

A Vessel for Discrimination: The Public Charge Standard of Inadmissibility and Deportation

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*“Law . . . becomes civilized to the extent that it is self-conscious of what it is doing.”*¹

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1. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 530 (1947) (characterizing the views of Justice Oliver Wendell Holmes, Jr.).

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INTRODUCTION

A provision of U.S. immigration law allows the government to exclude or deport immigrants based on the likelihood that they will become poor and dependent on the government. An immigration officer can find an alien inadmissible as “likely . . . to become a public charge” when the alien applies for admission to the United States or, if they are already in the country, when the alien applies for adjustment of status (for example, a green card).² This provision, often referred to simply as “public charge,” has never been statutorily defined. But, for over 100 years, it has been applied across statutes, common law, administrative regulation, and public understanding.

“Public charge” is vague but not devoid of meaning. A theme has developed over a century of application: a public charge implies an individual primarily or wholly dependent on the government, usually because of an inability to work and support oneself. However, the pliability of public charge offers a catchall rationale to exclude immigrants,³ creating a problem: if someone can be deemed inadmissible or can be deported as a “public charge,”⁴ but the term is undefined, how can an immigrant avoid becoming a public charge? The stakes are high and the rules are unclear. Public charge targets two intertwined groups with little political power: immigrants and the poor.⁵

2. 8 U.S.C. § 1182(a)(4)(A) (2012) (“Any alien who . . . at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”).

3. See LISA SUN-HEE PARK, ENTITLED TO NOTHING: THE STRUGGLE FOR IMMIGRANT HEALTH CARE IN THE AGE OF WELFARE REFORM 4 (2011); see also TORRIE HESTER, DEPORTATION: THE ORIGINS OF U.S. POLICY 153 (2017) (noting that the “‘likely to become a public charge’ provision” was a “catchall category to restrict the immigration of single women, Jews, and many other groups” and “was also used racially”).

4. This Note uses “public charge” to refer to the term as well as the legal and historical framework. Quotations are added when discussing a definition of the term or its use by a specific source.

5. See Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender, and Class*, 42 UCLA L. REV. 1509, 1512–14 (1995); see also HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 122 (2017) (describing the disenfranchisement and stigmatization of poor immigrants in the United States during the mid-19th century).

Awareness of the public charge provision has increased in recent months. In October 2018, the Trump Administration released a proposed rule to expand the definition of public charge,⁶ and in August 2019, the Department of Homeland Security (DHS) issued a final rule enacting the expanded public charge analysis (Final Rule).⁷

Before the Final Rule, DHS officers could only consider public benefit programs relied on by individuals with little-to-no income when determining whether an immigrant was a public charge. Now, DHS officers will consider programs established to help working individuals and families, such as federal housing assistance through public housing and Section 8, healthcare coverage through nonemergency Medicaid, and food assistance through the Supplemental Nutrition Assistance Program (SNAP).⁸ This means that DHS officers can look at new factors when determining whether an individual is likely to become a public charge.

There are two ways of understanding the public charge framework: interpretation and application. Historical *interpretation* derives a common principle of a public charge as someone primarily or wholly dependent on the government, usually because of their inability to work. Historical *application* of public charge shows how it has been co-opted for discriminatory use. This Note demonstrates that public charge should be defined by its common principle, not by its history of discriminatory application.

First, this Note surveys the current state of the public charge policy and summarizes the history of public charge. It also explores the modern transformation of the relationship between noncitizens and public benefits, with elected officials and policymakers using the language of public charge as a tool to deny noncitizens access to public benefit programs and weaponizing the use of public benefits to exclude and deport immigrants. Second, this Note illustrates how the lack of a formal definition of public charge allowed for inconsistent and biased application, but a central principle—an individual primarily or wholly dependent on the government—grounded the interpretation. Third, this Note offers evidence to support the central principle and proper definition of public charge as a person primarily or wholly dependent on the government. This section looks to modern and historical dictionary definitions, modern federal statutory provisions and agency guidance, the use of public charge at the time it was enacted as federal law, and common law interpretation. Ultimately, it becomes clear that public charge should be understood as it was written and interpreted, not as it came to be applied as a catchall tool for discrimination.

6. See Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51,114 (proposed Oct. 10, 2018) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248); Michael D. Shear & Ron Nixon, *Plan to Punish Immigrants for Using Welfare Could Boost G.O.P. Candidates*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/2018/08/07/us/politics/legal-immigrants-welfare-republicans-trump.html>.

7. See Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248).

8. *Id.* at 41,295, 41,501 (to be codified at 8 C.F.R. § 212.21(b)).

I. PUBLIC CHARGE: NOW AND THEN

“Public charge” is complicated and vague, and it has been used discriminatorily throughout history. To understand today’s debates over public charge requires some familiarity with its history. First, this Part explains the public charge standard and its recent changes in light of the Trump Administration’s Final Rule. Focusing on admissibility provisions, where public charge most commonly applies, this Part evaluates the current statutory standard, the soon-to-be-defunct⁹ but deeply rooted framework codified by the 1999 Field Guidance document, and the new Final Rule. Second, this Part provides an overview of the history of the public charge standard in the context of larger shifts in immigration policy. It breaks the history of public charge into three periods: (1) from the colonial era through the beginning of the twentieth century, (2) from the early twentieth century through World War II, and (3) from World War II through the welfare reform legislation of the 1990s. The last section of this Part covers in depth the 1990s welfare reform laws enacted during the Clinton Administration, which transformed the traditional understanding of public benefits and led directly to today’s debates and misunderstandings about the meaning of public charge and how it should be applied.

A. THE CURRENT STANDARD

An alien¹⁰ can be classified as a public charge on the way into the United States—admission—or on the way out—deportation. Two statutes—the Immigration and Nationality Act (INA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)—codified the modern public charge standard, with federal-agency guidance filling in the gaps. Until recently, a federal-agency guidance document known as the 1999 Field Guidance¹¹ directed the interpretation and application of the statutory provisions, with a tangled web of other statutes and federal agency regulations adding additional layers

9. At the time of writing, the Final Rule was not yet in effect. On January 27, 2020, the Supreme Court temporarily allowed the Final Rule to go into effect, after several federal district courts across the country granted preliminary injunctions ordering that DHS could not implement the Rule until final resolution of the cases. However, even after the Supreme Court’s decision, the USCIS website noted that the Final Rule was not yet in effect. See Amy Howe, *Government Gets Green Light to Implement “Public Charge” Rule Pending Appeals*, SCOTUSBLOG (Jan. 27, 2020, 2:59 PM), <https://www.scotusblog.com/2020/01/government-gets-green-light-to-implement-public-charge-rule-pending-appeals/> [<https://perma.cc/6UVX-YL4T>]; Susannah Luthi, *Supreme Court Allows Trump to Enforce ‘Public Charge’ Immigration Rule*, POLITICO (Jan. 27, 2020, 5:49 PM), <https://www.politico.com/news/2020/01/27/supreme-court-enforce-trump-immigration-rule-106520> [<https://perma.cc/9YHQ-7GX6>]; *Final Rule on Public Charge Ground of Inadmissibility*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility> [<https://perma.cc/5AB8-XZR4>] (last updated Jan. 30, 2020).

10. A note on language: I use “alien,” “immigrant,” and “noncitizen” interchangeably, except in reference to a statute that uses one specifically. Although “alien” has taken on a discriminatory tone in our political climate, it is used in the language of the statute and can be more precise in certain circumstances (an immigrant can be a citizen, for example).

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

of instruction. Now, the Trump Administration's Final Rule will govern its interpretation.

1. Admission

When an alien applies for admission to the United States or, if they are already in the country, applies for adjustment of status (for example, a green card), an immigration officer can find the alien inadmissible as “likely . . . to become a public charge.”¹² The officer makes a predictive determination based on a set of factors established by statute. The officer must consider, at a minimum, the alien's: “age; health; family status; assets, resources, and financial status; and education and skills.”¹³ Additionally, as part of the application for entry or adjustment of status, an alien will likely submit an affidavit of support from a family member. In the affidavit, the sponsor swears to provide financially for the alien so that the alien will not become a public charge.¹⁴ This is a binding contract between the federal government and the sponsor.¹⁵ The immigration officer may consider the affidavit of support in making the public charge determination.¹⁶ This statutory scheme establishes a totality of the circumstances analysis, with immigration officers balancing both positive and negative factors.¹⁷

However, this structure makes it difficult for an alien to know if they are inadmissible as “likely to become a public charge.” The modern policy debate has focused on a subset of that dilemma: if an alien has received public benefits, does that alien become inadmissible as likely to become a public charge? Congress has not weighed in on this question, leaving federal agencies during the Clinton and Trump Administrations to mine the history of public charge to make their own determinations. The Clinton Administration's interpretation, as embodied in the 1999 Field Guidance, formalized the longstanding interpretation of public charge and remained intact until the Trump Administration released the Final Rule.

The Immigration and Naturalization Service (INS), the precursor agency to the United States Citizenship and Immigration Services (USCIS), issued the 1999 Field Guidance during the Clinton Administration. Under this scheme, a person *might* be considered “likely to become a public charge” based on their receipt of

12. 8 U.S.C. § 1182(a)(4)(A) (2012) (“Any alien who . . . at the time of application for admission or adjustment of status, is likely at any time to become a public charge is inadmissible.”).

13. *Id.* § 1182(a)(4)(B)(i). However, certain groups such as asylees, refugees, and immigrants with U- and T-visas are exempt from the public charge grounds of inadmissibility. See EM PUHL ET AL., IMMIGRANT LEGAL RES. CTR., FACT SHEET: AN OVERVIEW OF PUBLIC CHARGE 2 (2018), <http://barhii.org/wp-content/uploads/2018/09/ILRC-An-Overview-of-Public-Charge.pdf> [<https://perma.cc/6FU2-XRKW>]; CONG. RESEARCH SERV., R43220, PUBLIC CHARGE GROUNDS OF INADMISSIBILITY AND DEPORTABILITY: LEGAL OVERVIEW 1–2, 1 n.6 (2017), https://www.everycrsreport.com/files/20170206_R43220_6ece03686544d907d3d96c4291bb39a17268cdf8.pdf [<https://perma.cc/M3NT-QLRH>].

14. See 8 U.S.C. § 1183a(a)(1)(A) (2012) (providing that the sponsor must agree to provide support to maintain the alien at an annual income of at least “125 percent of the Federal poverty line”).

15. See *id.* § 1183a(a)(1)(B). The affidavit provision lacks any instruction as to how the sponsor can provide for the alien to ensure that the alien will not become a public charge.

16. See *id.* § 1183a(a)(1).

17. See CONG. RESEARCH SERV., *supra* note 13, at 4.

public benefits only for income maintenance (that is, programs that serve individuals who earn little-to-no income, usually because of age or disability).¹⁸ The 1999 Field Guidance considered only the alien's: (1) receipt of cash assistance for income maintenance¹⁹ and (2) institutionalization for long-term care at government expense.²⁰ Immigration officials were barred from considering benefits not used for income maintenance, such as SNAP (formerly Food Stamps), health insurance, CHIP, Medicaid, and rental assistance.²¹ The question was whether the alien had a basic ability to self-maintain. In addition to considering an alien's use of these discrete public benefits programs, immigration officers were required to find some other set of specific circumstances such as "mental or physical disability, advanced age, or other fact reasonably tending to show that the burden of supporting the alien is likely to be cast on the public."²²

Under the new Final Rule, immigration officers will consider whether an immigrant is "more likely than not at any time in the future to become a public charge."²³ A "public charge" is a noncitizen who receives one or more of the defined public benefits for more than twelve months within a thirty-six month period.²⁴ However, each benefit counts as a separate month, so if a noncitizen receives multiple benefits, they can be deemed a public charge in under a year. For example, a person receiving three benefits for four months would be counted as having received twelve months of benefits.²⁵ So, a person likely to become a public charge is a person who the immigration officer determines is likely to, at some point in the future, receive one or more of the defined public benefits for the set time period.

The Final Rule drastically expands the defined public benefits that immigration officers may consider. It disrupts both the longstanding principle of a public charge as an individual wholly or primarily dependent on the government for support, as well as the 1999 Field Guidance interpretation which, in line with this longstanding principle, only considered income maintenance programs and long-term institutionalization. By contrast, the Trump Administration's Final Rule considers programs explicitly barred from consideration by the 1999 Field

18. See 1999 Field Guidance, *supra* note 11, at 28,690.

19. This includes Supplemental Security Income (SSI), Temporary Assistance for Needy Families (TANF), and state and local cash-assistance programs (or "general assistance" programs). PUHL ET AL., *supra* note 13, at 3.

20. For example, nursing-home or mental-health institutionalization covered by Medicaid. *Id.*

21. *Id.* at 4. Some of these programs are to be explicitly considered by immigration officials under the Trump Administration's new Final Rule. See Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (to be codified at 8 C.F.R. § 212.21(b)).

22. 1999 Field Guidance, *supra* note 11, at 28,690. The 1999 Field Guidance reflects earlier administrative decisions by the Board of Immigration Appeals (BIA) and the Attorney General. See, e.g., *In re Perez*, 15 I. & N. Dec. 136, 137 (B.I.A. 1974); *In re Martinez-Lopez*, 10 I. & N. Dec. 409, 421 (Att'y Gen. 1964).

23. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (to be codified at 8 C.F.R. § 212.21(c)).

24. *Id.* (to be codified at 8 C.F.R. § 212.21(a)).

25. *Id.* (to be codified at 8 C.F.R. § 212.21(a), (b)).

Guidance, including any federal, state, or local cash assistance for income maintenance, health assistance through Medicaid, food assistance through SNAP, or housing assistance through public housing or Section 8.²⁶

The Final Rule establishes a framework whereby a person is classified as “likely to become a public charge” if they exhibit attributes that, according to an immigration officer, make them likely to accept twelve months’ worth of public benefits in any thirty-six-month period at any point in the future. There is a deep irony to this rule: because most noncitizens are barred from accessing federal public benefits,²⁷ the rule will affect immigrants who are ineligible for benefits, but who are nonetheless found likely to receive benefits in the future.

2. Deportation

The government can deport as a public charge any alien who, within five years, becomes a public charge for reasons that did not arise during the alien’s time in the United States.²⁸ The deportation provision, which developed in the common law, is more narrowly construed than the inadmissibility provision because of the few constitutional due process rights granted to noncitizens.²⁹ Courts established a three-part test to determine if an alien is deportable as a public charge: where an alien has received public support, that alien is deportable if (1) the state law imposes a charge for the services rendered, thereby creating a debt; (2) the authorities have demanded reimbursement; and (3) there was a failure to repay.³⁰

B. HISTORY OF PUBLIC CHARGE

Over a century of use, “public charge” has mirrored the times. This section provides context for an analysis of the public charge framework through three phases of immigration law.³¹ There are two ways to understand the public charge framework: interpretation and application. The historical *interpretation* of public

26. *Id.* (to be codified at 8 C.F.R. § 212.21(b)).

27. *See, e.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 403, 110 Stat. 2105, 2265.

28. 8 U.S.C. § 1227(a)(5) (2012); *see also* 8 U.S.C. § 1227(a)(1)(A) (2012) (“Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.”).

29. *See* CONG. RESEARCH SERV., *supra* note 13, at 3 (explaining how the deportation statute is more narrowly construed because it “dislodges [the noncitizen’s] established residence” in the United States (quoting *In re Harutunian*, 14 I. & N. Dec. 583 (B.I.A. 1974))); *see also* *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law.”).

30. *See In re Harutunian*, 14 I. & N. Dec. at 585; *In re B-*, 3 I. & N. Dec. 323, 326 (Att’y Gen. 1948).

31. *See* Richard A. Boswell, *Restrictions on Non-Citizens’ Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1480 (1995) (outlining three periods of immigration law: (1) from founding to 1875, which was “characterized by few if any federal restrictions”; (2) “from 1875 until 1952,” characterized by “increasing restrictions imposed on those coming to the United States”; and (3) from 1952 until present, which is “commonly regarded as the beginning of contemporary immigration law”).

charge reflects someone primarily or wholly dependent on the government, usually because of their inability to work. The historical *application* of public charge reveals how the term has been coopted for discriminatory use. For example, the 1999 Field Guidance drew on the historical interpretation of public charge whereas the Trump Administration's Final Rule seems to rely on the term's historical application. This section surveys the interpretation and application of the public charge framework through the three phases of immigration law, providing context along the way.

1. The Colonial Era to the Beginning of the Twentieth Century

As the nation moved from colonies to states, public charge implied a “ward of the state,” a “pauper,” or someone who was wholly dependent on the government for support. During this time, the colonies opened their doors to certain immigrants: “[O]ne of the complaints the authors of the Declaration of Independence made against King George III was that his policies sharply restricted immigration.”³² Between 1820 and 1850, roughly 2.5 million immigrants came to the United States, most of them “from France, Germany, Ireland, and Great Britain.”³³

Only select groups were encouraged to immigrate; poor Irish and German immigrants were discriminated against, and nativist Americans advocated closing borders to poor immigrants from Europe.³⁴ States, rather than the nascent federal government, controlled immigration and implemented public charge provisions to reduce the number of poor immigrants coming to their territories.³⁵ Pauperism was considered a concrete condition: it was seen as a defect, and the poor were “seen as deviants in need of control rather than as neighbors undergoing misfortune.”³⁶ Almshouses were prevalent during this time.³⁷

“Pauper” and “public charge” were used interchangeably. Statutes in New York and Massachusetts—the two main immigration hubs—equated the two terms and excluded paupers from entering the state.³⁸ These laws set the stage for later federal immigration law. The New York and Massachusetts laws used “public charge” to mean someone wholly dependent on the government for support.

32. BILL ONG HING, *DEFINING AMERICA THROUGH IMMIGRATION POLICY* 13 (2004) (“In those days the control of immigration was practically equivalent to its encouragement.”); S. REP. NO. 81-1515, at 43 (same).

33. HING, *supra* note 32, at 4.

34. See HIROTA, *supra* note 5, at 102–03.

35. See E. P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798–1965*, at 390 (1981).

36. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1847 (1993) (citing DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 290 (1971)).

37. *Id.* Almshouses were homes for the poor often overseen by local or state authorities. See Leo M. Alpert, *The Alien and the Public Charge Clauses*, 49 YALE L.J. 18, 23 (1939) (“It is the type of relief today usually called general public assistance, welfare relief, or home relief, that is the modern counterpart of the pauper, almshouse and charity concept.”).

38. See Neuman, *supra* note 36, at 1850 n.92, 1855 n.138.

For example, Massachusetts excluded aliens with a “high risk” of becoming a public charge, defining this group as “a pauper, lunatic, or idiot, or maimed, aged, infirm or destitute, or incompetent to take care of himself or herself without becoming a public charge as a pauper.”³⁹ New York similarly lumped together “any lunatic, idiot, deaf, dumb, blind or infirm persons . . . or who have been paupers . . . or are likely soon to become a public charge.”⁴⁰ These groups of people were often housed in institutions and were primarily or wholly dependent on others or the state for support.⁴¹

When the New York and Massachusetts laws were struck down by the U.S. Supreme Court for levying an unconstitutional tax,⁴² Congress passed the 1882 Immigration Act as a replacement.⁴³ The 1882 Immigration Act was the first federal immigration legislation to include public charge. Borrowing language from the New York and Massachusetts statutes, it allowed the Secretary of the Treasury to exclude “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”⁴⁴ In 1891, Congress passed another immigration statute expanding the list of excludable groups to “idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, [and] polygamists.”⁴⁵ From state law to federal law, public charges were considered in the same category as paupers, lunatics, and idiots—people unable to care for themselves without significant support.

Although neither state nor federal law defined public charge, the law had an immediate impact: from 1892 to 1900, 15,070 of 22,515 immigrants denied entry (sixty-six percent) were found inadmissible as “likely to become [a] public charge”⁴⁶ and from 1901 to 1910, 63,311 of 108,211 (fifty-eight percent) were inadmissible under this category.⁴⁷ Altogether, public charge was the most

39. *Id.* at 1850 n.92 (quoting Act of Mar. 20, 1850, ch. 105, § 1, 1850 Mass. Acts 338, 339).

40. *Id.* at 1855 n.138 (quoting Act of Apr. 11, 1849, ch. 350, § 3, 1849 N.Y. Laws 562). New York required that a bond be paid for:

any lunatic, idiot, deaf, dumb, blind or infirm persons not members of emigrating families or who from attending circumstances are likely to become permanently a public charge, or who have been paupers in any other country or who from sickness or disease, existing at the time of departing from the foreign port are or are likely soon to become a public charge.

Id. at 1855 & n.138.

41. *See id.* at 1847.

42. *See Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1875) (holding that the state head tax against alien passengers in state ports as unconstitutional); *Passenger Cases*, 48 U.S. (7 How.) 283, 392 (1849) (same) (opinion of McLean, J.); *Henderson v. Mayor of New York*, 92 U.S. 259, 274 (1875) (same).

43. *See Neuman, supra* note 36, at 1859 & n.171.

44. Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214, 214.

45. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

46. INS, U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 258 tbl.66 (2003), https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2001.pdf [<https://perma.cc/5L8S-G9EK>].

47. *Id.*

commonly used reason for inadmissibility. From 1890 to 1920, between fifty and seventy percent of immigrants denied entry were deemed inadmissible as public charges.⁴⁸

2. The Early Twentieth Century to the End of World War II

This period is marked by three major shifts: (1) immigration rates increased,⁴⁹ (2) Congress reinforced and expanded the existing system of immigration regulation following growing nativist sentiment,⁵⁰ and (3) the nature of public benefits changed dramatically, transforming public relief from almshouses and charity programs supporting paupers to government programs providing public assistance to individuals and families in the lower and middle classes.⁵¹ These legislative efforts occurred against a backdrop of key historical moments and movements, such as the Industrial Revolution, World War I, the rise of eugenics and nativism, the Great Depression, and World War II. Additionally, America experienced a changing approach to poverty and the government's role in alleviating it. President Franklin Delano Roosevelt's New Deal and President Lyndon Johnson's War on Poverty changed societal notions of public assistance and created a new ecosystem of support available to U.S. residents.⁵²

The actual text and interpretation of the public charge provisions remained relatively consistent during this period, but the application did not. In the text, the main change was that Congress extended the period within which public charges could be deported.⁵³ In 1903, public charges could be deported within two years of entry.⁵⁴ In 1907, Congress extended the time period to three years.⁵⁵

48. JEANNE BATALOVA ET AL., MIGRATION POLICY INST., CHILLING EFFECTS: THE EXPECTED PUBLIC CHARGE RULE AND ITS IMPACT ON LEGAL IMMIGRANT FAMILIES' PUBLIC BENEFITS USE 7 n.12 (2018), <https://www.migrationpolicy.org/research/chilling-effects-expected-public-charge-rule-impact-legal-immigrant-families> [<https://perma.cc/MC6E-M6PP>] (citing INS, *supra* note 46, at 258 tbl.66).

49. See U.S. *Immigrant Population and Share Over Time, 1850-Present*, MIGRATION POL'Y INST., <https://www.migrationpolicy.org/programs/data-hub/charts/immigrant-population-over-time> [<https://perma.cc/63VC-HBZ6>] (last visited Feb. 19, 2020) (demonstrating an increase in the number of immigrants from 1900–1930).

50. See HUTCHINSON, *supra* note 35, at 159.

51. See KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972, at 9–11 (2016) (describing the evolution of welfare rights in the United States during the twentieth century); see also Alpert, *supra* note 37, at 22–23 (“It is now because of the diversity in the types of public assistance that the public charge spectre is so fearsome. . . . The social drives of 1939 bear the same relationship to those of 1924 as an adolescent to a mewling infant. . . . It is the type of relief today usually called general public assistance, welfare relief, or home relief, that is the modern counterpart of the pauper, almshouse and charity concept.”).

52. See TANI, *supra* note 51, at 9–11.

53. Notably, Congress did not actually legislate to facilitate the deportation provision until 1937, when it determined that public charges would be removed at public expense. HUTCHINSON, *supra* note 35, at 450. However, this applied only if the aliens were “desirous of being so removed.” *Id.* (quoting Act of May 14, 1937, ch. 181, 50 Stat. 164, 164).

54. See KITTY CALAVITA, U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820–1924, at 86 (1984) (citing Act of Mar. 3, 1903, ch. 1012, § 20, 32 Stat. 1213, 1218).

55. See *id.* at 86–87 (citing Act of Feb. 20, 1907, ch. 1134, § 20, 34 Stat. 898, 904–05).

Although the text changed little, in application, public charge became a tool for discrimination. Immigration authorities used public charge as a catchall to exclude people who fell into the broad—and broadly interpreted—category of individuals likely unable to work.⁵⁶ This category was read to encompass aliens with physical and mental disabilities, paupers, alcoholics, and many others.⁵⁷ Underlying this discriminatory application of public charge was a broader trend in the United States toward racism and nativism.⁵⁸ This sentiment, paired with the undefined public charge category of inadmissibility, allowed immigration officers to broadly interpret “likely to become a public charge.”

The Immigration Act of 1917 (1917 Act) reflected the trend toward a broad interpretation of immigration regulation as a way to restrict immigration—it marked “a definite move from regulation to attempted restriction” of immigration.⁵⁹ Congress restricted immigration in three key ways: (1) through a literacy test, which Congress had tried to enact for twenty-five years; (2) by expanding the list of excludable aliens (for example, imbeciles, feeble-minded persons, anarchists, polygamists, vagrants, and persons with tuberculosis); and (3) by raising the per-person tax to eight dollars, making it more expensive to emigrate.⁶⁰ These provisions offered immigration officers with even more tools to find immigrants inadmissible.

The 1917 Act also moved the public charge provision to a new section of the statute. Previously, “public charge” was placed next to “paupers” and “professional beggars,”⁶¹ which allowed immigration officers to rely on economic conditions—whether an alien would be likely to find a job because of extrinsic factors—in their decisions.⁶² By placing “public charge” in a different section of the statute, the 1917 Act removed the possibility of economic-based determinations,⁶³ but maintained the broad application of using public charge for discriminatory purposes. The Act further extended the deportation period for public charges to five years and placed the burden of proof on the alien to demonstrate that “a propensity for pauperism had not existed at the time of entry.”⁶⁴

The next important piece of legislation, the Immigration Act of 1924 (1924 Act), represented an acceleration of immigration regulation but did not affect the meaning of public charge. The 1924 Act created an immigration infrastructure. It

56. See HESTER, *supra* note 3, at 153.

57. See *infra* Section II.B (describing how public charge more explicitly included those with mental physical and mental disabilities, of which alcoholism was considered).

58. See *infra* Section II.B (same).

59. HUTCHINSON, *supra* note 35, at 167.

60. See *id.* at 167; see also Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875 (listing the types of excludable aliens); HING, *supra* note 32, at 51 (“The Immigration Act of 1917 required all aliens over sixteen years old, who were physically capable of reading, to be able to read English or some other language or dialect.”).

61. See *infra* Section III.B.3.

62. The Supreme Court in 1915 found relying on economic conditions unlawful in *Gegiow v. Uhl*, 239 U.S. 3, 9–10 (1915). See also CALAVITA, *supra* note 54, at 87.

63. See *infra* Section III.B.3.

64. CALAVITA, *supra* note 54, at 87 (citing Immigration Act of 1917 § 3).

established consular offices and procedures for issuing visas and defined the immigrant and nonimmigrant quota system.⁶⁵

As Congress increased the types of restrictions (like the literacy test) and added categories of excludable aliens, the number of aliens found inadmissible as “likely to become a public charge” and deported as public charges decreased. However, from 1911 to 1940, public charge remained the most widely used ground for inadmissibility. From 1911 to 1920, 90,045 of 178,109 excluded immigrants (fifty percent) were deemed inadmissible as “likely to become [a] public charge,”⁶⁶ and another 9,086 were deported as public charges.⁶⁷ From 1921 to 1930, 37,175 of 189,307 excluded immigrants (twenty percent) were deemed inadmissible as “likely to become a public charge,”⁶⁸ and another 10,703 (six percent) were deported as public charges.⁶⁹

Although the public charge provisions in the statutes remained largely the same from 1917 to 1952, the Executive Branch interpreted those statutes to differing degrees of severity. For example, at the start of the Great Depression, President Herbert Hoover encouraged Congress to revise immigration laws and procedures because it was “obvious” that immigrants would become public charges.⁷⁰ President Hoover further instructed consular officers to strictly interpret “likely to become a public charge” and to refuse visas for people in the class as a way to reduce immigration.⁷¹ From 1931 to 1940, 12,519 of 68,217 excluded immigrants (eighteen percent) were deemed inadmissible as likely to become a public charge,⁷² and another 1,886 were deported as public charges.⁷³

After the United States joined World War II, the total numbers dropped off. From 1941 to 1950, 1,072 of 30,263 excluded immigrants (four percent) were deemed inadmissible as likely to become a public charge,⁷⁴ and another 143 were deported as public charges.⁷⁵ However, during the War and the immediate post-war period, more aliens were excluded as likely to become a public charge than any other category.⁷⁶

Post-World War II, Congress relaxed restrictions and attended to immigration issues surfaced by the War, such as displaced persons and alien veterans.⁷⁷ But by

65. HUTCHINSON, *supra* note 35, at 194 (discussing Act of May 26, 1924, ch. 190, 43 Stat. 153, 153).

66. INS, *supra* note 46, at 258 tbl.66.

67. *Id.* at 259 tbl.67.

68. *Id.* at 258 tbl.66.

69. *Id.* at 259 tbl.67.

70. HUTCHINSON, *supra* note 35, at 219 (quoting H.R. DOC. NO. 71-519, at 9-10 (1930)).

71. See CALAVITA, *supra* note 54, at 160; see also HUTCHINSON, *supra* note 35, at 219.

72. INS, *supra* note 46, at 258 tbl.66.

73. *Id.* at 259 tbl.67.

74. *Id.* at 258 tbl.66. But see S. REP. NO. 81-1515, app.VI at 839 (1950) (reporting that from 1939-1948 there were 4,034 aliens excluded as “[l]ikely to become public charges”).

75. INS, *supra* note 46, at 259 tbl.67. From 1951 to 1960, 149 immigrants were deemed inadmissible as likely to become a public charge and 225 were deported as public charges. *Id.* at 258 tbl.66, 259 tbl.67.

76. See S. REP. NO. 81-1515, at 337.

77. See HUTCHINSON, *supra* note 35, at 297 (noting Congress’s focus on displaced persons, alien veterans legislation, and other “special problems” during the early 1950s).

1952, Congress returned to more heavy-handed regulation and shifted its focus to immigration procedure and administration.⁷⁸ There was a general agreement that the immigration laws needed revising, and Congress responded by passing the McCarran–Walter Act—or the Immigration and Nationality Act of 1952 (INA)—after an initial veto by President Truman.⁷⁹ The INA continued the quota system of the 1924 Act and targeted individuals with political viewpoints deemed un-American, such as anarchists, communists, and homosexuals.⁸⁰ The INA continued the informal pattern of designating three classes of inadmissible aliens in the public charge group: (1) individuals with a “defect, disease, or disability” that may affect the ability to earn a living; (2) “paupers, professional beggars, or vagrants”; and (3) those “likely at any time to become public charges.”⁸¹

3. Welfare Reform and the Modern Transformation of Public Charge

The 1990s marked a clear shift in the country’s approach to public benefits and, specifically, the relationship between noncitizens and public benefits, and public benefits and the public charge framework. Two bills—the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) and IIRIRA—transformed public charge from a tool used to exclude or deport aliens to a lever used to punish immigrants and limit their access to public benefits. These statutes did not change the definition of public charge; rather, PRWORA and IIRIRA dramatically reconfigured public benefits, with public charge as one piece of this reconfiguration. This set the stage for today’s battles over public charge.

The new statutes no longer linked public charge and the use of public benefits to pauperism or an inability to work.⁸² Instead, immigrants were hit on both sides: PRWORA barred most noncitizens from accessing federal means-tested public benefits,⁸³ and IIRIRA codified the factors immigration officers were already

78. *See id.* at 297.

79. *See id.* at 301–02, 307; *see also* Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 163.

80. *See HING, supra* note 32, at 73. The national origin quota system ended in 1965, but certain quotas remained. *See id.* at 96. One example is the quota on immigrants from the Western Hemisphere, which primarily affected Latin American applicants. *See id.*

81. HUTCHINSON, *supra* note 35, at 414 (quoting Immigration and Nationality Act of 1952, ch. 477, § 212(a)(7), (a)(8), (a)(15) 66 Stat. 163, 182–83).

82. The Immigration Act of 1990 removed from the code “paupers, beggars, vagrants, persons with some health impairments, and those with physical diseases or defects affecting their ability to earn a living.” Mark C. Weber, *Opening the Golden Door: Disability and the Law of Immigration*, 8 J. GENDER, RACE & JUST. 153, 162–63 (2004) (citing the Immigration Act of 1990, Pub. L. No. 101-649, § 601, 104 Stat. 4978, 5072).

83. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 403, 110 Stat. 2105, 2265 (codified at 8 U.S.C. § 1613 (2012)). “Federal means-tested public benefits” is a term introduced by PRWORA. *See id.* § 421 (codified at 8 U.S.C. § 1613 (2012)). It refers to SNAP (formerly Food Stamps), Medicaid, SSI, TANF, and CHIP. *See Accessing Resources: Public Benefits*, NAT’L LATIN@ NETWORK, <https://nationallatinonetwork.org/assessing-resources/public-benefits/federal-benefits/federal-means-tested-public-benefits> [<https://perma.cc/J8KV-TXEC>] (last visited Feb. 20, 2020).

using to determine whether an alien was inadmissible as “likely to become a public charge.”⁸⁴ This meant that although immigration officers were using the same factors, it became harder for aliens to access the public benefits that (before the 1999 Field Guidance) might be considered in a public charge analysis.

These Clinton Administration welfare reform bills had practical and philosophical effects. Practically, they limited the programs available to noncitizens and made it harder for noncitizens to qualify for the benefits still available to them. Philosophically, they shifted the public charge determination from a prospective analysis to a preemptive action. Instead of asking, “Is this alien inadmissible because they are likely unable to work and are therefore likely to become a public charge?,” it became an action statement: “Any alien might rely on public benefits, so we should prohibit their use of benefits so that they do not become a public charge.”

There is limited data for this period. Just a few years before these bills were passed, in 1992, 8,811 (or fifty percent) of total immigrant visa applications resulted in initial ineligibility findings on public charge grounds.⁸⁵ In 2000, 46,450 (or seventeen percent) of total immigrant visas resulted in initial ineligibility findings on public charge grounds.⁸⁶

The 1990s represent a crucial pivot in the history of public charge. First, the 1990s welfare reform laws relied on the language of public charge to limit noncitizens’ access to public benefits. Second, the welfare reform bills led to statutory and regulatory changes to the public charge framework. And third, there was a clear demand from immigrant communities to clarify the public charge framework.

a. Practical Effects and Limiting Access to Benefits.

PRWORA made it harder for aliens to access public benefits in three ways: (1) it barred aliens from accessing certain public benefit programs; (2) it placed more burdensome requirements on immigrants’ sponsors; and (3) it made it harder for aliens to qualify for the benefit programs for which they were still eligible.

First, PRWORA barred most noncitizens from accessing federal, means-tested public benefits. It established two regimes for whether, when, and how an immigrant could access public benefits: one for qualified (legal) aliens and one for

84. *In re A-*, 19 I. & N. Dec. 867, 869 (B.I.A. 1988) (citing future IIRIRA factors and case law relying on those factors); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 531(a), 110 Stat. 3009-546, 3009-674 (providing that immigration officers may determine age; health; family status; assets, resources, and financial status; and education and skills).

85. Johnson, *supra* note 5, at 1521 n.45 (citing U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 1992, at 140–41 (1994)).

86. BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, REPORT OF THE VISA OFFICE 2000, at tbl. XX (2000), <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2000.html> [<https://perma.cc/UJ2M-63UP>] (click “XX. Immigrant and Nonimmigrant Visa Ineligibilities (by Grounds of Refusal Under the Immigration and Nationality Act): Fiscal Year 2000”). Public charge was the second highest category of initial ineligibility findings for visa applications. *Id.* The largest category of initial ineligibility findings fell under 8 U.S.C. § 1201 “Applications Do Not Comply With the Provisions of the Immigration and Nationality Act or Regulations Issued Pursuant Thereto,” a generic provision encompassing all other sections of the chapter. *Id.*

nonqualified (illegal or temporary resident) aliens.⁸⁷ Qualified aliens are ineligible for federal means-tested public benefits—SNAP, SSI, TANF, CHIP, and Medicaid—during their first five years of living in the United States.⁸⁸ Nonqualified aliens—for example, temporary residents and undocumented immigrants—are ineligible for federal public benefits and for state and local benefits, unless the state where they reside passed a law making them eligible.⁸⁹

Second, PRWORA placed more of the burden on immigrants' sponsors by requiring them to take responsibility for immigrants' financial wellbeing. It requires, in most circumstances, an alien's sponsor to provide a legally binding affidavit of support to establish that the alien is not likely to become a public charge.⁹⁰ If the sponsored alien receives any means-tested public benefits, the government could require the sponsor to reimburse the government in an equal amount.⁹¹ This creates a disincentive for the alien and the sponsor—the alien might be less likely to seek out public benefits and the sponsor might be less inclined to sponsor. IIRIRA amended this provision of PRWORA to require that a sponsor demonstrate an income of at least 125 percent of the federal poverty level.⁹²

Third, PRWORA made it harder for aliens to qualify for the benefit programs for which they were still eligible. It established a "deeming" provision, whereby the income and resources of the sponsor and the sponsor's spouse are deemed available to the sponsored immigrant when determining the immigrant's eligibility for means-tested public benefits.⁹³ This reduces the likelihood that an immigrant will qualify for means-tested public benefits because their income might exceed the threshold required by the benefit program. For example, if an immigrant's sponsor's income is at 200 percent of the federal poverty level, and the immigrant applying for benefits has an income of 50 percent of the federal poverty level, the immigrant's eligibility would be determined by the former. This immigrant might not qualify for the benefit programs for which they would otherwise be eligible.

On the other side, IIRIRA codified the factors immigration officers could consider in the public charge analysis. Before IIRIRA and the totality of the circumstances test that led to the IIRIRA factors, immigration officers were instructed to apply the public charge framework to individuals who were likely to end up in poverty and required income support for basic necessities. After the IIRIRA factors, immigration officers were nominally less restricted—they no longer had to

87. See generally *Summary of Immigrant Eligibility Restrictions Under Current Law*, OFFICE OF ASSISTANT SEC'Y, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Feb. 25, 2009), <https://aspe.hhs.gov/basic-report/summary-immigrant-eligibility-restrictions-under-current-law> [<https://perma.cc/B579-YUSQ>].

88. See 8 U.S.C. § 1621(a)(1), (a)(3), (b)(3) (2012); *id.* § 1613(a); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 403, 110 Stat. 2105, 2265 (codified at 8 U.S.C. § 1613 (2012)); Interpretation of "Federal Means-Tested Public Benefit," 62 Fed. Reg. 45,256, 45,256 (Aug. 26, 1997) (designating TANF and Medicaid as federal means-tested public benefits); see also 8 U.S.C. §§ 1612(a)(2), 1613(b) (listing federal programs and immigrant groups exempted from these restrictions).

89. See 8 U.S.C. §§ 1611(a), 1621(a), 1621(d).

90. See *id.* § 1183a.

91. See *id.* § 1183a(b).

92. See *id.* § 1183a(a)(1)(A).

93. See *id.* § 1631(a).

find that an alien was likely to end up in destitute poverty. Instead, to determine whether an alien was likely to become a public charge, officers could consider a range of factors outlined in the statute, including: “age; health; family status; assets, resources, and financial status; and education and skills.”⁹⁴ With the IIRIRA factors, the meaning of public charge drifted away from abject poverty and toward a more vague totality of the circumstances analysis.

Crucially, neither statute explained whether an immigrant’s use of whatever benefits remained available factored into the public charge determination, and neither statute cast aside the understanding of public charge as a person primarily or wholly dependent on the public for support. This created mass confusion among immigrants and their families, immigrant advocacy groups, and even immigration officers. The confusion ultimately led to the 1999 Field Guidance—the most comprehensive document relating to the public charge provision.

b. Chilling Effect.

The substantial confusion caused by PRWORA and IIRIRA created a chilling effect—the legislation told immigrants that they could not access most federal benefit programs, made immigrants less likely to be eligible for the remaining available programs, and did not articulate whether and how using benefits would lead to negative outcomes, like deportation or inadmissibility.⁹⁵ Immigrants avoided participating in public health programs so as to not risk being designated a public charge, and thereby risk deportation.⁹⁶ The lack of clarity in the statutes had serious consequences: women went without prenatal care and parents ceased to vaccinate their kids.⁹⁷ Although some groups of noncitizens qualified for remaining public benefit programs, the “immigration statutes themselves act as a deterrent, if not a bar, to a person’s acceptance of benefits.”⁹⁸

Immigrant groups organized and demanded clarity. Spurred by this community activism, the Department of Justice issued the 1999 Field Guidance, which

94. *Id.* § 1182(a)(4)(B).

95. In the case law, prior receipt of public benefits has not been a determinative factor as to whether an alien is a public charge. *See* CONG. RESEARCH SERV., *supra* note 13, at 10; *see also In re T-*, 3 I. & N. Dec. 641, 644 (B.I.A. 1949) (focusing on respondent’s ability to earn a living, even where public benefits were not at issue); CONG. RESEARCH SERV., *supra* note 13, at 9 (“Collectively, the various sources addressing the meaning of *public charge* suggest that an alien’s receipt of public benefits, per se, has historically been unlikely to result in the alien being deemed removable on public charge grounds.”); Alpert, *supra* note 37, at 31 n.50 (“[R]eceiving public relief did not constitute a basis for claiming that the recipient had become a public charge, in the sense as used in the immigration laws.” (quoting HAROLD FIELDS, *THE REFUGEE IN THE UNITED STATES* 51 (1938))); *id.* (“Where lack of employment is the only factor which has placed aliens in needy circumstances, they incur no danger of deportation if they accept charitable aid.” (quoting Comment, *Statutory Construction in Deportation Cases*, 40 *YALE L.J.* 1283, 1289 & n.27 (1931))).

96. *See* Digna Betancourt Swingle, *Immigrants and August 22, 1996: Will the Public Charge Rule Clarify Program Eligibility?*, 81 *FAMS. SOC’Y* 605, 605 (2000).

97. *See id.*

98. Boswell, *supra* note 31, at 1496. “A person’s acceptance of these benefits, even in the case of a permanent resident, could lead to the person’s characterization as a public charge and cause the person to be removed or excluded for participating in any of these programs.” *Id.*

defined “public charge” as a person “primarily dependent on the government for subsistence.”⁹⁹ The 1999 Field Guidance began as a proposed rule, but it was never promulgated.¹⁰⁰ The proposed rule identified a historically consistent meaning of public charge, determining that “charge” meant “a person or thing committed or entrusted to the care, custody, management, or support of another.”¹⁰¹ For example, “he entered the poorhouse, becoming a county charge.”¹⁰² When the Department of Justice issued the 1999 Field Guidance (nearly identical to the proposed rule), it stated that “public charge” references an alien who is “primarily dependent on the government for subsistence” rather than one who “mere[ly] recei[ves] . . . a public benefit.”¹⁰³

However, even after the 1999 Field Guidance, confusion remained. Professor Lisa Sun-Hee Park interviewed a number of immigration advocates during and after the PRWORA and IIRIRA debates and the issuance of the 1999 Field Guidance. A San Francisco-based immigration advocate articulated the effect of the vagueness of public charge even after attempted administrative clarity:

The day after the clarification, some of our L.A. partners pulled together a press conference to announce the public charge clarification as a way to get a word in the community that it’s no longer a problem. People should feel safe to access benefits. They invited a woman community member who herself had been in the position of not enrolling her kids or herself in any health care programs because she thought it would be an issue. They talked to her several times beforehand and invited her to speak. She was great. She really spoke to the impact the policy had had prior to the clarification. The funny thing is, afterwards, some of our folks said, “Thanks for speaking at the press conference. Are you going to enroll in health programs now?” She said, “No, no way.”¹⁰⁴

Even those tasked with encouraging others to access benefits feared doing so. Today, we see this fear reemerge, with immigrants afraid to access benefits not

99. 1999 Field Guidance, *supra* note 11, at 28,692; *see also* BILL ONG HING, IMMIGRATION AND THE LAW: A DICTIONARY 257–58 (1999) (“Immigration authorities define *public charge* as an alien who has become (for removal purposes) or is likely to become (for admission or adjustment of status purposes) ‘primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance, or institutionalization for long-term care at government expense.’” (emphasis omitted)).

100. The 1999 Field Guidance was proposed at the end of President Clinton’s term, and it likely took a backseat to more pressing matters. Although the 1999 Field Guidance never became a formal regulation, federal agencies considered it binding guidance and published documents to inform constituents. *See* Swingle, *supra* note 96, at 606. Agencies that published new documents included the Administration of Aging, the Social Security Administration, and the Immigration and Naturalization Service. *See id.*

101. Inadmissibility and Deportability on Public Charge Grounds, 64 Fed. Reg. 28,676, 28,677 (proposed May 26, 1999) (to be codified at 8 C.F.R. pts. 212, 237) (citing *Charge*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 377 (1986)).

102. *Id.*

103. 1999 Field Guidance, *supra* note 11, at 28,689, 28,691.

104. PARK, *supra* note 3, at 81.

even included in the new public charge rule.¹⁰⁵

* * *

PRWORA and IIRIRA are crucial pieces of public charge history. The statutes complicate the interpretation and application of public charge, but in the face of that complication, the 1999 Field Guidance underscores the meaning of the term—public charge denotes a person wholly or primarily dependent on the government. The history of public charge was largely straightforward until the 1990s welfare reform legislation. It was understood one way and applied another way; in the 1990s, interpretation and application came to a head—interpretation won. Now, that conflict has been resurrected by the Trump Administration, which is attempting to enshrine application as interpretation.

II. INCONSISTENT AND BIASED APPLICATION

The public charge framework has rarely been applied in a uniform way. The discretionary nature of the public charge analysis created opportunities for officers to use public charge as a vessel for discrimination. Besides appearance, immigration officers had little to go on—an alien coming to the United States with money could lose it and an alien without money could gain it—so immigration officers had to rely on other factors.¹⁰⁶ This section offers examples of how public charge was applied in a discriminatory fashion.

First, immigration-officer discretion led to inconsistent application and biased determinations. Second, bolstered by eugenics-inspired ideas about who should be allowed into the country, officers combined pauperism with mental and physical disability to find immigrants excludable as likely to become a public charge.

A. OFFICER DISCRETION: BIAS AND INCONSISTENCY

A lack of definition allowed immigration officers' bias to infect the public charge analysis. Immigration officers stretched the meaning of public charge to find aliens excludable, and a series of cases with similar facts sometimes ended up remarkably different.¹⁰⁷ Unless—and even if—the alien appealed the decision, there was little oversight, and courts deferred to the initial determination of the officer.¹⁰⁸

105. See Elizabeth Trovall, *Immigrant Families Suffer Health Impacts, As Many Fear New Public Charge Rule*, HOUS. PUB. MEDIA (Aug. 16, 2019, 1:16 PM), <https://www.houstonpublicmedia.org/articles/news/in-depth/2019/08/16/342934/immigrant-families-suffer-health-impacts-as-many-fear-new-public-charge-rule/> [<https://perma.cc/95R8-3KXL>].

106. See S. REP. NO. 81-1515, at 347 (1950) (“[T]he amount of money which an alien has is . . . not necessarily a criterion, since an alien who has only \$300 might have a brother in the United States with a large home where he may stay, as well as the ability to support himself; while on the other hand another alien might have a million dollars, but because he is a professional gambler his fund would not guarantee his support.”).

107. See Alpert, *supra* note 37, at 34 n.61, 35 (listing cases and commenting that the holdings are “to put it mildly, not uniform”).

108. See CALAVITA, *supra* note 54, at 90 (noting that officers “operated almost unchecked in the[ir] application of the public charge clause”). Even today, there is little oversight for Customs and Border

Historian Hidetaka Hirota points out that whether migrants could actually support themselves barely mattered: “visual appearance had a profound consequence” and under the public charge standard, “the admission of migrants depended less on their realistic ability to support themselves than on the way they appeared to American inspecting officers.”¹⁰⁹ Using Irish immigrants in the late nineteenth century as an example, Hirota notes that news coverage of the Irish famine influenced American views. The reports “predisposed Americans to imagine that all the migrants were as poor and destitute as the most impoverished in Ireland.”¹¹⁰ This myth continued to surface: an 1838 presidential report proffered new material that “raised suspicion of some systematic sending of undesirables.”¹¹¹

In one high-profile case, a leading immigration lawyer, Henry Gottlieb, was hired to represent an immigrant woman, Nina Ashoff. She had a wealthy uncle prepared to take her in, but immigration inspectors nonetheless declared her “likely to become a public charge.”¹¹² In the appeal, Gottlieb argued that “the rich are inherently incapable of becoming a public charge.”¹¹³ The judge disagreed, deferring to the immigration officer as a matter of course: “If Baron Rothschild came over here in steerage as an immigrant . . . and the Commissioners decided that it was likely that he would become a public charge they could deport him.”¹¹⁴ By claiming that the famously wealthy Rothschild could be deemed a public charge, the judge underscored the excess of discretion granted to immigration authorities.

In other cases, courts overturned immigration officers’ decisions as groundless, but did not prohibit the reasoning in future cases. In *In re Feinknopf*, the court overturned an immigration officer’s decision to deport Mr. Feinknopf as a public

Protection (CBP). In January 2020, an Iranian student was denied entry by CBP and ignored a court order delaying the student’s removal. The judge admitted, “I don’t think [CBP officials] are going to listen to me.” Andrew Urban, *The Deportation of an Iranian Student Shows the Unchecked Power of Customs and Border Protection*, WASH. POST (Jan. 23, 2020, 7:16 AM), <https://www.washingtonpost.com/outlook/2020/01/23/deportation-an-iranian-student-shows-unchecked-power-customs-border-protection/>.

109. HIROTA, *supra* note 5, at 36.

110. *Id.* at 36–37; *see also* HING, *supra* note 32, at 52. In later years, Italians and Jews faced this discrimination, as only they “were commonly distinguishable in American eyes; thus, they suffered the most resentment.” *Id.* at 52. As with coverage of the Irish famine, American newspapers played a role in stoking fear and discrimination. *Id.* Newspapers covered Italian immigrants as violent and Jews as “immoral . . . given to greed and vulgarity” and “conspiring to rule the world.” *Id.*

111. HUTCHINSON, *supra* note 35, at 411. This suspicion continued: In 1889, the House Select Committee on Investigation of Foreign Immigration (or, the Ford Committee) presented “evidence of assisted immigration of paupers.” *Id.* at 412.

112. Louis Anthes, *The Island of Duty: The Practice of Immigration Law on Ellis Island*, 24 N.Y.U. REV. L. & SOC. CHANGE 563, 563–64 (1998); *see also* Alpert, *supra* note 51, at 38 (arguing that the application of public charge went beyond superficiality all the way to revenge: “the motto of the Immigration Service, in these cases, has seemed to be revenge; revenge for a fancied wrong done the state by the alien who becomes a charge upon public facilities, or who breaches the immigration laws willy-nilly or inadvertently”).

113. Anthes, *supra* note 112, at 565.

114. *Id.*

charge.¹¹⁵ The immigration officer decided to deport Feinknopf because he did not believe that Feinknopf was being honest about his training as a cabinetmaker or his lack of dependents or history of relying on public support.¹¹⁶ The court overturned the deportation order, finding that even if Mr. Feinknopf's testimony was not credible, there was no evidence to suggest that he was likely to become a public charge.¹¹⁷ If Feinknopf had not appealed, the officer's biased disbelief, despite the lack of supporting evidence, would have been the end of the story.

An immigration officer could find an alien likely unable to work for a range of reasons: disbelief, physical disability, race, national origin, or religion. The discretion afforded to officers meant that even obvious racial discrimination was allowed under the guise of "likely to become a public charge." In *In re Rhagat Singh*, the court found Indian workers inadmissible as public charges because, as Indians, they would be discriminated against and no employer would hire them.¹¹⁸ The court accepted the argument that "Hindoo laborers are obnoxious to very many of our people . . . [T]here exists a prejudice against them, and . . . comparatively few avenues are open to them in which to find employment."¹¹⁹

B. DISABILITY, PUBLIC CHARGE, AND EUGENICS: THE PRETEXT OF "UNABLE TO WORK"

Immigration officers compounded disability, pauperism, and public charge under the label of individuals likely unable to work (although physical and mental disabilities were, on their own, statutory grounds for exclusion). The public charge standard for inadmissibility became a vessel for eugenics-based ideas about who was capable of work, thus targeting the mentally and physically disabled, and paupers.¹²⁰ But a likelihood of poverty alone was insufficient: "[P]overty alone did not justify exclusion, at least if the immigrant was capable of work."¹²¹

Eugenicists considered immigration a biological issue—allowing "degenerate breeding stock" to enter the country amounted to treason.¹²² This "scientific" theory was popular during the height of public charge determinations in the early twentieth century and meant that officers could find nearly any alien as likely unable to work and therefore likely to become a public charge.¹²³

In the public charge context, eugenics offered support for denying admission to people considered paupers and to people with disabilities. First, eugenics offered a façade of support because pauperism was considered hereditary.¹²⁴

115. 47 F. 447, 447–48, 452 (E.D.N.Y. 1891).

116. *See id.* at 447–48.

117. *See id.* at 448.

118. 209 F. 700, 701–02 (N.D. Cal. 1913).

119. *Id.* at 701.

120. *See Weber, supra* note 82, at 156, 159.

121. *Id.* at 156 (noting that "nearly everyone traveling steerage was impoverished").

122. *Id.* at 159 (quoting JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925*, at 151 (2d ed. 1963)).

123. *See id.*

124. *See CALAVITA, supra* note 54, at 87.

Americans considered paupers “a separate, hostile, and morally depraved class of people who willfully exploited public relief and were a source of significant social problems such as crime and insanity.”¹²⁵ Immigration officers were concerned about preventing the trait from infecting future generations, and even welfare workers considered pauperism hereditary.¹²⁶ But because pauperism was and “is not an innate characteristic” obvious to the eye, immigration officers were unable to recognize paupers and thus relied on other signifiers.¹²⁷

Second, immigration officers saw minor forms of disability as not only a barrier to work, but also as a condition that would infect America.¹²⁸ In 1912, the Commissioner of Ellis Island made this calculation clear:

The fact that mentally defective immigrants may become a burden on the taxpayer is a relatively unimportant consideration. What is vitally important is that such persons contribute largely to the criminal classes and that they may leave feeble minded descendants and so start vicious strains leading to misery and loss in future generations and influencing unfavorably the character and lives of hundreds of persons.¹²⁹

On this reasoning, a court found a sixty-year-old man with an amputated leg excludable as a public charge, despite having grown children willing and able to support him.¹³⁰ In another case, a court found a boy inadmissible because he lacked “physical development for [his] age,” despite having two brothers in the United States who offered to support him.¹³¹ Officers had a long list of traits that could be used for exclusion, including a curved spine, flat feet, heart disease, hysteria, and bunions.¹³² In 1893, a physician visiting Ellis Island noted that immigration officials reserved for future examination people who had:

A hand done up, or any physical injury in any way . . . , or if a person has but one leg or one arm, or one eye, or there is any physical or mental defect, if the person seems unsteady and in any way physically incapacitated to earn his livelihood¹³³

125. HIROTA, *supra* note 5, at 122.

126. JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860–1925*, at 44 (2002 ed.) (“‘The hereditary character of pauperism and crime,’ said a leading welfare worker, ‘is the most fearful element with which society has to contend.’”).

127. *See* CALAVITA, *supra* note 54, at 70.

128. *See* S. REP. NO. 81-1515, at 338 (1950) (“[T]he real object of excluding the mentally defective is to prevent the introduction into the country of strains of mental defect that may continue and multiply through succeeding generations” (quoting S. REP. NO. 64-352, at 4–5 (1916))).

129. Weber, *supra* note 82, at 159 (quoting WILLIAM WILLIAMS, *IMMIGRATION AND INSANITY* 6 (1912)).

130. *See* United States *ex rel.* Canfora v. Williams, 186 F. 354, 355 (S.D.N.Y. 1911).

131. *See* United States *ex rel.* Kutas v. Williams, 204 F. 847, 847 (S.D.N.Y. 1913).

132. Douglas C. Baynton, *Disability and the Justification of Inequality in American History*, in *THE DISABILITY STUDIES READER* 17, 26–27 (Lennard J. Davis ed., 4th ed. 2013).

133. *Id.* at 27 (alteration in original).

Those found to have mental disabilities were excludable based on the disability itself, but those with physical disabilities were excludable to the extent that the disability affected their ability to support themselves.¹³⁴

The role of eugenics remained largely unchecked through the 1940s, when immigration officials considered whether aliens were likely to become public charges because of factors such as “insufficient funds for support to destination or until work is found, advanced age and lack of friends or relatives responsible for support, crippled, low earning power and burdened with dependents, addiction to drinking or gambling, and deaf-mutism if accompanied by poverty and ignorance.”¹³⁵

III. PROPER DEFINITION OF PUBLIC CHARGE

A. PUBLIC CHARGE: A VAGUE STANDARD WITH A HISTORY OF ANIMUS

Public charge encapsulates many things: a category of alien, a ground for exclusion and deportation, a person’s potential future state, and a term with over a century of historical baggage. The term has never been statutorily defined and remains a vague standard, but a century of interpretation established a common principle: public charge implies someone primarily or wholly dependent on the government, usually because of an inability to work due to disability or age.

This section explores the three reasons behind the vagueness and pliability of public charge: (1) it operates as a standard rather than a rule; (2) it is a prospective analysis that requires determining whether something is likely to happen in the future; and (3) its vagueness gives rise to the convoluted language and media coverage that inhibits immigrants and their advocates from knowing how to avoid the label.

First, public charge is vague because it operates as a standard, producing uncertainty for immigrants and their families, immigration advocates, policymakers, and immigration officers. Legal scholar Kathleen Sullivan proposes that “rules” and “standards” sit on opposite ends of a continuum of discretion afforded to decisionmakers.¹³⁶ A “rule” requires the decisionmaker to respond based on “delimited triggering facts.”¹³⁷ A “standard” allows the decisionmaker to apply the background principle to the facts at hand.¹³⁸ A rule can lead to problems of “over- or under-inclusiveness,” while a standard should decrease those errors through increased discretion of the decisionmaker.¹³⁹

134. See S. REP. NO. 81-1515, at 338 (“The reasons for excluding a physically defective alien are likelihood of his becoming a public charge and inability by his own exertions to care for himself and those dependent upon him . . .” (quoting S. REP. NO. 64-352, at 4-5)).

135. HUTCHINSON, *supra* note 35, at 414 n.22. These factors are similar to what immigration officials consider today, but today’s list is less specific and leaves more room for bias. Rather than “advanced age and lack of friends or relatives responsible for support,” immigration officers consider “age” and “family status.” Compare *id.*, with 8 U.S.C. § 1182(a)(4)(B)(i) (2012).

136. See Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 57 (1992).

137. *Id.* at 58.

138. *Id.*

139. See *id.* at 58-59, 58 n.236.

For example, assume that public charge is based on the principle that it is in the government's interest to keep out aliens who will become completely dependent on the government to eat, find housing, and stay healthy. A public charge *rule* could be that anyone with fewer than twenty-five dollars in their pocket is inadmissible. A public charge *standard* could be that anyone with some attribute that makes it unlikely that they will be able to work and support themselves is inadmissible. The standard allows for increased discretion, but because the public charge analysis requires determining whether a future event will take place, this increased discretion creates room for bias.¹⁴⁰ Maybe that attribute will make it unlikely that the alien will find work; maybe it will not. Sullivan explains that the decision to choose a standard or a rule should reflect the problem to be solved: reducing the risk of under- or over-inclusiveness (choose a standard) or reducing the risk of bias (choose a rule).¹⁴¹

Congress has twice grappled with whether to transform public charge from a standard to a rule, but both efforts failed. In 1906, Congress debated legislation that “would have required all male immigrants [over sixteen years old] to present \$25 to avoid a public charge determination.”¹⁴² Women over sixteen years old were required to present fifteen dollars.¹⁴³ Congress avoided implementing this rule because members considered the test too restrictive.¹⁴⁴ Later, in 1950, as Congress prepared to write and pass the INA, it considered defining public charge, but ultimately chose not to. Despite acknowledging that “there is no definition of the term” and that it “has been characterized as a ‘catch-all for cases perhaps not otherwise deportable,’” the Judiciary Committee recommended that the clause “be retained” and that “there should be no attempt to define the term in the law.”¹⁴⁵ Public charge therefore remains a standard, with discretion afforded to the immigration officer despite the risk of bias.¹⁴⁶

Second, whether an alien is “likely to become a public charge” is a prospective analysis that is, by its nature, vague. It is a forward-looking totality of the circumstances approach. The officer is “not supposed to rely on a single factor, such [as] past receipt of public benefits,” but is supposed to consider all of the factors and

140. See *id.* at 62 (“A decision favoring rules thus reflects the judgment that the danger of unfairness from official arbitrariness or bias is greater than the danger of unfairness from the arbitrariness that flows from the grossness of rules.”).

141. See *id.* at 58 n.236.

142. David Bier, *The \$1/Day Standard & Other Problems with DHS's Public Charge Rule*, CATO INST. (April 19, 2018, 4:13 PM), <https://www.cato.org/blog/1-day-standard-other-problems-dhss-public-charge-rule> [<https://perma.cc/Q6G5-AZX5>]; HUTCHINSON, *supra* note 35, at 413.

143. See HUTCHINSON, *supra* note 35, at 413.

144. See Bier, *supra* note 142; see also CALAVITA, *supra* note 54, at 91 (characterizing the twenty-five-dollar rule as “too harsh”).

145. See S. REP. NO. 81-1515, at 349 (1950).

146. DHS recognizes this broad discretion: the Final Rule notes that whether someone is inadmissible as likely to become a public charge will “not [be] governed by clear data.” Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,397 (Aug. 14, 2019) (to be codified at 8 C.F.R. pts. 103, 212–14, 245, 248).

balance them accordingly.¹⁴⁷ This determination depends on the “*seeming* incapability of self-support—due to poverty, physical and mental defects, or disease.”¹⁴⁸ It functions as a “kind of miscellaneous file into which are placed cases where the officers think the alien ought not to enter, but the facts do not come within any specific requirements of the statutes.”¹⁴⁹ This grants wide discretion to consular and immigration officers, who are largely shielded from judicial review.¹⁵⁰

Third, journalists, scholars, and policy organizations articulate public charge differently. This creates greater confusion because descriptions of public charge do not differentiate between receipt of *any public benefit at any point* and receipt of public benefits *for income maintenance*. Journalists have defined public charge variously as “someone who is likely to wind up on welfare,”¹⁵¹ someone “dependent on taxpayer funds for their support,”¹⁵² and “immigrants whom [the government] expect[s] to be a burden on the state.”¹⁵³

Scholars and policy organizations offer different understandings as well. Before the Trump Administration’s Final Rule, most abided by the 1999 Field Guidance, describing public charge as “likely to become primarily dependent on the government for subsistence, as demonstrated by either the receipt of public cash assistance for income maintenance or institutionalization for long-term care at government expense,” where receipt of “public benefits does not automatically make an individual a public charge.”¹⁵⁴ Others, primarily politically conservative organizations, define public charge as an alien who “will become dependent on public welfare programs.”¹⁵⁵ Still, others refer back to the original use of the

147. PUHL ET AL., *supra* note 13, at 3.

148. HIROTA, *supra* note 5, at 203.

149. CALAVITA, *supra* note 54, at 91 (quoting WILLIAM C. VAN VLECK, *THE ADMINISTRATIVE CONTROL OF ALIENS: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE* 54 (1932)); *see also* HIROTA, *supra* note 5, at 203 (same).

150. *See* CONG. RESEARCH SERV., *supra* note 13, at 10 n.66. This is especially true in the consular context because of “the doctrine of consular nonreviewability.” *Id.*; *see* Saavedra Bruno v. Albright, 197 F.3d 1153, 1159 (D.C. Cir. 1999) (noting that consular officials’ decisions to issue or withhold a visa are generally beyond judicial review).

151. Arthur Delaney & Elise Foley, *How Trump Can Use Welfare to Stymie Immigration—And Vice Versa*, HUFFINGTON POST (Sept. 24, 2018, 7:42 PM), https://www.huffingtonpost.com/entry/trump-immigration-welfare_us_5ba93274e4b069d5f9d56d63 [<https://perma.cc/6PBL-M4RP>].

152. Mark Krikorian, *The Truth About the ‘Public Charge’ Immigration Rule*, NAT’L REV. (Sept. 25, 2018, 5:30 AM), <https://www.nationalreview.com/2018/09/immigration-public-charge-rule-food-stamps-public-housing-welfare> [<https://perma.cc/KD95-TSVJ>] (incorrectly characterizing the 1882 Act as a law banning immigrants likely to become a “public charge”).

153. Eric Levitz, *Trump Has Scared Immigrants into Forfeiting Their Kids’ Nutritional Benefits*, N.Y. MAG. (Sept. 4, 2018), <http://nymag.com/daily/intelligencer/2018/09/trump-administration-scared-immigrants-wic-welfare-public-charge-rule.html> [<https://perma.cc/59FZ-P33D>].

154. PUHL ET AL., *supra* note 13, at 1.

155. Dale L. Wilcox, *The Public Charge Rule Keeps America Great*, IMMIGR. REFORM L. INST. (Sept. 12, 2019), <https://www.irli.org/single-post/2019/09/12/The-Public-Charge-Rule-Keeps-America-Great> [<https://perma.cc/QX9G-XZTH>].

term, noting that public charge is more akin to a “ward of the state” and has always required “a significant degree of support.”¹⁵⁶

Altogether, these factors contribute to a vague framework with serious consequences, deeming individuals admissible or not, likely to succeed or not, and able to reunite with their families or not.

B. A COMMON PRINCIPLE AND OUTER BOUNDARY

Despite the uncertainty of the standard, public charge is not devoid of meaning. A central definition emerges: whether an alien is able to work so as to care for themselves and not become primarily or wholly dependent on the government. This section argues that this interpretation is supported in four ways: by (1) modern and original dictionary definitions; (2) modern federal statutory provisions and federal agency guidance; (3) the use of public charge at the time it was enacted as federal law; and (4) common law interpretation.¹⁵⁷

1. Modern Definition and Use in Federal Statutes and Agency Guidance

Both the modern dictionary definition and the Federal Code identify public charge as a person wholly or primarily dependent on the state for support. The Oxford English Dictionary (OED) defines public charge as “a thing which is the responsibility of the State; a person who is dependent upon the State for care or support.”¹⁵⁸ The OED entry cites the original language in the 1882 Immigration Act: “Any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”¹⁵⁹ By referencing this original language, the modern dictionary definition impliedly adopts this original interpretation, which used public charge to imply a person wholly dependent on the state.¹⁶⁰

In the statutory text, public charge can adopt a broad view or a narrow view. In the inadmissibility provisions, the IIRIRA factors (“age; health; family status; assets, resources, and financial status; and education and skills”)¹⁶¹ take a broad view, narrowed by the 1999 Field Guidance. Enacted as part of the 1990s welfare reform bills, the IIRIRA factors provide immigration officers with discretion in

156. Bier, *supra* note 142.

157. *United States v. Wells*, 519 U.S. 482, 491 (1997) (reporting that Congress incorporates the common-law meaning of terms that are undefined by statute and have a settled common-law meaning); *Shannon v. United States*, 512 U.S. 573, 581 (1994) (noting that where Congress adopts the wording of a statute from a legislative jurisdiction, the wording of the statute carries with it past judicial interpretations of the wording (citing *Capital Traction Co. v. Hof*, 174 U.S. 1, 36 (1899), *Carolene Prods. Co. v. United States*, 323 U.S. 18, 26 (1944))); *see also* Frankfurter, *supra* note 1, at 537 (“Words of art bring their art with them And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.”).

158. *Public Charge*, OXFORD ENGLISH DICTIONARY (3d ed. 2007), <http://www.oed.com/view/Entry/154052?redirectedFrom=public+charge#eid113604747>.

159. *Id.*

160. *See* HIROTA, *supra* note 5, at 60 (quoting a Massachusetts official referring to Irish immigrants as “‘paupers in the truest sense of the word,’ who were destined to be public charges in the state until the end of their lives”).

161. 8 U.S.C. § 1182(a)(4)(B) (2012).

how to determine whether an alien is likely to become a public charge. In other parts of the Code, public charge requires a narrower interpretation: a reliance on public cash assistance and a history of unemployment. For example, in a provision allowing special agricultural workers to apply for temporary or permanent resident status, the statute creates an exception to the standard public charge provision.¹⁶² These workers are eligible for adjustment of status as a special agricultural worker if they can demonstrate “a history of employment in the United States evidencing self-support without reliance on public cash assistance.”¹⁶³ This more closely mirrors the historic link between public charge and cash assistance for income maintenance.

2. Public Charge at the Time of Enactment

In its original meaning and use, public charge did not refer to *anyone* who needed aid—it referred to individuals who would be wholly dependent on the government for support.¹⁶⁴ This section looks to dictionary definitions from the time of enactment and the structure and text of the first federal immigration statutes.

First, in the nineteenth century, dictionaries described “pauper” as a person on par with a public charge.¹⁶⁵ Pauper referred to an individual dependent on government support, and paupers were given near-criminal status, and linked with convicts and vagabonds.¹⁶⁶ A dictionary from 1860 defines pauper as “[o]ne so poor that he must be supported at the public expense.”¹⁶⁷ The interchangeability of these terms developed because most states held individual towns responsible for the relief of paupers found in the town.¹⁶⁸ For this reason, paupers became wards

162. *Id.* § 1160(c)(2)(C).

163. *Id.* However, if the alien applies for adjustment of status outside of the special agricultural worker status, they are no longer exempt. *See id.* § 1160(c)(2)(B)(ii)(II). This is consistent with the history of this category and of U.S. immigration policy prioritizing access to cheap immigrant labor, but avoiding expanding public benefits to those immigrants. *See CALAVITA, supra* note 54, at 68 (describing the purpose of the 1882 Immigration Act as “alleviating the fiscal burden on the states attending immigration without cutting down on what Carnegie called ‘that golden stream’” (citation omitted)).

164. *See HIROTA, supra* note 5, at 52. Crucially, “public charges” were considered distinct from poor but self-sufficient immigrants: “Pauperism, more than mere poverty, embodied a form of dependency Those in temporary poverty due to uncontrollable financial misfortunes received sympathy as the ‘deserving’ poor” *Id.*; *see also* Alpert, *supra* note 37, at 20 (“[‘Public charge’] is ringed with the emotional aura of paupers and charity and almshouses . . .”).

165. *See* Neuman, *supra* note 36, at 1850 n.92 (noting that early state immigration statutes equated “public charge” with “pauper”).

166. *See HIROTA, supra* note 5, at 54 (noting that the Supreme Court opined that states “must provide precautionary measures against ‘the moral pestilence of paupers, vagabonds, and possibly convicts’” (quoting *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837))).

167. *Pauper*, 1 A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND OF THE SEVERAL STATES OF THE AMERICAN UNION (John Bouvier ed., 10th ed. 1860). Among the many definitions of “charge” in 1860, the one most closely aligned with the concept of “public charge” is “[a]n obligation entered into by the owner of an estate which makes the estate responsible for its performance. . . . That particular kind of commission which one undertakes to perform for another, in keeping custody of his goods, is called a charge.” *Id.* at *Charge*.

168. *See supra* Section I.B.1; *see also* Neuman, *supra* note 36, at 1848, 1853.

of the town, or public charges.¹⁶⁹

Second, the structure and text of the original federal immigration legislation—the 1882 and 1891 Acts—indicate that public charge implied individuals wholly or primarily dependent on the government.

The 1882 Act does this in two ways. To start, Congress explicitly raised funds to provide financial aid to new immigrants.¹⁷⁰ Congress raised these funds to cover the costs of regulating immigration and care for “immigrants arriving in the United States, for the relief of such as are in distress.”¹⁷¹ The Act charged the Secretary of the Treasury with the duty to provide support and relief to immigrants in distress and in need of public aid.¹⁷² Immigrants would need some financial support, and that need did not make them public charges. Additionally, the text of the 1882 Act refers to “any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge.”¹⁷³ By placing public charge alongside categories of people who, upon arrival in the United States, would likely be placed into institutional care, the statute used public charge to mean an individual unable to self-maintain without becoming wholly dependent on the government for care (for example, for shelter, food, and medical care).¹⁷⁴ At the time, institutionalization was a common solution.¹⁷⁵ For example, a convict would likely end up in prison, a lunatic or idiot would likely end up in a mental institution or hospital, and a public charge would likely end up in an almshouse.¹⁷⁶ Each category denotes individuals unable to care for themselves. These two provisions of the 1882 Act—the authority to refuse entry to those “likely to become a public charge” and the mandate to provide financial relief to immigrants—make clear that public charge did not refer to *anyone* who needed aid—it referred to individuals who would be wholly dependent on the government for support. Congress knew that immigrants would need some level of support upon arrival and thus created a fund to care for them.

In the 1891 Act, Congress explicitly equated public charge with pauper and added new categories to the list of aliens excluded from admission, each of which

169. See *supra* Section I.B.1.

170. See Immigration Act of 1882, ch. 376, § 1, 22 Stat. 214, 214. The 1882 Act established a head tax, later held unconstitutional, of fifty cents for each noncitizen entering the United States. By the Act’s express terms, the purpose of the tax was to raise money for an “immigrant fund” to cover the costs of regulating immigration and to provide aid to new immigrants. See *id.*

171. *Id.*

172. See *id.* § 2; see also Weber, *supra* note 82, at 159 (quoting the Commissioner of Ellis Island in 1912: “The fact that mentally defective immigrants may become a burden on the taxpayer is a relatively unimportant consideration”).

173. Immigration Act of 1882 § 2.

174. In 1837, Massachusetts’s statute singled out individuals “incompetent . . . to maintain themselves.” Neuman, *supra* note 36, at 1850 n.92 (quoting Act of Apr. 20, 1837, ch. 238, § 2, 1837 Mass. Acts 270, 270).

175. See *id.* at 1847 (noting an “evolution from the traditional system of local fiscal responsibility . . . to a more centrally financed system that relied more heavily on institutionalization”).

176. See HIROTA, *supra* note 5, at 45 (explaining that, for example, the New York legislature passed a law in 1824 requiring that all destitute people in the state, including immigrants, be supported at county almshouses).

indicated institutionalization of some kind.¹⁷⁷ The 1891 Act expanded “convicts,” “idiots,” and “lunatics” from the 1882 Act to “idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, [and] polygamists.”¹⁷⁸ These categories imply government institutionalization, whether to prison, a mental institution, quarantine, a hospital, or an almshouse.

The 1882 and 1891 Acts were based on earlier New York and Massachusetts laws. These state laws focused on establishing an “orderly reception, . . . helping those in temporary difficulty, and . . . discouraging the entry of the permanently incapacitated.”¹⁷⁹ This further supported the notion that the original public charge statutes focused on individuals primarily or wholly dependent on the state for support, not just those in need of short-term care.

In fact, as the state laws developed through the early 1800s, states moved away from trying to prevent the entry of impoverished immigrants and instead sought to cover the costs of supporting poor immigrants. To do this, states placed a “head tax” on arriving passengers, paid for by the shipmaster.¹⁸⁰ By the 1820s, New York and Massachusetts continued efforts to cover the costs¹⁸¹ of regulating the immigration system and supporting poor immigrants, but abolished the head tax and instead required that shipmasters pay a bond to cover immigrant passengers. In Massachusetts, the shipmaster’s bond would be forfeited if the immigrant entered an almshouse within three years of entering the country—entering the almshouse rendered the immigrant a public charge.¹⁸² Understanding the history of these state laws—where entering an almshouse triggered the public charge designation—offers greater insight as to how the conception of public charge developed over time and its longstanding definition as a person primarily or wholly dependent on the government.

At each stage of development, the federal statutes—and the state statutes from which they came—encouraged caring for new immigrants who needed help getting started in their new homes but also limited admission for people who would be wholly or primarily dependent on the government for support.

3. Common Law Interpretation

Courts have interpreted public charge on a case-by-case basis,¹⁸³ and common law supports the principle that public charge implies an alien primarily or wholly

177. Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

178. *Id.*

179. HIGHAM, *supra* note 126, at 43.

180. *See* Neuman, *supra* note 36, at 1848 & n.78.

181. By 1855, Massachusetts spent one-third of its expenditures on “supporting foreign paupers.” HIROTA, *supra* note 5, at 105.

182. *See id.* at 46.

183. *See* CONG. RESEARCH SERV., *supra* note 13, at 2 (“[W]hile the INA provides that an alien may be inadmissible or deportable on public charge grounds, it does not define what it means for an alien to

dependent on the government, usually because of an inability to work due to disability.

In 1915, the Supreme Court found that, under the statute, public charge was similar to paupers and professional beggars. In *Gegiow v. Uhl*, immigration officers determined that immigrants traveling to a town with an overstocked labor market might have difficulty finding a job—making them likely to become public charges.¹⁸⁴ The Supreme Court found this too far a stretch, overturned the officers' decision, and held that immigrants could not be denied entry as likely to be a public charge because their destination had an overstocked labor market.¹⁸⁵ An alien's difficulty finding a job had to be tied to personal attributes, not external conditions. Justice Holmes determined that because public charge appeared next to paupers and professional beggars in the statute, it should be read as "generically similar to the others mentioned before and after."¹⁸⁶ These other terms were not specific to location, so public charge could not be based on local conditions. Congress responded in the 1917 Act by revising the placement of public charge to no longer reference paupers and professional beggars.¹⁸⁷

Even after the 1917 Act, two New York cases maintained this reading of public charge as equivalent or similar to paupers or beggars. In *Howe v. United States ex rel. Savitsky*, the court determined that public charge must be limited to people who "were likely to become occupants of almshouses for want of means with which to support themselves in the future."¹⁸⁸ In *Ex parte Mitchell*, the court concluded that:

A "person *likely* to become a public charge" is one who for some cause or reason appears to be about to become a charge on the public, one who is to be supported at public expense, by reason of poverty, insanity and poverty, disease and poverty, idiocy and poverty It would seem there should be something indicating the person is liable to become, or shows probability of her becoming, a public charge.¹⁸⁹

Common law established an outside boundary for who immigration officers could deem inadmissible as public charges: persons likely to become wholly dependent on the government because they were unable to support themselves. However, as the application of public charge makes clear, that boundary left

be a public charge. Such determinations were historically made using certain tests developed by the case law . . .").

184. 239 U.S. 3, 9–10 (1915), *superseded by statute*, Immigration Act of 1917, ch. 29, § 3, 39 Stat. 874, 875, 876 (moving public charge out of close proximity with paupers and professional beggars).

185. *Id.* at 10.

186. *Id.*

187. See Immigration Act of 1917 § 3.

188. 247 F. 292, 294 (2d Cir. 1917) (noting that Congress specifically included other excludable groups in the 1917 Act, and thus a broad construction of public charge would render those groups—"imbeciles, feeble-minded persons, insane persons, persons affected with tuberculosis and prostitutes"—unnecessary); see also *United States ex rel. Iorio v. Day*, 34 F.2d 920, 922 (2d Cir. 1929) (reasoning that public charge suggests "dependency [rather] than imprisonment").

189. 256 F. 229, 230 (N.D.N.Y. 1919).

room for immigration officers to find individuals likely unable to support themselves for a range of reasons.

4. Legislative History

The legislative history of the 1990s welfare reform bills—PRWORA and IIRIRA—demonstrates the fundamental divisions that surface when isolating the definition of public charge. The legislative history signifies a reimagining of public charge as a way to disincentive or limit immigration; it does not represent simply a preference for those who are able to contribute. This history is significant because, first, Congress contemplated strictly defining public charge but failed to do so, and second, that failure led directly to other efforts to limit noncitizens' access to public benefits.

First, in debates over welfare reform, Congress discussed and failed to define public charge. Neither PRWORA nor IIRIRA contains a definition. During congressional debate over the failed House Bill 2202 (the proposed Immigration Control and Financial Responsibility Act of 1996), certain members of Congress pushed to include a definition of public charge in the deportation context.¹⁹⁰ This debate and legislative failure relates to our understanding of public charge for two reasons: (1) House Bill 2202 resembles the recent Final Rule put forth by the Trump Administration (Congress's failure became the White House's success), and (2) House Bill 2202 led directly to IIRIRA, which codifies the factors for consideration in current public charge determinations.

House Bill 2202 would have amended the deportation provisions of the INA to include, for the first time, explicit statutory consideration of whether aliens used public benefits programs. The INA provides that “[a]ny alien who, within five years after the date of entry, has become a public charge from causes not affirmatively shown to have arisen since entry is deportable.”¹⁹¹ This would apply, for example, to an alien who contracted an illness making them unable to work. If the illness was contracted after entry, the alien was not deportable. The failed provision would have defined public charge as any alien who, within seven years of entry, received benefits from the following programs for an aggregate period of at least twelve months: SSI, Aid to Families with Dependent Children (AFDC), Medicaid, SNAP, state general cash assistance, and housing assistance.¹⁹² It did

190. See H.R. REP. NO. 104-828, at 138–39 (1996) (Conf. Rep.). The failure of House Bill 2202 led directly to Congress passing IIRIRA. IIRIRA represents the only provisions of House Bill 2202 on which Congress was able to agree.

191. 8 U.S.C. § 1227(a)(5) (2012). As laid out in the (later promulgated) 1999 Field Guidance, an alien may be deported as a public charge only if: (1) the individual is “primarily dependent on the government for subsistence,” (2) the government entity providing cash assistance or long-term institutionalization has a right to seek repayment of benefits, (3) the government entity sought repayment within five years and the party obligated to repay failed to do so, (4) there is a court or administrative judgment requiring the party to repay, and (5) the government entity has taken all actions necessary to enforce the judgment. See 1999 Field Guidance, *supra* note 11, at 28,689, 28,691.

192. See H.R. REP. NO. 104-828, at 138, 144.

not include emergency medical services, public health immunizations, and short-term emergency relief.¹⁹³

Senators opposed to the provision argued that it redefined public charge by incorporating the alien's use of the listed benefit programs into the meaning of the term.¹⁹⁴ This would have converted public charge from a standard to a rule, but the rule would have been over-inclusive. Indeed, senators in the minority noted that:

[T]he list of programs giving rise to deportability . . . includes assistance that falls outside our traditional notions of welfare, that should be available to all individuals in the public interest, and that will ultimately enable legal immigrants from escaping the kind of welfare dependency that the majority frowns on.¹⁹⁵

After House Bill 2202 failed, lawmakers supporting the provision acknowledged that their first priority was to exclude or deport aliens as public charges. However, since their legislation to punish immigrants for using benefits failed, they would instead accept limiting aliens' access to public benefits as a way to disincentivize immigration on the front end. Senator Alan Simpson (R-WY) stated this explicitly: “[W]ithout such a definition we really cannot deport even those recent immigrants who have become completely dependent upon taxpayer-funded welfare.”¹⁹⁶ But, he went on: “The only bright spot there is that under the welfare bill you can't receive welfare for a 4- or 5-year period . . .”¹⁹⁷

Second, from the ashes of House Bill 2202, Congress passed IIRIRA, which did not define public charge but offered statutory guidance on the types of factors, *not* benefit programs, that immigration officers should consider in making public charge determinations.¹⁹⁸ PRWORA and IIRIRA demonstrate an effort to reduce immigration by finding a workaround for the vagueness of public charge, due to the lack of definition in the statutes: if Congress could not or would not make it easier to deport or exclude people as public charges by defining the term, the next-best option was to limit the support available to immigration through public

193. *See id.* at 138–39, 144. The final Senate bill had a few key differences from the final conference report passed by the House, namely: the time period covered (within five years of entry or within five years of adjustment of status), the addition of a broad catchall category of covered benefits (for any other need-based assistance program), and a broader list of exclusions (including prenatal and postpartum services, assistance or benefits under laws designed to prevent childhood hunger, and other assistance such as soup kitchens, crisis counseling, and short-term shelter). Neither bill purported to define public charge for purposes of admissibility or adjustment of status. S. REP. NO. 104-249, at 22, 114–15 (1996).

194. S. REP. NO. 104-249, at 64 (“[T]he definition of public charge goes too far in including a vast array of programs none of us think of as welfare.”).

195. *Id.* at 48.

196. 142 CONG. REC. 26,437–38 (1996).

197. *Id.* at 26,438.

198. *See* 8 U.S.C. § 1182(a)(4)(B) (2012); *see also* CONG. RESEARCH SERV., *supra* note 13, at summary.

benefits.¹⁹⁹ Congress articulated a belief that public benefits functioned as an improper incentive for immigration to the United States. Each of these bills therefore attempted to curtail the use of benefits by noncitizens, or at least to limit the expense to U.S. taxpayers by transferring the burden to the immigrants' sponsors.

The themes of House Bill 2202 did not die with the Bill, but carried through to the welfare reform legislation. In urging his colleagues to vote for PRWORA, Congressman Lamar Smith (R-TX) said, "It ensures that sponsors, not taxpayers, will support new immigrants who fall on hard times. Just as deadbeat dads should support the children they bring into this world, deadbeat sponsors should support the immigrants they bring into our country."²⁰⁰

Without a definition of public charge, policymakers in Congress and federal agencies who have pushed for a reshaping of public charge rely on two other sources for support. Both pieces of evidence were used in debates over the meaning of public charge in the 1990s, and resurface in today's debates. First, conservative members of Congress (those in favor of creating a tighter link between public charge and use of public benefits) noted that PRWORA includes an almost-thesis statement on immigration. It announces that "[s]elf-sufficiency has been a basic principle of United States immigration law since this country's earliest immigration statutes" and that it is the country's policy that aliens "not depend on public resources to meet their needs, but rather rely on their own capabilities and the resources of their families, their sponsors, and private organizations."²⁰¹ Ironically, limiting immigrants' access to benefits makes them more likely to become a charge on the public. For example, if immigrants are unable to access Medicaid, they are more likely to show up in public hospital emergency rooms.²⁰² The Trump Administration relied on this thesis statement as support for its Final Rule.²⁰³

Second, other members of Congress and federal agencies have often relied on reports from the bipartisan U.S. Commission on Immigration Reform, referred to as the "Jordan Commission" in honor of Congresswoman Barbara Jordan. The Commission, authorized by the Immigration Act of 1990, produced a series of reports analyzing existing policies and making recommendations for future policies. In its final report, the Jordan Commission advised "against denying benefits

199. S. REP. NO. 104-249, at 6, 50 (providing the majority's argument that "there is a compelling Federal interest in enacting new rules . . . to reduce any additional incentive for illegal immigration provided by easy availability of welfare and other taxpayer-funded benefits," while the minority pointed out that the bill was a "back-door way of reducing legal immigration").

200. 142 CONG. REC. 20,705.

201. 8 U.S.C. § 1601(1)-(2).

202. Senator Bob Graham (D-FL) pointed this out in a floor speech during the debate over PRWORA: "There is no relationship to the goals we are trying to achieve in welfare reform. It has a lot to do with the fact this is a voiceless, vulnerable population, from which we can seek some additional resources in order to meet our budgetary goals." 142 CONG. REC. 20,961.

203. This "thesis statement" is routinely cited for support, even by the government in the Final Rule. Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,306 (Aug. 14, 2019) (to be codified at 8 C.F.R. § 212.21(c)).

to legal immigrants solely because they are noncitizens.”²⁰⁴ The Commission determined that citizenship should not be the decisive factor: “Basing eligibility for assistance on citizenship debases citizenship. . . . We do not want immigrants to become citizens solely because the alternative is the serious economic hardship that may result if benefits are lost or unavailable.”²⁰⁵

The Commission saw legal immigration to the United States almost as a contract. Because the United States had affirmatively admitted legal immigrants, “[t]he safety net provided by needs-tested programs should continue to be available to [them].”²⁰⁶ The Jordan Commission concluded that holding sponsors financially responsible for newly arrived immigrants who would otherwise be excluded on public charge grounds “makes greater sense than a blanket denial of eligibility for public services solely on the basis of a person’s alienage.”²⁰⁷

In much of the debate over PRWORA, IIRIRA, and House Bill 2202, members of Congress discussed immigrants’ use of public benefits and an immigrant’s classification as a public charge as two distinct topics. However, where the topics merged, Congress refused to enact a bill expanding the definition of public charge in the deportation context to encompass immigrants who received *any* benefits. Public charge and public benefits do not define each other.

These bills—PRWORA in particular—transformed the infrastructure of public benefits and affected anyone using public benefits, regardless of their immigration status. Politicians in Congress and the White House targeted public benefits and the citizens and noncitizens who used them. President Clinton repeatedly proclaimed that he wanted to “change welfare as we know it.”²⁰⁸ These limitations on access to benefits and services “ha[d] a disparate impact on people of color (especially Mexican immigrants against whom many of the efforts to reduce benefits are specifically directed), women (who are disproportionately affected by limitations on public assistance), and the poor (who are most in need of public benefits and services).”²⁰⁹

CONCLUSION

The modern transformation may be different in scale, but, as this Note demonstrates, using public charge as a lever of discrimination is not new. This is “part of a continuing tradition of ‘selective immigration’ that began in 1875. . . . [and] has existed just beneath the surface in U.S. immigration policy . . . rear[ing] its

204. U.S. COMM’N ON IMMIGRATION REFORM, BECOMING AN AMERICAN: IMMIGRATION & IMMIGRANT POLICY 73 (1997) [hereinafter U.S. COMM’N ON IMMIGRATION REFORM, BECOMING AN AMERICAN].

205. *Id.* at 73–74.

206. U.S. COMM’N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY, at xxiii (1994).

207. U.S. COMM’N ON IMMIGRATION REFORM, BECOMING AN AMERICAN, *supra* note 204, at 73.

208. Johnson, *supra* note 5, at 1511 (internal quotation marks omitted).

209. *Id.* at 1516.

head at key historical moments.”²¹⁰ It is “a powerful tool in its strategic ambiguity and quiet location on the outskirts of public notice.”²¹¹

Just as the literacy test enacted by the 1924 Act served as a means of discrimination rather than the proffered rationale of elevating American workers,²¹² restricting public benefits serves as a means of discrimination rather than a way to ensure self-sufficiency. On suggesting and implementing the literacy test, Senator William E. Chandler (R-NH) said that, “No one . . . suggested a race distinction. We are confronted with the fact, however, that the poorest immigrants do come from certain races.”²¹³ Similarly, in response to House Bill 2202’s proposed increase of the sponsor requirement to income over 140 or 200 percent of the federal poverty level—limiting the pool of U.S. residents who could act as sponsors²¹⁴—some senators noted that the provision would “preclude approximately 40 percent of all Latinos and 18 percent of Asians from sponsoring an immigrant into the United States.”²¹⁵

Just as the quota system of the 1924 Act deliberately discriminated on the basis of race and nationality—but was established under the rationale of inviting immigrants who would easily assimilate²¹⁶—the language of limiting public benefits offered a more palatable policy to support than arguing for additional immigration restriction on the basis of racial or ethnic phobias.²¹⁷ Mark Weber notes that, given the lack of evidence that immigrants rely disproportionately on public benefits—even before PRWORA and IIRIRA made that nearly impossible—“an inference may be drawn that ethnic biases are in fact at work in the benefits-restriction movement.”²¹⁸

Now, immigrants are squeezed from both sides: prohibited from accessing many public benefit programs, punished for accessing the programs still available to them or afraid to even try. The principle of public charge denotes an individual wholly or primarily dependent on the government for support, usually because of an inability to work, though modern policymakers have conveniently leaned on ambiguity and discretion. This Note is an attempt to bring this to light: to civilize law and policy by making it, and us, aware of what we are doing.²¹⁹

210. See Lisa Sun-Hee Park, *Challenging Public Charge Policy: Coalitional Immigrant Community Strategies*, 13 J. ASIAN AM. STUD. 371, 383 (2010) (footnote omitted).

211. *Id.* at 384.

212. See HING, *supra* note 32, at 58.

213. HIGHAM, *supra* note 126, at 101.

214. See 142 CONG. REC. 26,437 (1996) (statement of Sen. Simpson).

215. S. REP. NO. 104-249, at 50 (1996) (emphasis omitted). These senators therefore perceived such income cutoffs as “nothing less than a back-door way of reducing legal immigration.” *Id.*

216. See President Harry S. Truman, Veto of Bill to Revise the Laws Relating to Immigration, Naturalization, and Nationality, HARRY S. TRUMAN LIBR. MUSEUM (June 25, 1952), <https://www.trumanlibrary.gov/library/public-papers/182/veto-bill-revise-laws-relating-immigration-naturalization-and-nationality> [<https://perma.cc/W5NU-NHVJ>] (“The purpose behind [the quota system] was to cut down and virtually eliminate immigration to this country from Southern and Eastern Europe. A theory was invented to rationalize this objective.”).

217. See Weber, *supra* note 82, at 172.

218. *Id.*

219. See Frankfurter, *supra* note 1, at 530.