the variety and number of their interpretations.").

**84.** *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 14 IMMIGR. & NAT'LITY L. REV. 3, 10-23 (1992). Chinese immigrants in particular relied on litigation strategies to expand the scope of due-process protections. *See* LUCY E. SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW 169-94 (1995).

**85.** *See* Comment, *Statutory Construction in Deportation Cases*, 40 YALE L.J. 1273, 1289 (1931) ("In general the courts interfere only when the determination of the administrator . . . is obviously grotesque.").

**86.** *See* Motomura, *supra* note 84, at 10-26.

**87.** Alpert, *supra* note 78, at 21 n.20 (criticizing federal appellate court decisions as "equally and hopelessly conflicting"); *see* CLARK, *supra* note 56, at 76 ("[T]he conflict of [judicial] decisions continues with no tendency to settle the matter.").

**88.** CLARK, *supra* note 56, at 76.

**89.** 239 U.S. 3 (1915).

**90.** *Id.* at 9-10.

**91.** *Id.* at 10 (quoting Act of Feb. 20, 1907, ch. 1134, § 2, 34 Stat. 898, 898-99 (as amended by Act of Mar. 26, 1910, ch. 128, § 1, 36 Stat. 263)).

This interpretation lasted only two years before Congress relocated the phrase in 1917,[92] leading lower courts into "violent disagreement" as to the meaning of the relocation and the definition of public charge.[93] Some, including judges on the Court of Appeals for the Second Circuit, took the legislative change to indicate that "public charge" was broader than what the Supreme Court had construed in *Gegiow*.[94] Others, including judges on the Court of Appeals for the Ninth Circuit, disagreed.[95]

Decisions affirming or denying the exclusion and deportation of individual immigrants led to a patchwork of narrow holdings, rendering incoherent any general definition of public charge.[96] For example, the Ninth Circuit held in 1922 that a Japanese woman who knew very little English could not be deemed a public charge merely on the grounds that her family in the United States did not financially support her.[97] Meanwhile, a federal district court in 1923 held a deaf noncitizen was likely to become a public charge, despite a steady employment history and a standing offer of permanent employment.[98]

The public charge exclusion proved malleable in the hands of the President as well. In response to the Great Depression, President Herbert Hoover in 1930 directed consular officials to apply the public charge exclusion more broadly,[99]

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**92.** The law now excluded: "persons who have come in consequence of advertisements for laborers printed, published, or distributed in a foreign country; *persons likely to become a public charge*; [and] persons who have been [previously] deported." Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 3, 39 Stat. 874, 876 (emphasis added).

**93.** Alpert, *supra* note 78, at 20, 34-35 n.63. For a scathing appraisal of early twentieth-century public charge case law, see *id.* at 38, which concludes that "[t]he upshot of this matter of the alien and the public charge clauses is not particularly edifying"; and Comment, *supra* note 85, at 1288-93, which reviews the inconsistent range of judicial decisions on who is a public charge.

**94.** *See* United States *ex rel.* Iorio v. Day, 34 F.2d 920, 922 (2d Cir. 1929) (arguing that the term "is certainly now intended to cover cases like *Gegiow*"); PAT MCCARRAN, THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES, S. REP. NO. 81-1515, at 346 (1950) ("[The shift] was done intentionally by the Congress in order to overcome court interpretations of the term, which were not in conformity with its intent."). Judge Learned Hand offered in dicta: "The language itself, 'public charge,' suggests rather dependency than imprisonment." *Iorio*, 34 F.2d at 922. This language is frequently misquoted as "rather dependency than delinquency." *See, e.g.*, MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 81 (2004).

**95.** *See Ex parte* Sakaguchi, 277 F. 913, 916 (9th Cir. 1922); *Ex parte* Mitchell, 256 F. 229, 230 (N.D.N.Y. 1919) ("I am unable to see that this change of location of these words in the act changes the meaning that is to be given them.").

**96.** *See* Alpert, *supra* note 78, at 33-38.

**97.** *Id.* at 33-34 (discussing *Sakaguchi*, 277 F. 913).

**98.** *Ex parte* Tambara, 292 F. 764 (W.D. Wash. 1923).

**99.** *See* Evans, *supra* note 49, at viii.

leading to a "sharply reduced" rate of visa issuance.[100] He noted that most immigrants were unlikely to find employment given prevailing economic conditions, in contravention of the Supreme Court's interpretation in *Gegiow* precluding public charge determinations premised on external economic conditions.[101]

### *C. 1930s-1940s: Birth of the Federal Semiwelfare State*

The advent of federal benefits regimes in response to the Great Depression marked a fundamental shift in the administration of assistance—and created a tension with the public charge exclusion. Statutory benefits regimes aimed to improve the wellbeing of eligible populations, while public charge aimed to exclude those who receive such benefits. As benefits regimes expanded, the administrative state was left to untangle its relationship with immigration law, without guidance from Congress or the courts.

The New Deal's extraordinary expansion of the administrative state aimed in large part to meet the country's relief needs.[102] State, local, and privately funded poor-relief institutions proved insufficient to address mass unemployment.[103] With the Social Security Act of 1935, the federal government stepped into a social-welfare role.[104] The Act thus "reversed historic assumptions about the nature of social responsibility, and it established the proposition that the individual has clear-cut social rights."[105] It created social-insurance programs, such as Social Security and Unemployment Insurance, as well as means-tested benefits, such as Aid to Dependent Children (ADC) and Old Age Assistance.[106] Noncitizens were eligible for federal benefits such as Social Security, although programs

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**100.** Comment, *supra* note 85, at 1289 n.25.

**101.** CLARK, *supra* note 56, at 74-75, 75 n.1 (discussing inconsistencies between President Hoover's interpretation of the public charge exclusion and that of the Supreme Court in *Gegiow*).

**102.** MASHAW ET AL., *supra* note 7 (citing "the displacement to government of social welfare roles formerly played by families and private institutions" as one explanation for the "extraordinary growth" of the administrative state during this time); *see* KATZ, *supra* note 6, at 218-19, 226.

**103.** KATZ, *supra* note 6, at 220-21.

**104.** Wilbur J. Cohen, *The Development of the Social Security Act of 1935: Reflections Some Fifty Years Later*, 68 MINN. L. REV. 379, 382 (1983); *see* KATZ, *supra* note 6, at 234-40.

**105.** WILLIAM E. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-40, at 132-33 (1963).

**106.** Social Security Act of 1935, ch. 531, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.); Thomas E. Price, *Social Security History: Fifty Years Ago*, U.S. SOC. SECURITY ADMIN., https://www.ssa.gov/history/50ed.html [https://perma.cc/SKK4-VQXK]; *see* CYBELLE FOX, THREE WORLDS OF RELIEF: RACE, IMMIGRATION, AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL 251 (2012) ("Ironically, while it excluded many American racial minorities from its most generous benefits, the Social Security Act extended social insurance benefits without regard to citizenship or even legal status.").

funded in part by states, such as ADC, were sometimes unavailable due to state restrictions on eligibility.[107]

Immigration authority was consolidated in the Immigration and Naturalization Service (INS), formed in 1933 in the Department of Labor (DOL) and moved to the DOJ in 1940.[108] DOJ regulations created the Board of Immigration Appeals (BIA) within INS to render final decisions in immigration cases, subject to review by the Attorney General.[109] Due to a requirement in the Immigration Act of 1924 that prospective immigrants obtain a visa from a consulate abroad before coming to the United States, the job of excluding likely public charges passed from INS to the DOS.[110] By the 1950s, INS public charge exclusions were negligible, although they continued public charge deportations.[111]

The creation of federal benefits programs, often available to noncitizens,[112] posed a new question: which, if any, would make a noncitizen deportable as a public charge or excludable as a likely public charge? The federal promise of benefits had displaced the poorhouse as the nation's response to poverty, and the idea of "public charge" required elucidation.

The newly created BIA provided a half-answer with its decision in *Matter of B*.[113] There, an Irish immigrant became institutionalized at a state hospital.[114] She paid nothing for her stay under Illinois state law.[115] After leaving the country briefly and reentering, she was ordered deported as a public charge.[116] In dismissing the deportation proceedings on appeal, the BIA emphasized that mere receipt of any one "program sponsored by the State does not [make one] a public charge."[117] "We could go on *ad infinitum*," the BIA declared, "setting forth the

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**107.** FOX, *supra* note 106, at 250-80 (describing the interaction between New Deal benefits and noncitizens).

**108.** MASANZ, *supra* note 55, at 41; *Organizational Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 30, 2020), https://www.uscis.gov/about-us/our-history/organizational-timeline [https://perma.cc/PW4Q-Q23Y]; *Overview of INS History*, *supra* note 72, at 7.

**109.** *See* ALEINIKOFF ET AL., *supra* note 15, at 254; ANNA O. LAW, THE IMMIGRATION BATTLE IN AMERICAN COURTS 22-23 (2010).

**110.** *See* Evans, *supra* note 49, at 173-74; *Historical Background of Public Charge*, *supra* note 70, at tbl.1.

**111.** *Historical Background of Public Charge*, *supra* note 70, at tbls.1, 3. Data on DOS exclusions during this time are not available.

**112.** *See* Fox, *supra* note 11, at 1053, 1060 fig.2.

**113.** 3 I. & N. Dec. 323 (B.I.A. Oct. 28, 1948).

**114.** *Id.* at 323-24.

**115.** An Act to Regulate the State Charitable Institutions and the State Reform School, and to Improve Their Organization and Increase Their Efficiency, § 26, 1875 Ill. Laws 109.

**116.** *In re B.*, 3 I. & N. Dec. at 324.

**117.** *Id.*

countless municipal and State services which are provided to all residents, alien and citizen alike."[118] Under the BIA's reasoning, the sheer scope of the public services available to all appeared to weigh against using receipt of benefits as a proxy for becoming a public charge. The BIA instead offered a procedural definition of public charge, setting out a strict three-step test for when an officer may deport a noncitizen as a public charge.[119] A "public charge," it held, is a person who received services from the government under a statute that created a cause of action for repayment demands and then failed to repay.[120] This limitation, combined with the "subsequent to landing" causality requirement,[121] rendered the deportation provision effectively moot within a decade.[122]

### *D. 1950s-1970s: Responding to the Great Society*

The Immigration and Nationality Act of 1952's consolidation of existing immigration law did not substantively change the public charge regime.[123] But as

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**118.** *Id.*

**119.** The government must (1) "by appropriate law, impose a charge for the services rendered to the" noncitizen; (2) demand payment of the charge; and (3) wait until the noncitizen "fail[s] to pay for the charges." *Id.* at 326.

**120.** *Id.*

**121.** *Matter of B.* does not discuss whether the respondent's alleged status as a public charge was due to "causes not affirmatively shown to have arisen [subsequent] to landing" as required by the Immigration Act of 1917. *Id.* at 328 (Charles, Member, dissenting) (quoting the Immigration Act of 1917, Pub. L. No. 64-301, § 19, 39 Stat. 874, 889). Perhaps it was assumed that the respondent would be unable to show that the cause arose after landing because she was institutionalized due to mental illness.

**122.** *See Immigration and Public Welfare Benefits: Hearing Before the S. Comm. on the Budget*, 104th Cong. 97 (1996) [hereinafter *1996 Hearing*] (statement of David A. Martin, General Counsel, Immigration and Naturalization Service) (stating that *Matter of B.* "has taken away any real effectiveness" of the public charge deportation ground). Though the BIA's decision may have been sufficient on its own to cause this change, the data show that public charge deportations had been declining since the 1930s, despite a steadily rising deportation total. *Historical Background of Public Charge*, *supra* note 70, at tbl.3.

During the immigration reform of the 1990s, the INS, under significant pressure from Congress to improve enforcement, expressed its support for legislation overruling *Matter of B.* to allow for public charge deportations. *See 1996 Hearing*, *supra*, at 79 (statement of Sen. J. James Exon) (chastising Martin for the perceived failure of the INS to enforce the exclusion by noting that "[w]e haven't done a very good job on that one, have we?"); *id.* at 81 (statement of David A. Martin) (speaking in support of an amendment overruling *Matter of B.*).

**123.** *See* INA (codified as amended in scattered sections of 8 U.S.C.). It placed the exclusion determination within "the opinion of the consular officer . . . or in the opinion of the Attorney General," *id.* § 212(a)(15) (codified as amended at 8 U.S.C. § 1182(a)(4)(A) (2018)), which put

the statutory language of public charge remained unchanged, the scope of public benefits underwent another major expansion, beginning with the 1960s Great Society programs of President Lyndon B. Johnson.[124] A range of new services became available, including food stamps, Medicaid, and Medicare. A surge in federal funding accompanied income-based expansions of eligibility criteria.[125] Enrollment tripled in the Aid to Families with Dependent Children (AFDC) program, the successor of ADC.[126]

However, with this expansion of benefits came restrictions on the basis of immigration status.[127] For the first time, undocumented immigrants lost statutory eligibility (although lawfully present noncitizens remained eligible) for most federally funded programs.[128] Further entangling the relationship between immigration and benefits was the new AOS provision of the 1952 Act. Because noncitizens could now seek LPR status while residing in the country, presumably more people would have a history of receiving some kind of public benefit while seeking green cards.[129]

A pair of 1974 BIA adjudications offered another half-answer to how these changes affect the meaning of public charge. In *Matter of Harutunian*, the BIA

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"borderline adverse determinations beyond the reach of judicial review." *In re* Harutunian, 14 I. & N. Dec. 583, 588 (B.I.A. Feb. 28, 1974). The Senate Judiciary Committee recommended:

> Since the elements constituting likelihood of becoming a public charge are varied, there should be no attempt to define the term in the law, but rather to establish the specific qualification that the determination of whether an alien falls into that category rests within the discretion of the consular officers or the Commissioner.

S. REP. NO. 1515, at 349 (1950).

**124.** *See* KATZ, *supra* note 6, at 261-72; JOSHUA ZEITZ, BUILDING THE GREAT SOCIETY: INSIDE LYNDON JOHNSON'S WHITE HOUSE (2018). The benefits included Medicaid, the food stamp Program, Supplemental Security Income, Section 8 Housing Vouchers, and Medicare. *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 8, 88 Stat. 633, 662 (codified as amended at 42 U.S.C. §§ 1347(f)-1347(h) (2018)); Social Security Amendments of 1965, Pub. L. No. 89-97, tit. XIX, 79 Stat. 286, 291 (codified as amended at 42 U.S.C. §§ 1395-1395(w) (2018)); *id.* § 121, 79 Stat. at 343-52; Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (codified as amended in scattered sections of 7 U.S.C. §§ 2011-2024 (2018)); *Social Security Act Amendments (1965)*, OUR DOCUMENTS, https://www.ourdocuments.gov/doc.php?flash=true&doc=99 [https://perma.cc/VXB7-4PMK].

**125.** KATZ, *supra* note 6, at 261.

**126.** Fox, *supra* note 11, at 1062; *Aid to Families with Dependent Children (AFDC) and Temporary Assistance for Needy Families (TANF) — Overview*, U.S. DEP'T HEALTH & HUM. SERVS. (Nov. 30, 2009), https://aspe.hhs.gov/aid-families-dependent-children-afdc-and-temporary-assistance-needy-families-tanf-overview-0 [https://perma.cc/P37U-MAW5].

**127.** *See* Fox, *supra* note 11, at 1062-68 (outlining the causes of this shift).

**128.** *Id.* at 1052, 1058-59, 1068.

**129.** INA § 245(a) (codified as amended at 8 U.S.C. § 1255(a) (2018)). Because adjustment of status denial data are unavailable, it is unclear how many have been denied green cards as likely public charges.

held that, when making the inadmissibility determination, immigration officers should take into account a range of factors, such as age, health, economic circumstances, and family support.[130] Later the same year, in *Matter of Perez*, the BIA held that the determination is a "totality of the . . . circumstances" assessment.[131] Together, the cases stand for the propositions (1) that "[a] healthy person in the prime of life cannot ordinarily be considered likely to become a public charge";[132] and (2) that no single factor is decisive, such that receipt of any one benefit alone is insufficient to render one a likely public charge.[133]

These holdings offered, at most, a tautological definition of "public charge." A likely public charge, they assert, is whoever we determine them to be, by applying a wide range of factors to a specific situation. As *Matter of B*. did for deportation, *Harutunian* and *Perez* do a better job of describing who is *not* a likely public charge than who *is*. Though the decisions offered some insight into *how* to consider receipt of benefits, they provided little indication as to *which* benefits should count in the determination. Neither did they address the growing dissonance between Congress's use of eligibility criteria and the public charge exclusion. Congress could, if it chose, make noncitizens categorically ineligible for certain benefits — so what work is public charge doing?[134]

### *E. IRCA's Special Rule and the Origins of a Modern "Doctrine"*

In 1986, IRCA marked the closest Congress has ever come to addressing the relationship between benefits and public charge.[135] It did so indirectly, in the context of a one-time legalization program. With a single provision, Congress contemplated, for the first and only time, which benefits should count against a noncitizen in a public charge determination. In doing so, it embedded the cash/supplemental distinction into public charge's regulatory history. Immigration agencies, hungry for any indication of congressional intent, seized upon and expanded upon the distinction to guide *all* public charge determinations. The resulting regulations provided the analytical foundation of the 1999 guidance, cementing the formation of a modern, albeit flawed, public charge "doctrine."

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**130.** 14 I. & N. Dec. 583, 589-90 (B.I.A. Feb. 28, 1974).

**131.** 15 I. & N. Dec. 136, 137 (B.I.A. Nov. 12, 1974).

**132.** *Id.* (quoting *In re* Martinez-Lopez, 10 I. & N. Dec. 409, 421-22 (B.I.A. Dec. 20, 1962)).

**133.** *Id*.

**134.** Congress in fact took this approach in 1996. *See infra* Section I.F.

**135.** Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

### *1. IRCA's Public Charge Amendment*

Among other reforms, IRCA provided the "first large-scale legalization program in U.S. immigration history."[136] Under this program, undocumented people, meeting certain criteria and for a limited time, could petition for AOS to become LPRs. The purpose of this amnesty program was to "wipe the slate clean" of a separate underclass of undocumented immigrants.[137]

With remarkable foresight, Congress recognized that the public charge inadmissibility ground presented a potential barrier to the effective implementation of this legalization program. Because many of the undocumented people likely to benefit from the legalization program had low incomes,[138] the public charge provision had the potential to limit severely the legislation's reach—depending on how it would be applied. To ensure that the public charge provision did not stifle IRCA's policy aims, the House of Representatives added a "Special Rule" amendment. The Special Rule provided that, within the limited scope of IRCA's one-time legalization program, "[a]n alien is not ineligible for adjustment of status" under the public charge exclusion "if the alien demonstrates a history of employment in the United States evidencing self-support *without receipt of public cash assistance*."[139] With this language, Congress created an implicit distinction between "public cash assistance" and other kinds of unidentified, presumably non-cash, benefits.

Congress's consideration of the public charge exclusion in the context of the Special Rule marked a rare moment of clarity. Most legislative history reflects congressional confusion regarding the meaning of "public charge." Congress has invoked public charge to justify both the expansion of and restriction of welfare benefits.[140] In one illustrative debate, a senator factually misstated the exclusion,

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**136.** Muzaffar Chishti, Doris Meissner & Claire Bergeron, *At Its 25th Anniversary, IRCA's Legacy Lives on*, MIGRATION POL'Y INST. (Nov. 16, 2011), https://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives [https://perma.cc/B2HK-J3N2].

**137.** *Id.*

**138.** The existence of this undocumented "underclass," as well as its poverty, were largely consequences of U.S. policy. *See* NGAI, *supra* note 94, at 138–58 (describing the bracero program, a bilateral agreement under which the United States imported on average 200,000 workers from Mexico every year from 1948 to 1964). Ngai shows how the program encouraged illegal immigration and depressed wages for its laborers, promoting a permanent, unlawfully present, underpaid class of people. *See id.*

**139.** IRCA § 245A(d)(2)(B)(iii) (codified as amended at 8 U.S.C. § 1160(c)(2)(C) (2018)) (emphasis added).

**140.** *See, e.g.*, 142 CONG. REC. H9401 (daily ed. July 31, 1996) (statement of Rep. Smith) (arguing that "[w]elfare undermines [public charge] policy" by allowing immigrants to receive benefits); 142 CONG. REC. S8335 (daily ed. July 19, 1996) (quoting senators arguing both for and

stating that "a person who seeks to naturalize cannot do so if they possibly would be a public charge; nor, I think if they might become public charges after immigration."[141] Members of Congress have sometimes recognized the duplicative nature of the public charge ground and eligibility restrictions.[142] But for the most part, Congress's discussion of public charge reflects the exclusion itself—vague and contradictory.

IRCA's Special Rule offers a more nuanced glimpse into Congress's understanding of "public charge." Here, Congress contemplated an applicable legal standard for who constitutes a likely public charge: a distinction between which benefits would count and which would not. And while the text of the Special Rule clearly limits its scope to IRCA's legalization program, a close examination of the legislative history suggests something further. At least to the amendment's sponsor and opponents, the provision's aim was to ensure the *proper functioning* of public charge in a particularly consequential context, rather than to provide a one-time carveout to the public charge exclusion.

The amendment's sponsor used language that supports this reading while defending the provision in debate.[143] Representative George Brown (D-CA), recognizing that public charge has "no clear cut definition of how that particular criteria for excludability shall be actually interpreted," called on his colleagues to "clarify the true intent of the law" when making public charge determinations for legalization applicants.[144] Brown evinced a narrow understanding of public charge, arguing: "[T]hese undocumented aliens . . . may actually show incomes that are below the poverty line, and yet still they may not have been a public

against the Personal Responsibility and Work Opportunity Reconciliation Act's (PRWORA) eligibility criteria by invoking public charge).

141. 129 CONG. REC. 12,808 (1983). The public charge ground applies to admission, not naturalization. Furthermore, the standard is "likely at any time to become," not "possibly would be" or "might become." INA § 212(a)(15) (codified as amended at 8 U.S.C. § 1182(a)(4)(A) (2018)).

142. Senator Bob Graham (D-FL), for example, argued against PRWORA's eligibility restrictions, stating that with the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), "we passed a comprehensive immigration bill which outlined the restraints that we felt were appropriate. We are now coming, today, to essentially trash all of that work" by imposing new eligibility restrictions, constituting "a new set of unexamined, duplicative" policies. 142 CONG. REC. S8335 (daily ed. July 19, 1996) (statement of Sen. Graham).

143. The earlier version of the amendment, as introduced and defended by Congressman George Brown, reads as follows: "For purposes of this section, an alien shall not be excludable under section 212(a)(15) if the alien demonstrates a history of employment evidencing self-support without reliance on public cash assistance." 130 CONG. REC. 16,727 (1984). It is substantively the same as the amendment enacted.

144. *Id.*

charge. They may have supported themselves and they may have been productive citizens of this country."[145]

Those opposed to the Special Rule also appeared to discuss the exclusion in its general application. They seized on the ambiguity of the meaning of "public cash assistance," engaging in the line-drawing arguments that would characterize the agency debate over the 1999 guidance a decade later.[146] One congressman asked, "[D]oes [public cash assistance] include medical benefits having been received at taxpayers' expense, or is it limited to AFDC, or exactly what is it[?]"[147] Another wanted to broaden the phrase to "include medical assistance for family members,"[148] presaging future disagreement over Medicaid's inclusion in the determination.

Opponents of the amendment also expressed concern that the Special Rule might permanently weaken administrative discretion, further suggesting that they understood the rule to reach beyond IRCA. They pointed out that the provision's requirement that the Attorney General not find a person who meets the criteria inadmissible will "tak[e] full discretion away from the Attorney General" as assigned to them by the 1952 Act.[149] To prevent this, one member of Congress suggested allowing the Attorney General more enforcement discretion by changing the amendment's language from mandatory ("shall") to permissive ("may").[150]

But this proposed change in text did not carry the day; the amendment was agreed to, and later enacted, with the same substantive language as was debated on the floor of the House.[151] Though the legislative history says little about how supporters of the amendment understood the term "public cash assistance," the Special Rule shows that Congress was able to balance the exclusion of public charges against other policy aims. Congress considered and rejected a more expansive view of public charge that would have included receipt of medical and

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**145.** *Id.*

**146.** *See id.*

**147.** *Id.* (statement of Rep. Lungren). The same congressman also correctly pointed out that it would allow for the admission of people who have a history of employment but are now unable to work. *Id.* at 16,728.

**148.** *Id.* (statement of Rep. Fish).

**149.** *Id.* (statement of Rep. Lungren); *see* INA § 212(a)(15) (codified as amended at 8 U.S.C. § 1182(a)(4) (2018)).

**150.** 130 CONG. REC. 16,729 (1984) (statement of Rep. Fish).

**151.** IRCA § 201(d)(2)(B)(iii) (codified as amended at 8 U.S.C. § 1255a(d)(2)(B)(iii) (2018)). Earlier versions say "without reliance on public cash assistance," rather than "receipt of." H.R. REP. No. 99-682, at 20 (1986); 132 CONG. REC. 30,022 (1986).

other noncash benefits.[152] IRCA's Special Rule remains the best evidence of Congress recognizing and attempting to reconcile the tension between assistance and exclusion on the basis of likelihood to become a public charge.

### 2. *Interpreting the Special Rule*

When Congress enacted IRCA, the line between cash and noncash benefits was not widely recognized.[153] INS and DOS responded to IRCA by promulgating regulations fleshing out the distinction and sorting specific benefits into either category. These implementing regulations suggest that the agencies, at least at first, understood the cash/supplemental distinction as guiding *all* public charge determinations — not restricted to IRCA's amnesty program for qualifying undocumented immigrants.

The INS promulgated a rule in 1987 building out a definition of "public cash assistance" similar to that of the 1999 guidance.[154] The agency wrote that "[p]ast acceptance of public cash assistance . . . will enter into" the determination of "whether he or she is likely to become a public charge."[155] The INS thus

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**152.** Some legislative history also suggests that Congress's understanding of "public charge" hinged on employment, such that one cannot be a public charge if one is employed. *See* 118 CONG. REC. 30,169 (1972) (discussing public charge with regard to yearly labor contracts, assuming that, "intrinsically," one cannot become a public charge if one is working).

**153.** *See, e.g.*, 130 CONG. REC. 16,727 (1984) (statement of Rep. Lungren) ("The definition of public cash assistance, does that include medical benefits having been received at taxpayers' expense . . . ?").

**154.** The INS rule provided:

> "Public cash assistance" means income or needs-based monetary assistance, to include but not limited to supplemental security income, received by the alien or his or her immediate family members through federal, state, or local programs designed to meet subsistence levels. It does not include assistance in kind, such as food stamps, public housing, or other non-cash benefits, nor does it include work-related compensation or certain types of medical assistance (Medicare, Medicaid, emergency treatment, services to pregnant women or children under 18 years of age, or treatment in the interest of public health).

Adjustment of Status for Certain Aliens, 52 Fed. Reg. 16,205, 16,209 (May 1, 1987) (to be codified at 8 C.F.R. pt. 245a); *see also* Perales v. Thornburgh, 967 F.2d 798, 802-04 (2d Cir. 1992) (detailing the INS's evolving policy on SSI, AFDC, and the receipt of benefits by children, in the form of memos and letters).

**155.** Adjustment of Status for Certain Aliens, 52 Fed. Reg. at 16,212; Adjustment of Status for Certain Aliens, 52 Fed. Reg. 8752, 8758 (proposed Mar. 19, 1987) (to be codified at 8 C.F.R. pt. 245a).

extrapolated the use of the cash/supplemental distinction beyond IRCA's amnesty program, for about two years,[156] to all public charge assessments.[157]

DOS also issued guidance discussing the cash/supplemental distinction following IRCA[158]—though it had no role in implementing the Special Rule.[159] The Foreign Affairs Manual (FAM) instructed consular officers to look to the "underlying" purpose of the program to determine whether it was "essentially supplementary in nature" or a "more traditional form[] of welfare . . . consisting of direct monetary payments" in making the public charge determination.[160] The fact that DOS's regulations outlined an analytical distinction between cash and supplemental benefits for garden-variety public charge determinations suggests that either DOS understood the distinction to extend beyond IRCA or that the distinction predates IRCA as a longstanding part of DOS practice in public charge determinations.

### *F. IIRIRA and PRWORA*

Through the enactment of immigration and welfare reform in 1996, Congress again changed eligibility criteria for public benefits while leaving the substance of the public determination untouched. This time, the nation entered "an unprecedented new era of restrictionism" for immigrants' access to public benefits.[161] Before Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), LPRs were eligible for most of the same

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**156.** The INS overruled this with a regulation two years later, reinterpreting the cash/supplemental distinction as an exception to the public charge exclusion, and holding that the "Special Rule" only applies after a noncitizen has *already* been found likely to become a public charge. Adjustment of Status for Certain Aliens, 54 Fed. Reg. 29,442, 29,453 (July 12, 1989) (to be codified at 8 C.F.R. pt. 245a).

**157.** Adjustment of Status for Certain Aliens, 52 Fed. Reg. at 16,211; Adjustment of Status for Certain Aliens, 52 Fed. Reg. at 8,757 ("An applicant for residence who is likely to become a public charge will be denied adjustment.").

**158.** *See Foreign Affairs Manual*, DEP'T OF ST. 7 (1987) (PC I [1] 12-13). Noncurrent versions of the *Foreign Affairs Manual* are difficult to find. This version was archived with other Domestic Policy Council files and correspondence, indicating its role in the development of the 1999 guidance.

**159.** The Special Rule is limited to adjustment of status, a process in which the DOS takes no part. *See* IRCA § 201(d)(2)(B)(iii) (codified as amended at 8 U.S.C. § 1255a(d)(2)(B)(iii) (2018)); INA § 245(a)(2) (codified as amended at 8 U.S.C. § 1255 (2018)).

**160.** *Foreign Affairs Manual*, *supra* note 158, at (PC I [1] 12-13). "The essential issue is whether the purpose of the public program . . . is specifically designed to support individuals unable to provide for themselves. A program essentially directed to the general welfare of the public as a whole does not present a 'public charge' issue." *Id.* at 13.

**161.** Tanya Broder, Avideh Moussavian & Jonathan Blazer, *Overview of Immigrant Eligibility for Federal Programs*, NAT'L IMMIGR. L. CTR., Dec. 2015, at 1.

federal benefits as citizens. After PRWORA, most "were barred from receiving assistance under the major federal benefits programs for five years or longer."[162] Lawful immigrant enrollment in all such programs dropped after the passage of PRWORA,[163] including (perhaps surprisingly) among the immigrants that remained eligible for benefits.[164] Meanwhile, DOS green-card denials on the basis of public charge more than doubled.[165]

Congress considered and rejected expansions of public charge in the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[166] passed just one month after PRWORA. Bills in the House and Senate would have made deportable noncitizens who "for more than 12 consecutive months"[167] receive "any public benefit (including cash, medical, housing, food, and social services)."[168] But this expansion of the deportation ground did not become law. In its final form, IIRIRA instead added five minimum factors to the inadmissibility determination.[169] Early drafts refer to these factors as an "expansion" of public

**162.** *Id.*

**163.** *Id.*; Michael E. Fix & Jeffrey S. Passel, *The Scope and Impact of Welfare Reform's Immigrant Provisions*, URB. INST. (Jan. 15, 2002), https://www.urban.org/sites/default/files/publication/60346/410412-Scope-and-Impact-of-Welfare-Reform-s-Immigrant-Provisions-The.pdf [https://perma.cc/3M3L-TUN5].

**164.** Namratha R. Kandula, Colleen M. Grogan, Paul J. Rathouz & Diane S. Lauderdale, *The Unintended Impact of Welfare Reform on the Medicaid Enrollment of Eligible Immigrants*, 39 HEALTH SERVS. RES. 1509, 1509 (2004).

**165.** *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., R41104, IMMIGRATION VISA ISSUANCES AND GROUNDS FOR EXCLUSION: POLICY AND TRENDS 20 (2010). While this change may have been caused in part by IIRIRA's new affidavit requirement, it is also likely due in part to how INS and DOS administered the public charge ground of exclusion.

**166.** Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C. (2018)).

**167.** S. 1884, 103d Cong. § 803(a) (1994); *see* S. 269, 104th Cong. § 203(a) (1995) (adding "any other program of assistance funded, in whole or in part, by the Federal Government or any State or local government entity, for which eligibility for benefits is based on need"); H.R. 1915, 104th Cong. § 622(a) (1995) (specifying that aliens who receive benefits through public assistance programs like AFDC, Medicaid, and food stamps for a threshold period of time may be deported as public charges); H.R. REP. NO. 104-469, at 90 (1996) (amending H.R. 2202, 104th Cong. (1996)).

**168.** H.R. REP. NO. 104-828, at 144 (1996) (Conf. Rep.). The reasons provided in the conference report for the expansion show a simplistic understanding of public charge, out of step with administrative precedent. *See id.* at 241 ("Aliens who access welfare have been deportable as public charges since 1917. However, only a negligible number of aliens who become public charges have been deported in the last decade.").

**169.** *Id.* § 212(a)(4)(B). The five factors are "age; health; family status; assets, resources, and financial status; and education and skills." *Id.*

charge,[170] but the heading was later changed to the more neutral "factors to be taken into account."[171]

Receipt of benefits was, notably, not listed among these minimum factors.[172] Nonetheless, DOS and INS continued to consider benefits receipt. Internal communications reveal a record of the agencies confirming with their officers that the recent reforms did not impact their preexisting public charge policies, including the consideration of Medicaid[173]—a point of particular scrutiny in the subsequent public outcry.

## II. THE 1999 PUBLIC CHARGE GUIDANCE: CAUSES AND NEGOTIATIONS

This Part explores how the overreach of immigration agencies empowered to implement public charge led to outrage over the exclusion's application, as well as a long-overdue opportunity to clarify public charge's relationship with public benefits. The Clinton Administration responded to this pressure by leading an interagency negotiation effort aimed at curbing aggressive enforcement, preserving access to key benefits, and delineating which benefits would count in the determination. Through sustained discussions, the White House wrangled a consensus out of the agencies' divergent interpretations of public charge. The guidance drew upon the cash/supplemental distinction suggested in IRCA's Special Rule and expanded upon in its implementing regulations. The resulting compromise balanced competing regulatory priorities, strategically ensuring access to key benefits (including Medicaid) while clarifying the scope of the public charge exclusion.

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170. H.R. REP. NO. 104-828, at 240 (1996) (Conf. Rep.); *see* H.R. REP. NO. 104-469, at 143-45.

171. H.R. 4278, 104th Cong. § 531(a) (1996). This is more accurate, because the factors merely mirrored the existing administrative case law, rather than adding new considerations. *In re* Harutunian, 14 I. & N. Dec. 583, 588-90 (B.I.A. Feb. 28, 1974).

172. INA § 212(a)(4)(B) (codified as amended at 8 U.S.C. 1182(a)(4)(A) (2018)).

173. *See* Dep't of State Cable from Madeleine Albright, Sec'y of State, to All Diplomatic & Consular Posts (Dec. 1997) (PC I [2] 7-8) [hereinafter DOS Cable] (informing consulates that "the Department's long-standing guidance will generally continue to be applicable in the same way as before [IIRIRA and PRWORA]," so that "non-basic assistance means-tested programs such as Medicaid for non-emergency medical care . . . will continue to be indicators that the alien is likely to become a public charge"); Email from Julie A. Fernandes, Special Assistant to the President for Domestic Policy, to Diana Fortuna, Office of Policy Dev., Exec. Office of the President (Dec. 5, 1997) (PC I [2] 15) [hereinafter Fernandes/Fortuna Email] (confirming that officers "can ask those seeking 'admission' about current or prior use of Medicaid").

### *A. The Lookout Systems and Public Response*

In the 1990s, INS and DOS collaborated with state benefits-granting agencies to enforce a new and aggressive understanding of public charge, in violation of federal law.[174] Under DOS's "Public Charge Lookout System," and the INS's "Border Lookout System" (the Lookout Systems), officials demanded repayment of the cash value of Medicaid and other benefits lawfully received by noncitizens, as a condition of granting visas, LPR status, and reentry into the country.[175] Although other abuses of public charge persisted during this time,[176] the Lookout Systems were the most egregious. Detained immigrants were told that they would be stripped of their lawful status or denied reentry unless they repaid the monetary value of the benefits and disenrolled themselves and their families.[177] At least ten states participated by sharing enrollment information with federal immigration enforcement.[178]

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**174.** *See* Claudia Schlosberg & Dinah Wiley, *The Impact of INS Public Charge Determinations on Immigrant Access to Health Care*, MONTANAPROBONO (May 22, 1998), https://www.montanaprobono.net/geo/search/download.67362 [https://perma.cc/TCP7-CV3Q]; *see also* NAT'L IMMIGRATION L. CTR., PUBLIC CHARGE 5 (July 1997) (PC I [1] 52); Teresa Mears, *Immigrants Are Told to Pay Back Aid: Advocates Call Actions by Judges in Miami a Form of Extortion*, BOS. GLOBE (Oct. 19, 1997) (PC I [2] 26).

**175.** *See* Broder, Moussavian & Blazer, *supra* note 161, at 520 ("Rumors about demands for repayment or other public charge problems have deterred immigrants from seeking the medical care and other services that they need."); CATHOLIC LEGAL IMMIGRATION NETWORK & NAT'L IMMIGRATION LAW CTR., AFFIDAVIT OF SUPPORT AND SPONSORSHIP REQUIREMENTS: A PRACTITIONER'S GUIDE (1998) (PC I [1] 62) [hereinafter CLIN/NILC Guide] ("[E]ven some immigration judges . . . have conditioned their grants of suspension of deportation on the applicant paying back benefits received."); *see also* Memorandum from Bob Greenstein & Stacy Dean to Diana Fortuna & Steve Warnath (Nov. 26, 1997) (PC I [2] 17) [hereinafter CBPP Memo] ("[L]egal immigrants [are] being asked to repay the value of Medicaid benefits that they or their children (including citizen children) have *legally* received. INS also is compelling some legal immigrants who legally are eligible for Medicaid to disenroll themselves and their children.").

**176.** Receipt of Medicaid by a U.S.-citizen child often formed the sole basis for their parent's inadmissibility as a likely public charge, in contravention of the BIA's decision in *Matter of Perez* and INS regulations. Letter from Claudia Schlosberg, Nat'l Health Law Program, and Pat Baker, Mass. Law Reform Inst., to Doris Meissner, Comm'r of INS (Aug. 7, 1998) (PC II [2] 26). DOS consular officers also considered "supplemental" benefits in their determinations. Telegram from Sec'y of State, Dep't of State, to Manila Embassy (Feb. 1996) (PC I [1] 44) (informing the Manila embassy that it must stop considering food stamps in making its public charge determinations).

**177.** LISA SUN-HEE PARK, ENTITLED TO NOTHING: THE STRUGGLE FOR IMMIGRANT HEALTH CARE IN THE AGE OF WELFARE REFORM 54-87 (2011); *id.* at 62-63; Lisa Sun-Hee Park, *Criminalizing Immigrant Mothers: Public Charge, Health Care, and Welfare Reform*, 37 INT'L J. SOC. FAM. 27, *passim* (2011); Park, *supra* note 46, at 1174; *see also* CBPP Memo, *supra* note 175, at 17-18.

**178.** CLIN/NILC Guide, *supra* note 175, at 62.

Federal law does not authorize repayment demands for lawfully received benefits.[179] A class action challenging California's implementation of the program[180] resulted in a settlement requiring the return of at least three million dollars to about 1,500 eligible families.[181] INS and DOS leadership rolled back these programs in a series of 1997 directives,[182] clarifying that IIRIRA and PRWORA had granted no new authority to demand repayment, and that such authority had never existed.[183] Meanwhile, HHS directed state Medicaid and TANF directors not to collect repayment or share information regarding immigrant benefit receipt.[184]

While the origins and aims of the Lookout Systems are not entirely clear, they likely began at the initiative of the agencies themselves, rather than as centralized White House policy. Even after HHS expressed concern to DOS over its Lookout System in 1995,[185] DOS promoted its expansion for years. A cable sent to consuls in May 1997 extolled its benefits and shared DOS's "view to encourage

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**179.** CBPP Memo, *supra* note 175, at 18 (describing many instances of unlawful repayment demands, stating "[t]his practice is illegal; it violates Title XIX of the Social Security Act"). Under Title XIX of the Social Security Act, "[n]o adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made," except in very limited circumstances, of which public charge is not one. 42 U.S.C. § 1396p(b)(1) (2018). Furthermore, state Medicaid plans may only demand repayment in the case of overpayment after notice and an opportunity for hearing. *See* 42 U.S.C. § 1396a(a)(3) (2018); 42 C.F.R. § 431.200-.250 (2019).

**180.** Complaint for Injunctive, Mandamus, and Declaratory Relief at 2, Rocio v. Belshe, Civil No. 97-CV-0463R, 1997 WL 33830449 (S.D. Cal. Mar. 19, 1997) (alleging that the California Department of Health Services "routinely, knowingly, and deliberately used the project to collect benefits lawfully paid to immigrants").

**181.** *See* Park, *supra* note 46, at 1174. Incidentally, the defendant, the California Department of Health Services, encouraged INS to clarify its public charge policy the very next year. Letter from S. Kimberly Belshé, Dir., Cal. Dep't of Health Servs. & Cliff Allenby, Chair, Cal. Managed Risk Med. Ins. Bd., to Doris Meissner, Comm'r of INS (Dec. 7, 1998) (PC VI [3] 9-12) [hereinafter Belshé letter].

**182.** DOS Cable, *supra* note 173, at 8; Memorandum from Office of Programs & Office of Field Operations to All Reg'l Dirs., All Dist. Dirs. (Including Foreign), All OICs (Including Foreign), All Port Dirs., All Serv. Ctr. Dirs., All Training Acads. (Glynco and Artesia), All Reg'l Counsels & All Asylum Dirs., Public Charge: INA Sections 212(a)(4) and 237(a)(5)—Duration of Departure for LPRs and Repayment of Public Benefits (Dec. 16, 1997) (PC I [2] 1-3) [hereinafter INS Memorandum].

**183.** *See* DOS Cable, *supra* note 173, at 8-16.

**184.** *See* Letter from Lavinia Limon, Dir., Office of Family Assistance, to State TANF Dirs. (Dec. 17, 1997) (PC I [2] 31); Letter from Sally K. Richardson, Dep't of Health & Human Servs., to State Medicaid Dirs. (Dec. 17, 1997) (PC I [2] 29-30). These letters did not direct state agencies to provide retroactive relief for families who had already paid.

**185.** Fax Cover Sheet RE: Public Charge from Sue Anne Flaherty to Dennis Hayashi (May 20, 1995) (PC I [1] 32) ("It was good to meet with HHS and the other agencies and learn of . . . interest and concerns regarding [the] Public Charge Lookout System.").

more states to develop [Lookout] programs."[186] DOS suggested that public charge had "take[n] on greater importance" as a result of the recently enacted PRWORA.[187] This justification rings hollow, given that immigrants had less access to benefits than before, and that DOS's Lookout System predated PRWORA.[188] At the state level, the Lookout Systems were justified as efforts to prevent fraudulent receipt of benefits,[189] although in practice they aimed simply to cut Medicaid costs.[190] The policies appear to have ended at the behest of the White House and HHS.[191]

Outrage over the Lookout Systems drew attention and scrutiny to public charge. Pressure on the Clinton Administration to clarify its public charge policy mounted as a direct result. Correspondence from nonprofits,[192] members of Congress,[193] and state agencies,[194] as well as negative press coverage in national newspapers,[195] urged the Administration to adopt a uniform public charge approach that would ease immigrant anxiety, promote access to lawful public benefits, and improve public health.[196]

Besides termination of the Lookout Systems, critics' primary concern was ensuring noncitizens' access to healthcare — especially through Medicaid. A letter to President Clinton from the California State Legislature explained that the

186. *See* Fax from Dennis Hayashi to Diana Fortuna of *Interpreter Releases: State Dept. Provides Information on Public Charge Lookout Systems* (Dec. 1, 1997) (PC I [1] 31).

187. *See id.* (PC I [1] 28).

188. Fax Cover Sheet RE: Public Charge, *supra* note 185.

189. *See* PARK, *supra* note 177, at 59 (describing how California's program purported to "discourage the fraudulent use of health care").

190. Park, *supra* note 177, at 32. California, to take one example, "recovered" $25 million in repaid benefits. *See* CLIN/NILC Guide, *supra* note 175, at 62.

191. *See* Schlosberg & Wiley, *supra* note 174.

192. *See, e.g.*, CBPP Memo, *supra* note 175, at 17-18.

193. *See, e.g.*, Letter from Members of Cong. to President Clinton (Mar. 23, 1999) (PC VI [3] 29-32) [hereinafter Letter from Members of Cong.]; Letter from Members of the Cong. Hispanic Caucus to President Clinton (Mar. 25, 1999) (PC VI [3] 33-34).

194. *See, e.g.*, Belshé Letter, *supra* note 181, at 9-12; Letter from Bruce M. Bullen, Comm'r, Mass. Exec. Office of Health & Human Servs., Div. of Med. Assistance, to Chris Jennings, Special Assistant to the President for Health Policy Dev. (Apr. 23, 1998) (PC I [1] 58).

195. *See, e.g.*, Mears, *supra* note 174, at 27 (describing the absurdity of the Lookout Systems in detail, including instances of immigration judges chastising immigrants for accepting Medicaid); Alissa J. Rubin & Patrick J. McDonnell, *Immigrants Hit with Pressure to Repay Benefits*, L.A. TIMES/WASH. EDITION (Dec. 22, 1997) (PC I [1] 69) (noting that repayment demands "appear to violate the stated policies of the INS and State Department").

196. *See, e.g.*, Letter from the Bd. of Supervisors, Cty. of L.A., to Doris Meissner, Comm'r of INS (May 19, 1998) (PC VI [3] 15-17); Letter from the Cal. Legislature to President Clinton (Nov. 10, 1998) (PC VI [3] 6-8).

"current implementation of immigration law" was causing "a major public health crisis" by "severely deterring a significant portion of Californians from accessing vital safety net services." It urged the President to restrain INS and DOS "from making policy choices that undermine" access to benefits, and contended that "[non-]cash assistance (such as health care) should be exempted from public charge determinations."[197] The Governor of Washington State similarly implored President Clinton to "clarify that Medicaid services not be classified as a public benefit" for public charge purposes, deriding how "[DOS and INS] have taken ambiguous and often conflicting positions on the treatment of Medicaid and other services."[198] Memos presented to then-Deputy Director of the Domestic Policy Council Elena Kagan and Vice President Al Gore concurred, describing how public charge enforcement chilled lawful receipt of Medicaid and food stamps, interfering with the Administration's public-health and welfare goals.[199]

These criticisms were especially salient given the Clinton Administration's stated policy on healthcare, immigration, and welfare. President Clinton made guaranteed health insurance the centerpiece of his 1994 State of the Union Address.[200] And, though he signed PRWORA in 1996, Clinton promised to try to restore benefits to lawful immigrants,[201] stating: "I am deeply disappointed that this legislation would deny Federal assistance to legal immigrants and their children."[202] And indeed, two significant, albeit limited, benefits-restoration statutes passed Congress in the years following PRWORA.[203] The first, in 1997, restored Supplemental Security Income payments to most lawful immigrants who

**197.** Letter from the Cal. Legislature (PC VI [3] 6-8), *supra* note 196.

**198.** Letter from Gary Locke, Governor of Wash., to President Clinton (July 21, 1998) (PC VI [3] 18).

**199.** Memorandum for the Vice President Regarding Public Charge (Jan. 21, 1999) (PC III [1] 13-14) (stating that "concern about negative immigration consequences associated with the legal use of Medicaid and Food Stamps interferes with our goal of increasing insurance coverage and improving public health"); Memorandum Regarding Public Charge Remaining Legal Issues from Julie A. Fernandes, Special Assistant to the President for Domestic Policy, to Elena Kagan, Deputy Assistant to the President for Domestic Policy (Jan. 11, 1999) (PC III [1] 27) [hereinafter Fernandes/Kagan Email] (same).

**200.** Ann Devroy, *President Insists Congress Enact Reforms in Welfare, Health Care*, WASH. POST (Jan. 26, 1994), https://www.washingtonpost.com/wp-srv/politics/special/states/stories/souo12694.htm [https://perma.cc/A78Z-DBSH].

**201.** *See* Audrey Singer, *Welfare Reform and Immigrants: A Policy Review*, BROOKINGS INSTITUTION 27 (Feb. 10, 2004), https://www.brookings.edu/wp-content/uploads/2016/06/200405_singer.pdf [https://perma.cc/RQK8-7VCG].

**202.** Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 2 PUB. PAPERS 1329 (Aug. 22, 1996).

**203.** *See* Shawn Fremstad, *Immigrants and Welfare Reauthorization*, CTR. ON BUDGET & POL'Y PRIORITIES 1 (Feb. 4, 2002), https://www.cbpp.org/sites/default/files/atoms/files/1-22-02tanf4.pdf [https://perma.cc/W4JK-4C7M].

arrived prior to PRWORA.[204] The second, in 1998, "restored food stamp eligibility for immigrant children and for elderly and disabled persons" residing in the U.S. before 1996.[205] For advocates and legislators, the aggressive enforcement of public charge looked like a bait-and-switch—an Administration pushing to expand immigrant eligibility for benefits, while penalizing those who chose to receive them.[206]

### *B. Interagency Negotiations*

The Clinton Administration began interagency negotiations with an understanding that public charge enforcement was disrupting benefits regimes. Meetings began in late 1997, with INS agreeing to draft guidance that would end the Lookout Systems and clarify the meaning and implementation of public charge.[207] The meetings, led by the Domestic Policy Council (DPC) of the Executive Office of the President (EOP), aimed to gather an administration-wide consensus on the definition of public charge, including identifying which benefits would, and would not, count against an applicant in the public charge inadmissibility determination. The range of officials at the meetings reflected the Administration's understanding of public charge's overlapping nature; indeed, a "Public Charge Contact List" included officials from INS, DOS, HHS, USDA, and SSA.[208]

INS's first full draft of the guidance, sent to the Office of Management and Budget (OMB) in early 1998, differed substantially from the final version in

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**204.** *Id.*

**205.** *Id.*; Hammond, *supra* note 35, at 514; *see also The Administration's Proposals to Ease Some of the Welfare Law's Harshest Provisions*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 11, 1997), https://www.cbpp.org/archives/admwelf.htm [https://perma.cc/U3HD-EZ5Z] (discussing aspects of President Clinton's proposed 1998 budget that would restore benefits).

**206.** Letter from Members of Cong., *supra* note 193, at 29 (noting the discrepancy between President Clinton's "proposals to restore SSI, Food Stamps, [and] Medicaid," and the likelihood that "a substantial proportion of the eligible population will not participate for fear of jeopardizing their immigration status or that of a family member").

**207.** Route Slip from Steve Mertens, Exec. Office of the President, to Jack Smalligan, Nikki Highsmith, Jeff Farkas, Debra Bond, Joe Pipan & Ingrid Schroeder (Jan. 20, 1998) (PC I [1] 81) (delivering the draft guidance promised as part of the "commitment" INS made to the Office of Management and Budget (OMB) in December 1997); INS Memorandum, *supra* note 182, at 1 (promising forthcoming "comprehensive guidance on the application of the public charge grounds of inadmissibility and the related ground of deportation").

**208.** *See* Public Charge Contact List (PC II [2] 17-18). Other agencies were listed, including OMB, the National Economic Council, the Office of White House Counsel, and the National Security Council. *See id.*

1999.[209] It listed Medicaid and food stamps as programs that, with exceptions, would count in the public charge determination.[210] Restrictions on the consideration of food stamps was the apparent result of a "compromise."[211] In determining what benefits to consider, the draft guidance suggested, as the FAM had, that officers look at the nature of the program in question.[212] If the program is "specifically designed to support individuals unable to provide for themselves," then it ought to count against a noncitizen in their application.[213]

DOS appeared to be thinking along the same lines, stating in a late 1997 cable to all consular posts that, though repayment demands were unlawful, Medicaid may still be considered as part of the public charge determination.[214] DOS took a backseat during the negotiations, often following behind the steps taken by INS, HHS, and the White House.[215] This may be in part because of DOS's decentralized structure. As one White House official wrote, "[DOS] has very little control over what their consular officers do."[216]

HHS responded to the INS proposal with a different understanding of how public charge ought to be administered.[217] Taking a reformist view that would characterize its stance throughout the negotiation process, HHS suggested that INS "[e]xplicitly prohibit consideration of receipt of ANY Federal benefits," as long as those benefits were "legitimately received."[218] This approach, HHS argued, would be most consistent with recent statutory changes in immigration

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**209.** Draft Memorandum from Office of Programs to All Reg'l Dirs., All Dist. Dirs. (Including Foreign), All OICs (Including Foreign), All Port Dirs., All Serv. Ctr. Dirs., All Training Acads. (Glynco and Artesia), All Reg'l Counsels, All Asylum Dirs., Public Charge: INA Sections 212(a)(4) and 237(a)(5) (Jan. 20, 1998) (PC I [1] 81-90) [hereinafter January 1998 Draft Guidance]; *see also infra* Section II.D.

**210.** January 1998 Draft Guidance, *supra* note 209, at 86-88. It also reiterated that there was no lawful basis for the Lookout Systems. *Id.* at 82, 84.

**211.** *Id.* at 81. DOS had a more lenient policy of not considering any receipt of food stamps. *See id.* at 88.

**212.** *Id.* at 85.

**213.** *Id.*

**214.** DOS Cable, *supra* note 173, at 7-8.

**215.** *See, e.g.*, Email from Julie A. Fernandes, Special Assistant to the President for Domestic Policy, to Distribution List of Seven White House staff (Oct. 1, 1998) (PC II [2] 20) [hereinafter Fernandes/White House Staff Email] (suggesting "that we call [DOS] in . . . to let them know where we are and that we want their acquiescence in this decision").

**216.** Fernandes/Fortuna Email, *supra* note 173, at 15.

**217.** *See* Draft: Recommendation on INS Public Charge Guidance, DEP'T HEALTH & HUMAN SERVS. (Apr. 13, 1998) (PC I [1] 94-95) [hereinafter HHS Draft Recommendation]. For an expanded argument in favor of HHS's interpretation, see *infra* Section III.B.

**218.** HHS Draft Recommendation, *supra* note 217, at 94.

and public-benefits law under IIRIRA and PRWORA.[219] HHS noted that, of the five factors IIRIRA required officials to consider when making the public charge determination, none related to "benefit receipt."[220] Furthermore, recognizing that Congress had limited noncitizen eligibility for most benefits with PRWORA, HHS argued that "instead of introducing benefit receipt as a factor in the discretionary and prospective public charge determination process, Congress chose the more direct and effective policy of denying benefit eligibility to immigrants subject to public charge determinations."[221] There should therefore be a "compelling rationale" for taking benefit receipt into account, a threshold unmet by a mere reliance on "past administrative practices," given the new statutory landscape.[222] The White House declined to respond to these arguments, an omission I address at length.[223]

A few months later, HHS had retreated from its stance that no receipt of any federal benefits be considered.[224] It focused instead on preserving access to healthcare, suggesting that public charge be interpreted consistent with one of the three following options: (1) prohibit consideration of all Medicaid receipt because Medicaid is "supplementary"; (2) generally prohibit consideration of Medicaid receipt, except for institutionalized people for whom the benefit is no longer "supplementary"; or (3) generally prohibit consideration of Medicaid, unless institutionalized or a "chronic" Medicaid user.[225] EOP summarized these options in an internal memo comparing the INS and HHS proposals, with the aim of determining the permissibility of "disregard[ing] Medicaid receipt."[226] The phrase "Find IRCA" is handwritten at the bottom of the HHS proposal,[227] presumably by a White House official, suggesting that the White House relied upon the Special Rule's cash/supplemental distinction as precedent to support its own nascent benefits distinction. Another handwritten margin note makes clear the White House's need for this support, stating that "[a]gencies aren't sure" of the legality of option two.[228]

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219. *Id.*

220. *Id.*

221. *Id.* at 95.

222. *Id.*

223. *See infra* Section III.B.

224. Its reasons for doing so are not apparent. *See* Draft: No Title, HHS Options (July 10, 1998) (PC I [1] 5) [hereinafter HHS Options Draft].

225. *Id.*

226. Email from Diana Fortuna, Assoc. Dir., White House Domestic Policy Council, to Distribution List (July 7, 1998) (PC I [1] 14-16).

227. HHS Options Draft, *supra* note 224, at 5.

228. *Id.*

INS was indeed reluctant to accept a view of public charge that would categorically exclude Medicaid or food stamps from the determination. A series of DPC emails in August of 1998 gives some sense of the back-and-forth between the White House and INS on this issue. One email reveals that INS's General Counsel was writing an opinion for the Commissioner "that a policy that exempts Medicaid (except in cases of institutionalization) is not legally supportable."[229] It argued that a "program by program evaluation (within Medicaid) of what should be considered" was "compelled by their BIA cases."[230] After some back-and-forth with INS, the White House contacted Office of Legal Counsel (OLC), the legal office of the DOJ.[231] On October 1, 1998, OLC "agreed that it is legally permissible to take Medicaid off the table, except for institutionalization,"[232] apparently settling the matter.

After INS and DOS agreed to the non-consideration of Medicaid, the classification of unlisted benefits became a point of contention.[233] HHS, providing feedback on the INS draft guidance from earlier that year, advocated for an approach under which any given benefit would be excluded from the determination unless explicitly listed.[234] This would make the determination more predictable, because "all programs not included in the list . . . would by definition not

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**229.** Email from Julie A. Fernandes, Special Assistant to the President for Domestic Policy, to Robert N. Weiner, Senior Counsel, White House Counsel's Office, Emil E. Parker, Staff of Nat'l Econ. Council, Cynthia A. Rice, Special Assistant to the President for Domestic Policy & Jack A. Smalligan, Deputy Assoc. Dir. for the Educ., Income Maint. & Labor Div., Office of Mgmt. & Budget (Aug. 26, 1998) (PC II [2] 22).

**230.** *Id.*

**231.** One email encourages a White House official to persuade INS to accept the non-consideration of Medicaid. If unsuccessful, "we have to figure out how to deal with it. [Elena Kagan, Deputy Assistant to the President for Domestic Policy] keeps asking why we have not come to closure on this." *Id.* In a conversation the following day, Kagan "suggested that [Robert Weiner, from the White House Counsel's Office] also contact [the Office of Legal Counsel] to ask them for an opinion (likely, informal) on whether it would be legally permissible for us to exclude Medicaid (except for cases of institutionalization) from the public charge determination." Email from Julie A. Fernandes, Special Assistant to the President for Domestic Policy, to Robert N. Weiner, Senior Counsel, White House Counsel's Office (Aug. 27, 1998) (PC II [2] 21).

**232.** Fernandes/White House Staff Email, *supra* note 215, at 20.

**233.** *See* Email from Jack A. Smalligan, Deputy Assoc. Dir. for the Educ., Income Maint. & Labor Div., Office of Mgmt. & Budget, to Julie A. Fernandes, Special Assistant to the President for Domestic Policy & Cynthia A. Rice, Special Assistant to the President for Domestic Policy (Oct. 29, 1998) (PC III [1] 96) [hereinafter Smalligan Email] (addressing how to "treat programs that fall in between the 'do' and 'don't' lists").

**234.** *See* Fax from Dennis Hayashi, Counselor to the Deputy Sec'y, Dep't of Health & Human Servs., to Cynthia Rice, Special Assistant to the President for Domestic Policy (Oct. 20, 1998) (PC II [1] 48-55) [hereinafter Hayashi/Rice Fax].

be considered."[235] But as one White House official stated via email, "That approach doesn't work for INS."[236] And although he had tried proposing language that would prevent consideration of "[s]imilar services" as those already listed, he cautioned that "this compromise does not satisfy HHS," adding, "I don't think that is possible."[237]

INS's next draft expressly excluded consideration of food stamps and Medicaid (except for long-term institutionalization), in accordance with the suggestions of HHS and EOP.[238] Comparison with an earlier version of the same document, marked up by HHS, shows that the INS had incorporated a number of HHS's suggestions.[239] For example, it removed from under "Benefits that may give rise to a public charge determination" a catch-all provision for any means-tested benefits.[240] But INS refused to remove its list of enumerated benefits excluded from consideration, as HHS had requested.[241] And although HHS had rejected INS's language granting officers discretion to determine whether unenumerated benefits counted, INS refused to allow the default to be non-consideration of benefits.[242]

Here the cash/supplemental distinction took shape. DPC met with DOJ in December of 1998, suggesting that HHS's "cash or cash-like benefits" framework "could be the basis for a principled distinction defining all programs that should count or not count for purposes of admission."[243] The DOJ official said "he would think about it and pitch it to INS."[244] A memo from DPC to Elena Kagan a month later states the DPC's preference for "the INS's guidance to lay out a clear analytical distinction between those programs that should be

235. Smalligan Email, *supra* note 233.

236. *Id.*

237. *Id.*

238. Draft: Memorandum for All Reg'l Dirs., All Serv. Ctr. Dirs. (Nov. 4, 1998) (PC III [1] 15).

239. *Compare id.*, *with* Fax from Irene B. Bueno, Deputy Assistant Sec'y/Cong. Liaison, U.S. Dep't of Health & Human Servs. (Oct. 26, 1998) (PC II [1] 9-19) [hereinafter Bueno Fax].

240. *Compare* Bueno Fax, *supra* note 239, at 15, *with* Draft: Memorandum for All Reg'l Dirs., *supra* note 238, at 20-21. The catch-all category reads as follows: "Certain non-cash benefits under programs in which eligibility for benefits, or the amount of such benefits, are determined on the basis of income, resources or financial need . . . ."

241. HHS's handwritten markup removes the enumerated list like a proofreader would, with a firm "out." *Compare* Bueno Fax, *supra* note 239, at 16, *with* Draft: Memorandum for All Reg'l Dirs., *supra* note 238, at 21-22.

242. *Compare* Bueno Fax, *supra* note 239, at 15, *with* Draft: Memorandum for All Reg'l Dirs., *supra* note 238, at 20.

243. Email from Julie A. Fernandes, Special Assistant to the President for Domestic Policy, to Distribution List (Dec. 15, 1998) (PC III [1] 33) (describing HHS's "very strong pitch," by which "INS seemed somewhat persuaded, but needed to think about it further").

244. *Id.*

considered . . . and those that should not."[245] It points out that although the "current version of the guidance" listed examples in each category, it lacked a "basis for distinguishing one group from the other."[246] It described how "HHS has made the argument to the INS that the distinction should be between cash and non-cash benefits," but that "[a]ccording to DOJ and INS, they have not yet concluded whether they can—in light of their past administrative decisions re: public charge—separate programs based on a cash/non-cash or a supplemental/non-supplemental distinction."[247] Nonetheless, the distinction prevailed. Joint DOJ/INS drafts of the proposed rule, sent to OMB in April[248] and May[249] of 1999, adopted the cash/supplemental distinction.

The resulting guidance provided the first federal definition of public charge: a noncitizen "primarily dependent on the Government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance or (ii) institutionalization for long-term care at government expense."[250] INS published its interim field guidance alongside a notice of proposed rulemaking, expanding on the reasoning behind the definition and cash/supplemental distinction.[251] The intent was for the guidance to "alleviate public confusion" until the rule could be promulgated,[252] although it never was. Meanwhile, DOS incorporated the field guidance's definition of public charge into DOS guidance and the FAM.[253]

When Vice President Gore announced the administration-wide policy, over a year after negotiations began, he focused on addressing the confusion that had deterred access to health insurance and other critical benefits for legal

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**245**. Fernandes/Kagan Email, *supra* note 199, at 28 ("Public Charge—remaining legal issues.").

**246**. *Id.*

**247**. *Id.* at 29. In the HHS fax from months before, the White House predicted this sticking point with INS, scribbling "Supplemental—INS won't buy it." Hayashi/Rice Fax, *supra* note 234, at 49.

**248**. *See* INS Draft: Deportability and Inadmissibility on Public Charge Grounds, at 12 (Apr. 14, 1999) (PC IV [3] 21).

**249**. *See* INS Draft: Deportability and Inadmissibility on Public Charge Grounds (May 10, 1999) (PC V [3] 1).

**250**. 1999 INS Field Guidance, 64 Fed. Reg. 28,689 (Mar. 26, 1999).

**251**. Inadmissibility & Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676 (May 26, 1999) (to be codified at 8 C.F.R. pts. 212 & 237) [hereinafter 1999 INS Proposed Rule].

**252**. *Id.*

**253**. *See* Visas: Ineligibility Based on Public Charge Grounds, 84 Fed. Reg. 54,996, 54,998-99 (Oct. 11, 2019) (to be codified at 22 C.F.R. pt. 40) ("The Department [had previously] adopted this interpretation in the FAM," constituting "Department guidance in effect since May 1999").

immigrants.[254] White House officials took care to frame the policy change in a way that emphasized kinds of *benefits* rather than kinds of *people*, advising Vice President Gore to "talk about this issue not as a way to help immigrants get more welfare, but to ensure all families . . . get the health care and other services they need."[255] A White House press release echoed this emphasis, declaring the Clinton Administration's "strong commitment to insuring low income families and promoting the public health."[256]

### *C. Public Charge and the White House*

In this Section, I will offer some observations from the archives to frame my arguments in Part III.

First, the 1999 guidance would have been impossible but for the coordination efforts and pressure from the White House. The Clinton Administration recognized that the dynamic between the agencies required intervention, given HHS's relative powerlessness to address the deterrent effects of immigration enforcement on benefits participation. By taking on the role of "negotiator in chief,"[257] the White House prompted INS and DOS to do things that otherwise may have come later or not at all: ending the Lookout Systems, setting aside receipt of Medicaid and food stamps in the public charge determination, and accepting the cash/supplemental distinction as the analytical framework for the guidance.

Second, the White House's actions are consistent with how scholars have described the role of the modern president in controlling immigration and the regulatory state. Then-professor Elena Kagan described how the Clinton White House (in which she served) achieved policy goals via regulation by wielding the

**254.** *See, e.g.*, Draft Q&A on Public Charge (May 25, 1999) (PC V [1] 13-14) (clarifying the implications of public charge); Press Release, Office of the Vice President, Vice President Gore Takes New Action to Assure Families Access to Health Care and Other Benefits (May 25, 1999) (PC VI [2] 1) [hereinafter Gore Press Release] (describing the new policy as "clarif[ying] a widespread misconception that has deterred eligible populations from enrolling . . . .").

**255.** Email from Cynthia A. Rice, Special Assistant to the President for Domestic Policy, to Irene Bueno, Deputy Assistant Sec'y/Cong. Liaison (May 23, 1999) (PC V [2] 58).

**256.** Gore Press Release, *supra* note 254, at 3.

**257.** Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1201 (2012) ("By seizing control of the interagency process, the President and his staff can play the role of negotiator in chief, helping to broker outcomes that more closely align with his preferences than would the results of an unmediated process.").

authority of the presidency to an unprecedented degree.[258] Stymied by congressional opposition, Clinton and his staff pivoted to the administrative state for solutions on healthcare, gun control, and as I have shown, immigrants' access to public benefits.[259] Others have argued that the president — not Congress — wields primary control over immigration policy.[260] Public charge, I have shown, is no exception.

Third, the White House appeared at times to be conscious of avoiding the appearance of a heavy-handed executive. EOP avoided phrases like "chaired by the [DPC]," because "[a]n anonymous interagency discussion is better than a perception that this is driven from the [White House]."[261] It preferred to foreground an image of strong interagency cooperation, boasting of "extensive consultation with benefit-granting agencies" in the guidance, and publishing letters from the agencies endorsing the cash/supplemental distinction.[262] But this framing obscured a multi-tiered power dynamic: the White House exerted authority over DOS and INS, forcing them to reign in their unilateral infringement on the missions of benefits-granting agencies,[263] and encouraging them to adopt a version of public charge less injurious to the public welfare.

## III. THE PROBLEM WITH PUBLIC CHARGE

In this Part, I address public charge's administrability problems and their underlying causes. I begin by identifying a unique interagency relationship that analysis of the pre-guidance negotiations uncovers: zero-sum asymmetry, whereby the success of one regulatory regime depends on the failure of another. I argue that in the context of public charge, this problematic dynamic is a symptom of the longstanding tension between exclusion and assistance.

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**258.** Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001) ("Whether the subject was health care, welfare reform, tobacco, or guns, a self-conscious and central object of the White House was to devise, direct, and/or finally announce administrative actions — regulations, guidance, enforcement strategies, and reports — to showcase and advance presidential policies.").

**259.** *Id.*

**260.** *See* CRISTINA M. RODRÍGUEZ & ADAM COX, THE PRESIDENT AND IMMIGRATION LAW 3 (2020).

**261.** Email from Jack Smalligan to Eugenia Chough & Irene Bueno (May 17, 1999) (PC IV [2] 15) (discussing a DOS cable).

**262.** 1999 Guidance, *supra* note 42, at 28,692. The appendix to the 1999 INS proposed rule included letters from HHS, USDA, and SSA calling cash benefits and long-term institutionalization the "most effective proxies" for determining primary dependence. 1999 INS Proposed Rule, *supra* note 251, at 28,686-88.

**263.** *See infra* Section III.A (describing this relationship as "zero-sum asymmetry").

I assume in Section III.A that consideration of benefits receipt is a necessary element of the public charge inadmissibility determination.[264] But in Section III.B, I argue that a policy prohibiting the consideration of all federal benefits in the inadmissibility determination is prudent and permissible under immigration law.[265] Public charge "doctrine" presents a weak case that benefits *must* be considered. Building on HHS's rejected proposal, I present a more compelling reading of what the exclusion requires. Public charge policy should aim to untether the success of immigration enforcement from the failure of benefits regimes to provide benefits to deterred noncitizens. A new public charge rule could reconcile competing regulatory priorities in accordance with congressional aims and provide categorical assurance to immigrant families. In Section III. I qualify my preceding recommendation. While such a policy would be a wise stopgap measure, public charge's troubled history, incoherent doctrine, and inconsistency with contemporary norms counsel in favor of its complete rescission by Congress.

### *A. Asymmetrical Zero-Sum Relationships Between Agencies*

Analysis of the archival documents in Part II reveals a form of interagency relationship not yet described in the administrative-law literature,[266] which I term "zero-sum asymmetry." Public charge is a paradigmatic example of this form; other examples and variations may exist elsewhere.[267]

Zero-sum asymmetrical agency relationships bear the following characteristics: (1) two or more agencies have independent statutory missions in tension or conflict; (2) one agency impedes the other's mission *to the degree that* it enforces its own mission; and (3) the encroaching agency has greater enforcement

**264.** I base this assumption on BIA precedent, the Special Rule and its subsequent interpretations by agencies, and the 1999 guidance, all of which contemplated that receipt of at least some benefits would enter into the public charge determination.

**265.** I limit my defense to such a rule's consistency with public charge "doctrine." Addressing all legal challenges to, for example, a Biden public charge rule is beyond the scope of my argument.

**266.** *See infra* notes 271-276 and accompanying text.

**267.** Some related variations may include the following relationships: between a regulatory regime and an agency, such as the Freedom of Information Act's requirements that an agency reveal information potentially damaging to its enforcement practices, see *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978); between DOJ and other agencies regarding decisions about litigation and prosecution, see Neal Devins & Michael Herz, *The Uneasy Case for Department of Justice Control of Federal Litigation*, 5 U. PA. J. CONST. L. 558, 588 (2003); and between states and federal agencies, such as state laws prohibiting employers from consenting to immigration searches, see *United States v. California*, 314 F. Supp. 3d 1077, 1086 (E.D.C.A. 2018).

discretion, determining the degree to which the encroached-upon agency's mission is impeded. Stated another way, the completion of the regulatory objectives of one agency depends, proportionately, on the discretionary non-enforcement or under-implementation of another agency's regulatory objectives.

In the case of public charge, benefits-granting agencies (HHS, SSA, USDA) cannot fulfill their public-welfare missions to the extent that immigration-enforcement agencies (INS, DOS, and since 2002, DHS) deter participation by enforcing public charge using receipt of benefits. If the aim of benefits regimes is to improve the public welfare by providing assistance to eligible people who require it (and I assume for this discussion that *is* the aim),[268] then public charge implicates two objectives that cannot both be fully realized. The Clinton Administration recognized the overreach of the Lookout Systems and took the opportunity to articulate a plan for balancing exclusion aims against public welfare. But it could not resolve the underlying problem; it merely brokered an uneasy truce.

Scholars describe regulatory overlap as occurring when different agencies "enjoy regulatory authority over the same individuals or institutions, with regard to the same or related issues."[269] Many variations of such relationships exist between agencies.[270] In some, Congress divides regulatory authority between multiple agencies (for example, the Department of Energy (DOE) and the Federal Energy Regulatory Commission (FERC)).[271] In others, Congress does not clearly delegate authority to either agency,[272] or delegates identical authority to multiple agencies.[273]

Scholars have recently offered many justifications for overlap. Some argue that it may be efficient to grant authority to more than one agency when the regulated area implicates multiple regimes (for example, toxic workplace

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**268.** This, at least, was the prevailing view of the Clinton White House and HHS during the negotiations. Whether or not, for example, the Trump Administration's HHS viewed its mission differently is beyond the scope of my argument. I similarly assume for the purposes of this Section that the aims of immigration enforcement require the consideration of benefits receipt, because INS and DOS understood this to be the case.

**269.** Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENV. L.J. 237, 238 (2011) (quoting Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 864 (2006)).

**270.** FREDERICK M. KAISER, CONG. RESEARCH SERV., R41803, INTERAGENCY COLLABORATIVE ARRANGEMENTS AND ACTIVITIES: TYPES, RATIONALES, CONSIDERATIONS 6 (2011).

**271.** *See, e.g.*, Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378, 382 (2019).

**272.** Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 207-09.

**273.** Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 182 (2011).

exposures implicate both environmental and employment law).[274] Or, intentional divisions of authority over a given regulatory space may prevent factionalism and promote legitimacy.[275] Others argue that coordination efforts can produce substantial benefits in such "shared regulatory space[s]."[276] More conventionally, however, regulatory overlap is regarded as an obstacle to policy objectives,[277] leading to an array of relationships characterized by some degree of incompatibility,[278] competition,[279] or conflict.[280] A typical interagency "conflict" stems from "multiple agencies [having] jurisdiction to regulate in the same area," leading to situations where agency *A* requires conduct incompatible with what agency *B* requires (for example, rough floors for safety and smooth floors for sanitation).[281]

But the statutory authority of benefits-granting agencies and immigration-enforcement agencies do not overlap or conflict in this traditional sense. INS and DOS had no role in shaping welfare policy, nor did HHS determine immigration policy. Neither did the 1999 guidance negotiations over the meaning and implementation of public charge evince an interagency attempt to "share" regulatory space. The agencies did not even share jurisdiction over the same set of policy questions—at least not officially. Under a formalist view, the two regimes exist on parallel tracks, never quite intersecting: HHS provided benefits to immigrants, and INS determined the inadmissibility of those immigrants, partly on the basis of those benefits. Nonetheless, a functional conflict between regulatory priorities arose. The White House, HHS, politicians, advocates, and the press

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**274.** *See* Aagaard, supra note 269, at 300; Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 199 (2013).

**275.** *See* Jacobs, *supra* note 271, at 388-89.

**276.** *See* Freeman & Rossi, *supra* note 257, at 1186.

**277.** *See* Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 333; Aagaard, *supra* note 269, at 286-88; U.S. GEN. ACCOUNTING OFFICE, PAD-81-76, GAINS AND SHORTCOMINGS IN RESOLVING REGULATORY CONFLICTS AND OVERLAPS 1 (June 23, 1981), https://www.gao.gov/assets/140/133860.pdf [https://perma.cc/DAC3-CVD6].

**278.** Freeman & Rossi, *supra* note 257, at 1148-49 (describing "interacting jurisdictional assignments," in which one agency's primary mission impacts the interests of another, and "delegations requiring concurrence," in which one agency has authority to block the actions of another).

**279.** Gersen, *supra* note 272, at 212-14 (arguing that agencies with shared authority may compete to assert jurisdiction).

**280.** See Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1387-1407 (2017), for a thorough taxonomy of agency conflict, albeit one in which zero-sum asymmetry does not find a comfortable home. It is decidedly not "symmetrical," because one agency clearly dominates, and it lacks the aspects of "hierarchy," "advising," and "monitoring" that characterize the remaining relationships. *Id.* at 1390, 1397, 1398.

**281.** *See, e.g.*, Aagard, *supra* note 269, at 287 nn.231-32.

understood that a conflict indeed existed.[282] The year-long back-and-forth between the agencies and the White House itself attests to the existence of a conflict that had to be resolved.

The relationship between the agencies implicated by public charge is zero-sum. HHS's realization of its statutory mission (as it understood it) depended, proportionately, on the non-realization of INS and DOS's statutory missions (as they understood them). To the degree that INS and DOS enforced public charge by considering benefits receipt, the policy aims of benefits regimes were displaced. Since the fulfillment of HHS's statutory mission depended on the *non-enforcement* of public charge, existing scholarship on interagency conflict does not fully capture the dynamic at play. Though interagency "turf battles" are common,[283] conflicts caused by irreconcilable tension between two fundamentally incompatible missions are not.

The relationship between the immigration-enforcing agencies and the benefits-granting agencies is also asymmetrical. INS and DOS had significant discretion to define and administer public charge, whereas HHS had the more delimited task of ensuring the provision of benefits to statutorily defined eligible groups as determined by Congress.[284] INS and DOS, unfettered by such restrictions, were free to wield their discretion to deter unilaterally benefits receipt using the public charge determination, while HHS had no countervailing discretion to expand eligibility criteria. Whereas HHS expressed consistent concern about public charge enforcement, DOS and INS appeared less interested in the proper functioning of public benefits regimes.[285] This imbalance affected negotiations, in which HHS proved far more eager to reach a compromise than INS and DOS, both of which lacked any comparable incentive to bargain.[286]

The context of immigration and labor law presents a dynamic similar to zero-sum asymmetry. Professor Stephen Lee describes the relationship between ICE and DOL in regulating the labor market of undocumented people as a "mission mismatch."[287] Due to "asymmetric enforcement authority," ICE dictates federal policy in the workplace by privileging immigration enforcement over fair

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**282**. *Supra* notes 193-199 and accompanying text.

**283**. *See* Farber & O'Connell, *supra* note 280, at 1385, 1401; KAISER, *supra* note 270, at 17.

**284**. *See supra* Sections I.D & II.A. There may be good reasons for circumscribing HHS's power in this way – to leave the determination of who may receive benefits up to elected representatives, and to insulate beneficiaries from shifts in agency behavior as presidential administrations change.

**285**. *See supra* Part II.

**286**. *Id.*

**287**. Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1118 (2011).

labor practices.[288] Immigration law itself may be particularly prone to implicating contradictory objectives, as other scholars have suggested,[289] making such problematic relationships more likely. But although there is asymmetry,[290] the zero-sum component is not present in the ICE-DOL relationship. The regulatory aims of the two agencies are not *necessarily* at odds; in fact, Congress contemplated a "complementary" enforcement relationship, and the Obama Administration achieved some success in "harmoniz[ing]" the regimes.[291] In contrast, such compatibility is theoretically foreclosed in the context of public charge. The aims of public benefits-granting agencies are necessarily frustrated to the degree that immigration agencies deter benefits use.

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court misidentified the interagency relationship at issue — again between immigration and labor enforcement — as one characterized by the zero-sum asymmetry I have identified in public charge. The Court denied the authority of the National Labor Relations Board (NLRB) to award backpay to an undocumented worker who was unlawfully fired.[292] Its rationale reveals that it saw the relationship between the NLRB and immigration enforcement the way I have described the public charge agencies, above. The Court found that awarding backpay "unduly trench[ed] upon explicit statutory prohibitions critical to federal immigration policy" — namely, IRCA's prohibition on the hiring of undocumented workers.[293]

The relationship at issue does bear some similarities to true zero-sum asymmetry. The NLRB had the discretion to award backpay or not, while the INS had a simpler mandate to enforce immigration law prohibiting unlawful hiring of undocumented workers. In the majority's view, the discretionary decision of the NLRB to enforce its labor-law mission using backpay awards to an unauthorized worker "r[an] counter to" the goals of immigration law.[294] "[A]warding backpay

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**288.** *Id.* at 1096-1105.

**289.** KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820-1924, at 67-68 (1984) (exploring a contradiction in immigration policy between the need to produce surplus workers to "feed the voracious appetite of capital," and the need to sustain the surplus workers impoverished by that system); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 75 (1984) (identifying a tension between our decrepit classical immigration law and our liberal commitment to an open community).

**290.** Lee, *supra* note 287, at 1089 ("ICE has relatively little interest in regulating the relationship between employers and unauthorized workers, while the DOL has a relatively high interest but lacks the autonomy to effectively do so.").

**291.** *Id.* at 1099, 1118.

**292.** Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 140 (2002).

**293.** *Id.* at 151.

**294.** *Id.* at 149.

in a case like this," the Court wrote, "not only trivializes the immigration laws, it also condones and encourages future violations."[295]

But the Court reached the wrong conclusion by misconstruing the nature of the supposed conflict at issue. The enforcement of labor law does not necessarily impede the aims of immigration law—if anything, the opposite may be true. As Justice Breyer argued in dissent, an award of backpay would likely *support* the aims of both employment law and immigration law by disincentivizing the cheap hiring and exploitation of unauthorized workers.[296] The tension the Court found in *Hoffman* rested on a need for ideological consistency, whereby no part of government should appear to condone unauthorized employment. Such inconsistency differs from the zero-sum asymmetry characterizing public charge, wherein one regime functionally and proportionately impedes the mission of another.[297]

### *B. Public Charge and Public Benefits*

Early in the negotiations, HHS raised the following argument: in light of PRWORA and IIRIRA, immigration law does not require consideration of *any* benefits in the public charge determination, and the guidance ought to prohibit consideration of *all* federal benefits absent any other "compelling rationale."[298] Congress had the opportunity to list "benefits receipt" among IIRIRA's five minimum factors to be considered in the public charge determination, but it declined to do so. When considered alongside PRWORA's restrictions, HHS argued, it is reasonable to conclude that Congress chose the better of two regulatory options—to control access to benefits ex ante using eligibility restrictions, rather than penalize recipients ex post using public charge.

Nowhere in the archives of the negotiations does the White House address this compelling reading of public charge's recent history. But a careful review of the archival documents leaves the reader with a sense of the White House's implicit answer: the government cannot ignore receipt of *all* benefits, as HHS proposed, because "public charge" *has to mean something*, and that "something" has to do with benefits. While the Clinton White House felt pressure to maintain immigrants' access to services,[299] it surely felt some countervailing pressure as

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**295.** *Id*. at 150.

**296.** *Id.* at 156 (Breyer, J., dissenting).

**297.** *See also* CALAVITA, *supra* note 289, at 67-68 (identifying a contradiction in immigration policy between the need to produce surplus workers to "feed the voracious appetite of capital," and the need to sustain the surplus workers impoverished by that system).

**298.** HHS Draft Recommendation, *supra* note 217, at 95.

**299.** *See* Memorandum for the Vice President Regarding Public Charge, *supra* note 199.

well. After all, President Clinton had grudgingly signed into law the most severe restrictions to date on immigrants' access to benefits just three years earlier.[300] By agreeing to the cash/supplemental distinction, the Administration could limit the exclusion's harm while placating the interests that favored more immigration enforcement and less access to benefits.

The White House's omission is telling. Perhaps the White House did not respond because doing so would require admitting that the consideration of *any* benefits necessarily infringes on the policy aims of statutory benefits regimes. In other words, perhaps the Clinton Administration was unwilling to say that Congress had charged the administrative state with fulfilling two conflicting objectives, without any clear indication of how it wanted them reconciled.

I reassert HHS's argument: the public charge inadmissibility determination does not require consideration of benefits receipt, and a rule prohibiting consideration of all benefits is both good policy and consistent with the exclusion's history. Given the absence of a clear doctrinal requirement to the contrary, prohibiting the consideration of all benefits would eliminate the zero-sum asymmetry described in Section III.A, aligning immigration policy more closely with congressional aims. Though the 1999 guidance advanced the most coherent understanding of public charge to date, it lacked a principled justification for its selective imposition on the distribution of cash benefits. By permitting receipt of cash benefits to be considered in the public charge determination, the guidance aimed to "identify those who are primarily dependent on the government for subsistence without inhibiting access to non-cash benefits that serve important public interests."[301] But the guidance failed to explain why the "important public interests" of non-cash benefits must be preserved, while the undiscussed public interests served by cash benefits may be jettisoned to serve discretionary immigration-enforcement goals.[302] When Congress provides by law that groups of noncitizens are eligible for certain benefits, it presumably legislates with certain public interests in mind. This may be even more true given the restrictions on eligibility imposed by PRWORA; what Congress left standing may have been even more thoughtfully chosen.

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**300.** *See* Statement on Signing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, *supra* note 202.

**301.** *Id*.

**302.** In this sense, DHS's 2018 notice of proposed rulemaking was descriptively correct in seeking to remove "the artificial distinction between cash and non-cash benefits." Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,123 (proposed Oct. 10, 2018) (to be codified in scattered parts of 8 C.F.R.). However, it failed to explain adequately how the removal of this distinction would "align[] public charge policy with the self-sufficiency principles [of PRWORA]." *Id*.

Although IRCA's Special Rule provided the clearest indication of which benefits Congress might have wanted to count and not count,[303] it nonetheless does not provide substantial support for the notion that Congress intended the cash/supplemental distinction to govern all public charge determinations, or that those determinations must consider benefits receipt at all. The distinction was plainly not adopted for general use in public charge determinations,[304] notwithstanding House debates and implementing regulations suggesting otherwise.[305] This point cuts both ways. On the one hand, Congress may have only been willing to sanction a lenient exception given the "one-time-only" nature of IRCA's amnesty program. On the other, one could argue that if Congress proved willing to ignore the non-cash benefits receipt of undocumented people, then the garden-variety public charge determination, for presumptively lawful immigrants, might not require consideration of cash benefits either. The amendment's legislative history is thin, and its discussion of benefits is largely mooted by PRWORA's subsequent restrictions on noncitizens' benefits access.[306] The Special Rule's cash/supplemental distinction therefore proves unconvincing as evidence that Congress intended for the consideration of benefits receipt.

Agencies have broad authority to change prior policies.[307] But a rule prohibiting consideration of benefits would not require an overhaul of administrative precedent—in fact, some may even support such a prohibition. For example, if one accepts a plain reading of *Matter of B*, benefits receipt bears little relation at all to a noncitizen's likelihood of becoming a public charge. The case holds that a noncitizen only becomes a public charge if the government demands repayment under a statute that authorizes it to pursue a cause of action against the noncitizen. Federal public benefits do not provide for such a general cause of action against recipients.[308] As a result, receipt of benefits is properly irrelevant in determining whether a noncitizen is "likely to become" a public charge.

The other key BIA precedents, *Harutunian* and *Perez*, offer little further resistance.[309] At most, they rest on a factual assumption that officers *will* consider some benefits in the determination, rather than addressing whether they ought

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**303.** *See supra* Section I.E.

**304.** *See* IRCA § 245A(d)(2)(B)(iii) (codified as amended at 8 U.S.C. § 1160(c)(2)(C) (2018)).

**305.** *See supra* Section I.E.

**306.** *See supra* Sections I.E & I.F.

**307.** FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009) (holding that, in addition to meeting the standard Administrative Procedure Act requirements, it is sufficient that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better").

**308.** *See supra* note 179 and accompanying text.

**309.** *See supra* Section I.E.

to. Their holdings—that no single benefit can serve as a proxy for becoming a public charge, and that officers should instead consider the "totality of the circumstances"—aim to *limit* the role of benefits receipt in the public charge regime, not to enshrine it.

A policy prohibiting consideration of benefits might look like the following formulation: *Perez*'s "totality of the circumstances" test,[310] including IIRIRA's five minimum factors,[311] but excluding all lawfully received public benefits. This simple carveout would recognize Congress's pattern of using eligibility instead of public charge to control immigrants' access to benefits, and decouple the success of immigration enforcement from the failure of benefits regimes. Notably, it would not require a definition of public charge itself that ignores receipt of benefits. Nor would it require any particular definition of "public charge." Benefits receipt may still be relevant as to whether one *has become* a public charge. It would merely require that, in determining upon admission whether a noncitizen is "likely to become" a public charge, the official rely upon factors other than benefits receipt. Evidence of benefits receipt, even if probative of likelihood to become a public charge, ought to be excluded for reasons of public policy.[312]

### *C. The Tension Between Exclusion and Assistance*

The inadmissibility determination's infringement on benefits regimes is symptomatic of a deeper problem with public charge—an underlying tension between excluding and providing. The existence of this tension helps to explain public charge's weak doctrine and inconsistent enforcement, and it counsels in favor of its rescission.

The concept of a "public charge" is itself at odds with firmer and more recent commitments to provide for those in need of assistance—commitments that scholars and courts have long recognized. In 1964, Yale Law School Professor Charles Reich called for the creation and protection of "a new property" in response to the growth of government-administered wealth, including the widespread provision of public benefits.[313] Indeed, his piece supports the argument

310. *In re* Perez, 15 I. & N. Dec. 136, 137 (BIA 1974).

311. INA § 212(a)(4)(B) (codified as amended at 8 U.S.C. § 1182(a)(4)(B)) (2018).

312. *Cf.* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence obtained in violation of the Fourth Amendment is inadmissible in state criminal trials, not withstanding its probative value).

313. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964).

that, in a very real sense, we have all become something like public charges.[314] As one commentator paraphrased, "the increased dependency of citizens on their relationships to government" required "a re-construction" of the relationship between them.[315] The Supreme Court affirmed this understanding by citing Reich in its landmark entitlements decision *Goldberg v. Kelly*.[316] "From its founding," the Court wrote, "the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. . . . The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it . . . ."[317] "[B]enefits," the Court declared, "are a matter of statutory entitlement for persons qualified to receive them."[318]

After every major change in welfare policy, the government has struggled to adapt public charge to evolving understandings of what is an "acceptable" amount or kind of public assistance. As I have shown in Part I, every step—the New Deal, the Great Society, and PRWORA—has required the administrative state to reclarify (with mixed results) the definition of public charge. This ever-present question will only grow more salient as the nation drifts further from the poorhouses of the 1800s. Our answers, meanwhile, will grow more contorted.

Due to these shifting welfare commitments, a sustained, unified account of "public charge" has long eluded Congress, the courts, and the administrative state. Most recently, the 2018 Trump rule discarded the strongest contender—the 1999 guidance—with little justification beyond a flat assertion that noncitizens should be "self-sufficient, [that is, should] not depend on public resources to meet their needs, but rather rely on their own capabilities."[319]

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**314.** A report on the 2018 rule estimated that, by the rule's logic and income guidelines, over 80% of the world's population would be considered a public charge. Danilo Trisi, *Trump Administration's Overbroad Public Charge Definition Could Deny Those Without Substantial Means a Chance to Come to or Stay in the U.S.*, CTR. ON BUDGET & POL'Y PRIORITIES 7 (May 30, 2019), https://www.cbpp.org/sites/default/files/atoms/files/5-30-19pov.pdf [https://perma.cc/C7QB-UPAD]. Over half of those born in the United States have used a relevant benefit. *Id.* at 4.

**315.** Handler, *supra* note 9, at 899.

**316.** 397 U.S. 254, 262 n.8 (1969).

**317.** *Id.* at 264-65.

**318.** *Id.* at 262.

**319.** Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114, 51,118 (Oct. 10, 2018) (to be codified in scattered parts of 8 C.F.R.). The rule offers little more of substance: "This proposed rule would improve upon the 1999 Interim Field guidance by removing the artificial distinction between cash and non-cash benefits." *Id.* at 51,123.

Plaintiffs challenging the rule allege that its definition departs from the "well-established common law meaning of 'public charge'" used since 1882.[320] They cogently argue that the guidance's definition of public charge, "primary dependence," codified longstanding administrative practice whereby public charge excludes a small category of immigrants likely to become institutionalized or destitute.[321] The 1999 proposed rule similarly defended the "primarily dependent" definition using a historical understanding of public charge's plain meaning.[322]

But while the litigants are correct that the Trump Administration attempted to implement an absurdly expansive interpretation, they overstate the coherence of "public charge doctrine."[323] Implementation of public charge has rarely remained consistently limited. Early enforcement was gratuitous and unchecked.[324] The one Supreme Court case interpreting the term "public charge" added only a modest gloss, any value of which was overridden by Congress's subsequent decision to relocate the language. Exclusions spiked during the Great Depression at the behest of the President, and in response to 1996 immigration and welfare reform at the initiation of immigration agencies.[325] Under the Lookout Systems, federal and state agencies interpreted public charge to authorize their collusion in violation of immigrants' constitutional rights and statutory entitlements. Overreach and inconsistency are public charge's norm, not aberrations.

If the plaintiffs lose on this point, it may be for failure to show a cohesive historical narrative regarding what "courts, agencies, and Congress" have meant by "public charge."[326] Such a narrative does not exist. Their loss would underscore the incoherence and injustice of the public charge exclusion.

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**320.** Complaint for Declaratory & Injunctive Relief, New York v. DHS, No. 1:19-cv-07777, 2019 WL 3936551, ¶ 50 (S.D.N.Y. Aug. 20, 2019) (including New York, Connecticut, Vermont, and New York City).

**321.** *See, e.g.*, Complaint, New York v. DHS, 2019 WL 3936551, at 8, 9, 16-19; *id.* at 1-3; Hester et al., *supra* note 6, at 1.

**322.** 1999 INS Proposed Rule, *supra* note 251, at 28,677. This view is consistent with historical work on the subject. *See, e.g.*, Hester et al., *supra* note 6, at 2-3 (detailing the early development of public charge laws).

**323.** Some historians may disagree. *See* Hester et al., *supra* note 6, at 1 (characterizing the public charge regimes as "over 100 years of consistent United States immigration policy"). While I fully agree that DHS's 2018 proposed rule presented an unprecedented expansion, I would not characterize public charge policy since 1882 as "consistent."

**324.** *See supra* Section I.A.

**325.** *Supra* notes 99-101, 165 and accompanying text.

**326.** Complaint, New York v. DHS, 2019 WL 3936551, at 4, 8.

## CONCLUSION

My review of public charge's history suggests that we, as a nation, have never agreed on who or what a public charge *is*. Legal standards like "primarily dependent"[327] and "public cash assistance"[328] mask generations of silence and dispute over the exclusion's meaning and purpose. There is not, and never has been, a shared understanding of whose interests the exclusion aims to serve, or how it furthers those interests.[329] The exclusion is a vestige of a bygone era, its vague command eroded by waves of specific commitments to the public welfare.

Prohibiting the consideration of benefits receipt, as I propose, would mitigate the public charge determination's intrusion on benefits regimes. But it would leave a dissonance between public charge's exclusionary purpose and our national commitments to provide for those in need. It would also leave a disturbing list of mandatory considerations: the age, health, wealth, and education of prospective immigrants.[330] Such an administrative rule should therefore be considered a stopgap in the absence of congressional action — the final chapter in public charge's troubled history.

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**327.** 1999 INS Proposed Rule, *supra* note 251, at 28,677.

**328.** IRCA § 245A(d)(2)(B)(iii) (codified as amended at 8 U.S.C. § 1160(c)(2)(C) (2018)).

**329.** Consider recent disagreement over what interests the exclusion furthers. *Compare* Casa De Maryland, Inc. v. Trump, 414 F. Supp. 3d 760, 776 (S.D. Md. 2019) (finding that organizations providing "services to immigrant communities" fall "squarely within the bounds of [the public charge exclusion's] interest in the health and economic status of immigrants admitted"), *and* Casa De Maryland, Inc. v. Trump, 971 F.3d 220, 241 n.5 (4th Cir. 2020) (finding that noncitizens wishing to adjust status fall within the zone of interests because they are "directly regulated" by public charge), *with Press Briefing by USCIS Acting Director Ken Cuccinelli* (Aug. 12, 2019), https://www.whitehouse.gov/briefings-statements/press-briefing-uscis-acting-director-ken-cuccinelli-081219 [https://perma.cc/VT9A-H2L] (describing the "benefit to taxpayers").

**330.** *See* INA § 212(a)(4)(B)(i) (codified as amended at 8 U.S.C. § 1182(a)(4)(B)(i) (2018)).