
COMMENTARY

Immigration Law, Public Health, and the Future of Public Charge Policymaking

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U.S. immigration law has excluded noncitizens likely to become a “public charge” since 1882.¹ When the Trump administration proposed a new Rule expanding the interpretation of that exclusion in 2018, over 55,000 people wrote public comments.² These comments, overwhelmingly opposed to the change, are the subject of Rachel Fabi and Lauren Zahn’s insightful article in this issue of *The Journal of Law, Medicine, and Ethics*.³ The themes they identify resonate with the history of the public charge exclusion, which has always reflected a tension between two aims of American governance — to provide for those in need of assistance, and to shape the nation’s citizenry according to ideals of self-sufficiency.

Fabi and Zahn’s study also offers timely lessons for the Biden administration’s effort to square the public charge exclusion with public health policy. If finalized, the Biden administration’s proposed public charge rule would return the federal interpretation of “public charge” to a more moderate position, in line with that reached under President Clinton.⁴ Because the Clinton administration never finished the notice-and-comment rulemaking process, Biden’s Rule, if promulgated, would mark the first legally binding definition of “public charge” by a Democratic administration.

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The History of the Public Charge Exclusion

The purpose of all three rulemaking efforts — Clinton’s nonbinding guidance, Trump’s now-halted expansion, and Biden’s proposed return to the Clinton-era policy — has been to fill gaps in federal immigration law. The Immigration and Nationality Act does not define “public charge,” and Congress left few details on how to enforce the exclusion in individual cases. While there is general agreement that the term refers to someone reliant on public assistance, enforcing the exclusion has proven complicated in practice. As immigration increased in the early 1900s, immigration officers applied the exclusion inconsistently, and federal courts failed to cohere around a workable definition of “public charge.”⁵ The phrase’s meaning warped further over the 20th century, as the federal government took a central role in addressing public welfare.⁶ Is someone a “public charge” if they receive Social Security? Food Stamps? Medicaid? The language of the law pre-dates the existence of these programs.

The function of the exclusion is to prevent certain noncitizens from entering the country or gaining lawful permanent residency. But since the 1990s, policymakers and advocates have increasingly identified another, indirect consequence — to dissuade noncitizens living in the U.S. from participating in public programs such as Medicaid.⁷ Despite the fact that very few noncitizens eligible for federal benefits are subject to the exclusion, fear and confusion over losing their chance at lawful status lead many to forgo benefits to which they are lawfully entitled.⁸ This “chilling effect” thus creates a conflict between the goals of immigration enforcement and the public policy aims of benefits programs.⁹ Indeed, when the Trump administration proposed to consider participation in Medicaid

and the Supplemental Nutrition Assistance Program, it was followed by a decrease in low-income child enrollment in those programs.¹⁰

Trump's Rule was not the first time the public charge exclusion has weakened public health policy. Aggressive enforcement of the exclusion in the 1990s led public health officials, governors, and members of Congress to urge the Clinton administration to clarify its stance on public charge.¹¹ In letters to the administration, they described how federal immigration agencies were interfering with public health aims by chilling participation in public benefits programs like Medicaid. This public pressure led to a years-long interagency negotiation, in which the Clinton White House brokered a compromise between the Immigration and Naturalization Service (DHS's predecessor)

was properly considered.¹⁶ Litigation against the 2019 Rule on this basis resulted in multiple federal courts blocking the rule.¹⁷ Before the litigation could resolve however, the Biden administration took office and abandoned the Rule, as promised during Biden's campaign. In response, a group of states with Republican attorneys general sought to defend it. In February of 2022, the Supreme Court heard oral argument in *Arizona v. City and County of San Francisco*, on the question of whether the states may defend the 2019 Rule notwithstanding the Biden administration's refusal to defend it.¹⁸ But the Court reversed course in June by dismissing the case without a decision.¹⁹ As a consequence, the 1999 Guidance remains in effect as litigation on the 2019 Rule continues in the lower courts.

In the long term, the public charge exclusion's incompatibility with public welfare policies warrants its repeal by Congress. But policymakers in the Biden administration face a more immediate challenge: crafting a notice-and-comment rule that can encourage the use of needed services *and* survive legal challenges. Navigating this process, in particular responding to public comments, will require thoughtful engagement with the themes identified by Fabi and Zahn — belonging, deservingness, justice, and compassion.

and the Department of Health and Human Services. The result was the nonbinding Interim Guidance document that set federal public charge policy until the Trump Rule went into effect in 2019.

Public Comments in Federal Rulemaking

When federal law leaves gaps, such as how to define and enforce "public charge," the Administrative Procedure Act provides a pathway for agencies to fill them in: notice-and-comment rulemaking.¹² This process requires agencies to provide a meaningful opportunity for public comment on proposed rules, and to address those comments in final rules.¹³ The effect of public comments in shaping final rules is debated by scholars.¹⁴ Fabi and Zahn note that although more than 96% of comments to the 2018 proposed rule opposed it, the Rule went into effect without substantial change, and although DHS duly catalogued the commenter's objections as required by law, its responses were analytically inadequate.¹⁵

But, as Fabi and Zahn observe, public comments also serve a legal function. Comments become part of the administrative record, which is relevant for legal challenges to determine whether the agency's rule

The Future of Public Charge

The outcome of the litigation may not ultimately matter to policymakers and immigrants, because a new rulemaking process is already underway. Days before the Court heard oral arguments in *Arizona*, DHS published a Notice of Proposed Rulemaking that contrasts starkly with its predecessor. It defines "public charge" as the Clinton Administration did, as someone "likely to become primarily dependent on the government for subsistence."²⁰ Although DHS likely could and should prohibit the consideration of all lawfully received public benefits in public charge determinations, the return to the 1999 Guidance's focus on "cash" benefits signals a re-prioritization of public health.²¹

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Note

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