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The Shortcomings of the “Public Charge” Doctrine: Why the DHS Final Rule Should Be Abandoned and Why the United States Should Look to the Progressive Immigration Policies of Sweden

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THE SHORTCOMINGS OF THE “PUBLIC CHARGE” DOCTRINE: WHY
THE DHS FINAL RULE SHOULD BE ABANDONED AND WHY THE
UNITED STATES SHOULD LOOK TO THE PROGRESSIVE
IMMIGRATION POLICIES OF SWEDEN

By: Emily Demetree

Abstract

The United States has a longstanding history of denying aliens admission based on a wide range of grounds that we have deemed to demonstrate the alien would be either dangerous to society or a financial burden on the state. “Self-sufficiency” has been a basic principle of US immigration law since the country’s earliest immigration statutes. It is the contention of the Department of Homeland Security that the availability of public benefits can create an incentive for immigration to the United States at a rate that cannot be financially supported by the government. Certain European countries, such as Sweden, see a high rate of immigrant flow into their welfare state. However, in Sweden, the general policy of “self-sufficiency” is not as pertinent, and thus, the general population of Sweden welcomes aliens despite high use of public benefits.

In October 2018, DHS proposed a rule under section 212(a)(4) of the Immigration and Nationality Act that would expand the scope of the “public charge” ground of inadmissibility. The public charge doctrine dates back to the 1800’s. However, the proposed rule prescribes with specificity how it will determine whether an alien is inadmissible to the United States, by better defining, and expanding, who would fall within this category.

Whatever perceived strain that immigrants place on the welfare state should not be reason to prevent aliens from admission or citizenship in the United States. In this paper, I will analyze the history of the public charge doctrine and its intersection with the welfare state, as well as analyze the current use of public benefits by aliens. I will conduct an international comparison to the country of Sweden and analyze its Immigration and social policy. I will use these current findings and international comparisons as arguments against the DHS expansion of "public charge."

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HISTORY AND DEVELOPMENT OF IMMIGRATION POLICY IN THE UNITED STATES

Since the early years of the Republic, the United States' economy and culture has been built by the waves of immigrants entering into the country. While some argue that the United States has a history of welcoming immigrants and visitors of all races, one can find historical immigration policies immersed in racism and xenophobia.¹ In 1790, the original Congress enacted the first

¹ See generally David B. Oppenheimer, Swati Prakash, and Rachel Burns, *Playing the Trump Card: The Enduring Legacy of Racism in Immigration Law*, 26 LA RAZA L.J. 1 (2016).

naturalization law, the Naturalization Act, providing citizenship to any “free white person . . . of good moral character.”² While such language might be characterized as a fairly “open door” policy, the attitudes of Americans, even in the early days of the United States, demonstrated feelings of hatred and fear against those that were racially and religiously different. These attitudes amongst Americans spilled into the political sphere, and subsequently the United States government began to curb immigration from specific ethnic groups. For example, in 1798, Congress enacted the Alien and Sedition Act partly out of fear of Irish sympathies to French radicalism. One Congressman stated it was necessary because he did not want “hoards of wild Irishmen, nor the turbulent and disorderly of all parts of the world, to come here with a view to disturb our tranquility.”³ Congress also directed such blatant racist attitudes towards Chinese immigrants. Between 1852 and 1882, when thousands of Chinese immigrants arrived to work in gold fields and to build the first transcontinental railroad, white workers viewed their Chinese counterparts as cultural threats, labor competition, and racial inferiors.⁴ When the United States government realized that the majority of these Chinese workers intended to remain in the country, Congress enacted the Chinese Exclusion Act, which barred Chinese immigrants for nearly a century.⁵

A. Immigration in the United States: The Public Charge Doctrine

The origins of the public charge doctrine can be traced back to the “poor laws” of colonial times.⁶ These laws determined who could, and could not, reside in colonial towns, and served as an example for laws that governed who could, and could not, enter states like New York and Massachusetts in the early years of the republic.⁷ The first federal immigration laws were modeled after

² *Id.* at 2.

³ *Id.* at 8.

⁴ *Id.* at 18-9.

⁵ *Id.*

⁶ Act of March 20, 1850 (relating to alien passengers); Acts of 1849, 1840, 1851, ch. 105, Mass. Laws 339 (resolves passed by the General Court of Massachusetts).

⁷ *Id.*

those state laws; In 1882, Congress passed the first general Immigration Act which excluded "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."⁸ Nearly a decade later, Congress expanded this inadmissible group to anyone who was "likely to become a public charge."⁹ However, enforcement of deportation was only carried out against those who were accommodated at public charitable institutions; thus, the primary purpose of these early laws was to prevent recently arrived immigrants from becoming "inmates of almshouses or charitable hospitals."¹⁰

Enforcement of the public charge doctrine in the first decades of the twentieth century was inconsistent. Unfortunately, immigration officials often enforced policy against those whom had "negative" gender and ethnic biases. For example, they would exclude South Asians because they believed these immigrants would not work hard or were unclean.¹¹ Individuals who practiced Judaism were excluded because they were believed to be "economically unfit."¹² However, many of these inconsistencies and biases were eradicated with the establishment of quantifiable standards for the public charge rule.

In the 1960's, when major federal benefit programs were being enacted-Medicaid, TANF (Temporary Aid for Needy Families), Supplemental Security Income (SSI), food stamps, etc-citizens and noncitizens were equally eligible for government assistance.¹³ That is, the programs did not distinguish between the two. However, in 1986, Congress passed the Immigration Reform and Control Act,¹⁴ and in 1996 passed the Personal Responsibility and Work

⁸ Act of Aug. 3, 1882, ch. 376, 22 Stat. 214 (1882) (relating to regulating immigration).

⁹ Act of March 3, 1891, ch. 550, 26 Stat. 1084 (1891) (relating to various acts relative to immigration and the importation of aliens under contract or agreement to perform labor).

¹⁰ *Id.*

¹¹ U.S. Department of Labor, Reports of the Department of Labor, 438-39 (1914).

¹² Deirdre Moloney, *National Insecurities: Deportation Policy since 1882*, 79-80 (2012).

¹³ Cybelle Fox, *Unauthorized Welfare: The Origins of Immigrant Status Restrictions in American Social Policy*, 102 J. AM. HIST. 1051, 1051-1074 (2016).

¹⁴ Immigration Reform and Control Act, Pub. L. No. 99-603, 100 Stat. 3445 (1986) (IRCA legalized the status of persons who entered before January 1, 1982 and had resided in the country continuously since then. Nearly three million received legal permanent status under IRCA).

Opportunity Reconciliation Act (PRWORA).¹⁵ These congressional actions were enacted to impose restrictions on eligibility to federal benefit programs for lawful permanent residents. For example, following the enactment of the PRWORA, the affidavit of financial support provided by the alien’s sponsor would be legally enforceable. Those who would be ineligible, (non-qualified persons) included temporary visa holders and undocumented immigrants.¹⁶ It is important to note however, that many health services are available to all people regardless of immigration status: emergency medical care, public health programs, K-12 public education, and WIC.¹⁷

By the mid-century, the Board of Immigration Appeals (BIA) set explicit instructions for determining deportability under the public charge provisions.¹⁸ In admission cases, the BIA reaffirmed a “totality of the circumstances” test, much broader than the test given in deportation proceedings.¹⁹ The test included a range of factors such as age, health, educational level, financial status, and family assets and support. In 1999, the Immigration and Naturalization Service defined a public charge as “an alien who has become primarily dependent on the Government for subsistence as demonstrated by either 1) the receipt of public cash assistance or 2) institutionalization for long-term care at Government expenses.

The idea that aliens entering the United States should be “self-sufficient” continues to be at the center of United States immigration policy, and DHS contends that the availability of public benefits should not constitute an incentive for immigration to the United States.²⁰ The “public charge” doctrine is now currently in place under the Immigration and Nationality Act (INA) as a ground of inadmissibility. According to Section 212(a)(4), an alien applicant for a visa, admission, or adjustment of status is inadmissible to the United States if he is likely at any time

¹⁵ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (Eligibility restrictions apply to persons who entered the US on or after August 22, 1996. “Federal means-tested public benefits” are Medicaid, CHIP, TANF, SNAP and SSI).

¹⁶ *Id.*

¹⁷ Torrie Hester, et al., *Comment, DHS Notice of Proposed Rule “Inadmissibility on Public Charge Grounds”*, FR 2018-21106, 1, 6 (2018).

¹⁸ *Id.* at 5.

¹⁹ 7 U.S. CITIZENSHIP AND IMMIGRATION SERV., POLICY MANUAL, pt. A, ch. 6 (2018).

²⁰ See generally, *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114 (proposed Oct. 10, 2018).

to become a “public charge.”²¹Section 213 of the INA provides the DHS Secretary with discretion to admit into the United States an alien who is determined to be inadmissible as a public charge under Section 212.²²

A series of administrative decisions after passage of the INA clarified that a “totality of the circumstances” review was the appropriate framework/analysis for making public charge determinations and that receipt of public benefits would not, alone, lead to a finding of a likelihood of becoming a public charge. According to the proposed and final rule, DHS will not use receipt of public benefits as a per se rule to find an alien inadmissible.²³ However, as will be discussed in Part III, the enactment of the proposed rule will have negative consequences that reach far beyond those that DHS has explicitly identified.

HISTORY AND DEVELOPMENT OF IMMIGRATION POLICY IN SWEDEN

Sweden is arguably the most egalitarian, humanitarian, and democratic country in the world. The country was comprised of a relatively ethnically, linguistically, and religiously homogenous society well into the 20th century.²⁴ By 1950, only 2.8 percent of the population was foreign-born. However, the post-World War II expansion of heavy industry created labor market demands that outpaced the available immigrant supply at that time. In fact, Sweden began to recruit “guest workers” from countries such as Yugoslavia, Greece, Turkey, Hungary, Austria, and Italy during this time.²⁵

The demographics of the Swedish population in the mid-20th century majorly contributed to the development of the most generous welfare state in the world; their homogenous society

²¹Immigration and Nationality Act, 8 U.S.C.A. § 1182 (a)(4) (2013).

²²Immigration and Nationality Act, 8 U.S.C. § 1183.

²³Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51174 (Oct. 10, 2018).

²⁴Jorgen Hansen, Magnus Lofstrom, *Immigrant-Native Differences in Welfare Participation: The Role of Entry and Exit Rates*, 50 INDUS. REL. 412, 415-17 (2011).

²⁵Admir Skodo, *Sweden: By Turns Welcoming and Restrictive in its Immigration Policy*, MIGR. POL. INST., December 6, 2018, <https://www.migrationpolicy.org/article/sweden-turns-welcoming-and-restrictive-its-immigration-policy>.

created a sense of unity and civic duty to contribute to a social safety net for all. However, in recent decades the country has seen successive and large waves of immigration. By the 1990s, immigrants in Sweden represented about 11 percent of the population.²⁶ These “waves” of immigrants have greatly affected their labor markets. Despite historical homogeneity of its society, the Swedish government generally welcomed these immigrants.²⁷ There is no comparable “public charge” ground of denying aliens entry into Sweden. In fact, over the years the Swedish government has passed legislation to protect minority groups as well as create economic incentives for both employers and workers in order to integrate new populations of immigrants.²⁸

Of course, the general political beliefs in Sweden are much different than in the United States. The mantra of “self-sufficiency,” which is used through the DHS proposal to expand the “public charge” doctrine, is approached very differently through Swedish immigration policy. In fact, policy is aimed at reducing the need of welfare among immigrants, rather than using the need for welfare as justification to deny entry into the United States. More specifically, this policy is at the center of the Social Democratic platform, and is known as the “welfare state model.”²⁹ This model is characterized by its application of comprehensive, generous, and redistributive benefits and welfare services that are universal in the sense that they are intended for the whole population and not only for particularly vulnerable groups.³⁰ Again, this ideology is vastly different from the rhetoric and policy that we see in the US. For example, in the 1950’s, there was a general consensus that immigrants, upon seeking admission to the US, make a “promise to the American people that they will not become a burden on the taxpayers.”³¹

Even when it was demonstrated that immigrants accounted for nearly half of the Sweden’s expenditure on social assistance (while accounting for only 11 percent of the total population), public

²⁶ Hansen, *supra* note 24 at 1.

²⁷ *Id.*

²⁸ *Id.* at 6.

²⁹ Karin Borevi (2014) *Multiculturalism and Welfare State Integration: Swedish Model Path Dependency*, 21 *Identities* 708, 711. (2014).

³⁰ *Id.*

³¹ Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51157 (Oct. 10, 2018).

policy arguments centered around the need to educate immigrants in the effort to reduce their reliance on welfare, and ultimately to foster integration.³²

The origins of Swedish integration policy towards its immigrants date back to the late 1960's. The concept of a good Swedish citizen prevalent at the time assumed that by providing citizens with fundamental social rights, they would feel that they belonged and would want to live up to certain expectations: the duty to work and contribute to full employment.³³ In 1968, the government passed a law ensuring that "guest workers" would be covered by the same welfare provisions as Swedish citizens.³⁴ Even as the country began to encounter higher unemployment rates amongst immigrants in the 1980's and 1990's, the goals of integration were at the forefront of the country's policies. While civic integration was certainly a policy in the country, Sweden officially adopted a policy of multiculturalism; the state provided support for activities such as minority cultural associations and mother-tongue instruction in primary schools.³⁵

While the mantra of multiculturalism policies was well-intentioned, it may have actually backfired, by highlighting cultural differences between Swedes and immigrants. Such policies essentially reinforced mental and social boundaries.³⁶ Therefore, the government turned more towards to civic integration of immigrants into the labor force.

The obligation to work is in fact built into the system of immigration control. In order for an alien to obtain a residence permit in Sweden, he has to find a job with adequate terms.³⁷ Thus, immigrants are integrated into the labor market from the beginning. The Swedish government has given the Minister of Employment the majority of the responsibility to integrate Swedish immigrants into the labor force;³⁸ a task that has proven to be an

³² Borevi, *supra* note 29.

³³ Skodo, *supra* note 25.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Bernd Parusal, Swedish Integration Policy, BPB (Nov. 26, 2015), <http://www.bpb.de/gesellschaft/migration/laenderprofile/58635/integration-policy>

³⁷ Borevi, *supra* note 29.

³⁸ Lee Roden, *How Is Sweden Tackling Its Integration Challenge?* THE LOCAL (May 2, 2017), <https://www.thelocal.se/20170502/how-is-sweden-tackling-its-integration-challenge>.

enormous feat. As of March 2017, the unemployment rate among Sweden’s foreign-born population was 22.2 percent, compared to 4.1 percent among Sweden-born citizens.³⁹ As will be discussed in Part III, the United States uses statistics like these as justification for the proposed rule.

However, while there is no comparable “public charge” laws, the Swedish government and its citizens still push for a certain level of “self-sufficiency.” Such a goal is met in a much different way than in the United States. The core idea of Swedish welfare state universalism is that integration presupposes that citizens enjoy equal access to a bundle of fundamental rights.⁴⁰ According to Swedish policy, access to these rights are crucial for any alien to integrate into their society. While the DHS has explicitly stated that access to public benefits should not be an incentive for aliens to immigrate into the US, access to public benefits in Sweden is intended to be exactly that. They view such access as an incentive and inspiration, “a prize that individuals will be awarded after successfully fulfilling the goals formulated in the integration obligations.”⁴¹ These “integration obligations” for immigrants translates into labor market participation.

The Public Employment Agency has taken steps to solve the great divides in unemployment with a plan called the “Introduction Programme.” The goal of this program is to best meet the individual needs of each immigrant, whether that be further education or additional work experience and training. For those who had a high level of previous education or work skills can enter the program through a “fast track.”⁴² Furthermore, aliens in Sweden who are granted residence permits must attend an obligatory “Swedish for Immigrants” course if they want to remain eligible for public benefits.⁴³ This course teaches immigrants the Swedish language and provides them with knowledge of the social system and Swedish traditions; the course is also paid for by the local government where the immigrant is granted residence.⁴⁴ All

³⁹ *Id.*

⁴⁰ Borevi, *supra* note 29.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Bernd Parusal, *Swedish Integration Policy*, BPB (Nov. 26, 2015), <http://www.bpb.de/gesellschaft/migration/laenderprofile/58635/integration-policy>.

of the aforementioned efforts have come about to combat the very high unemployment rates among Sweden's foreign born population.

DISCUSSION OF THE PROPOSED AND FINAL RULE

According to the Department of Homeland Security (DHS), "self-sufficiency" has been a basic principle of US immigration law since the country's earliest immigration statutes.⁴⁵ When developing immigration policy in the past, Congress had declared that aliens generally should not depend on public resources and that these resources should not constitute an incentive for immigration to the United States.⁴⁶

In its effort to ensure that applicants for admission to the United States and applicants for adjustment of status are financially self-sufficient, the Department of Homeland Security (DHS) proposed a rule on October 10, 2018 that would expand and better define the "public charge" law.⁴⁷ Pursuant to informal agency rulemaking, DHS allowed a period during which organizations, individuals, and other stakeholders could submit a comment to the proposed rule. After consideration of these comments, the final rule was published on August 14, 2019.⁴⁸ The final rule included both revisions to and expansions of the proposal issued in 2018.

Overall, the doctrine seeks to expand on the INS Interim Field Guidance issued in 1999, and better define what it means to become a public charge.⁴⁹ This guidance had directed officials to make determinations on a case-by-case basis using a "totality of the circumstances" test. Section 212(a)(4) of the INA states that an alien who, "in the opinion of" the Secretary is likely to become a public charge is inadmissible.⁵⁰ According to DHS, this statutory language gave immigration officials the authority to use a "totality of the circumstances" test when assessing an alien's age, health, family

⁴⁵ Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51123 (Oct. 10, 2018).

⁴⁶ *Id.* at 51123.

⁴⁷ *See generally* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, (Oct. 10, 2018).

⁴⁸ Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41292, (Aug. 14, 2019).

⁴⁹ *Id.*

⁵⁰ *Id.* at 41396.

status, assets, resources, financial status, education, and skills.⁵¹ A main purpose of the proposed rule was to provide more detailed guidance by which these factors would be analyzed.⁵² The extent to which DHS has achieved this goal is debatable, and is further discussed *infra*.

In 1999, when the Field Guidance was published, immigration officials were directed to consider receipt of cash public benefits but were precluded from consideration of non-cash public benefits.⁵³ The proposed rule expanded upon this guidance by removing the distinction between cash and non-cash benefits.⁵⁴ The expansion of this will doctrine apply to those aliens applying for: admission to the United States, permanent residence, a temporary visa, or extension of stay or change of status.⁵⁵

The proposed rule provided a definition of a public benefit, and proposed different thresholds for monetizable and non-monetizable benefits.⁵⁶ Public comments raised concerns regarding the complexity of those standards, so, in its final rule, DHS decided that “all benefits with a single duration-based standard” would be evaluated.⁵⁷ Per the final rule, a public charge is an alien who receives one or more public benefits for more than “12 months in the aggregate within any 36-month period.”⁵⁸

DHS recognized that many of the concerns raised during the public comment were valid. As such, it made many revisions to its proposal, such as excluding consideration of “receipt of Medicaid by aliens under the age of 21 and pregnant women during pregnancy and the 60-day period after pregnancy.”⁵⁹ DHS also removed the “future looking” assessment; officials will only consider whether the alien has received designated benefits for more than 12 months in the aggregate for more than a 36-month period since obtaining the nonimmigrant status they wish to extend or change.⁶⁰

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Inadmissibility on Public Charge Grounds, *supra* note 45.

⁵⁶ 84 Fed. Reg. at 41297 (Aug. 14, 2019).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

While it is commendable that DHS addressed these concerns and took steps to limit the final rule, there are other ways in which the final rule is more expansive. For example, in the proposed rule, DHS stated that immigration officials would not consider receipt of benefits below the applicable threshold.⁶¹ Now, per the final rule, officials may consider and give appropriate weight to past receipt of benefits below the single durational threshold.⁶²

In support of its initial proposed rule, DHS cited to the Survey of Income and Program Participation, or SIPP. The results of the SIPP database suggested that receipt of non-cash public benefits are more prevalent than receipt of cash benefits.⁶³ Furthermore, DHS provides data on public benefit participation among U.S. citizens and noncitizens. DHS presents the data in a way that demonstrates a higher rate of use of public benefits among noncitizens whose health is “fair” or “poor,” than their U.S. citizen counterparts.⁶⁴ However, this data is misleading, and DHS has attributed public benefit program participation to a lack of self-sufficiency amongst noncitizens.

ANALYSIS: DHS SHOULD NOT EXPAND THE PUBLIC CHARGE DOCTRINE

To understand why the proposed rule’s inclusion of non-cash benefits is so expansive, one may simply turn to the fact that only about 3% of noncitizens receive cash assistance, while nearly 50% receive some form of non-cash benefits.⁶⁵ As pointed out in its proposal, DHS acknowledged that 4 million noncitizens receive Medicaid, 9.6 million have at least one family member receiving Medicaid or CHIP, and 4.5 million belong to a family in which at least one member receives food support.⁶⁶

DHS should not enact its proposed rule for many reasons that are grounded in policy. First, DHS ignores important factors and

⁶¹ *See id.*

⁶² *See id.*

⁶³ Inadmissibility on Public Charge Grounds, *supra* note 45, at 51160.

⁶⁴ *Id.* at 51201

⁶⁵ Jeanne Batalova, et al., *Chilling Effects: The Expected Public Charge Rule and Its Impact on Legal Immigrant Families’ Public Benefits Use*, MIGRATION POLICY INSTITUTE, June 2018, at 1, 22.

⁶⁶ *Id.*

characteristics among noncitizens that heavily weigh against the data it uses to justify the public charge expansion. Second, in its enforcement, the proposed rule could have serious health consequences for noncitizens as well as U.S. citizens. Third, if “self-sufficiency” is truly a concern for U.S. immigration policy, DHS should look to countries like Sweden that make efforts to integrate its immigrants into their labor force.

Of course, these policy objectives may only be foreseeable after a change in the Presidential administration. So, as a final matter, I will analyze the possible legal challenges that could present strongly in a court of law.

A. DHS uses misleading data, ignores realities and complexities of immigrant communities.

In 2016, the federal government spent approximately \$2.3 trillion on the welfare state.⁶⁷ A large percentage, more than half, of those expenditures went to the entitlement programs of Social Security and Medicare.⁶⁸ While the motivations and interests of the current administration to roll back expenditures of these entitlement programs might be valid, its methods of doing so (by way of the DHS proposal) are misguided. While immigrants are more likely to lack a high school degree and have incomes below the poverty line than the native born, immigrants do show progression in their earnings over time in the United States.⁶⁹

Studies have found that immigrants are generally less likely to consume welfare benefits than native-born Americans. In a 2013 policy brief written by the Cato Institute, findings based on the 2012 Census Bureau’s Current Population Survey revealed that low-income noncitizen children and adults utilize Medicaid, SNAP, cash assistance, and SSI at a generally lower rate than comparable low-income native-born citizen children and adults.⁷⁰ According to

⁶⁷ Alex Nowrasteh & Robert Orr, *Immigration and the Welfare State – Immigrant and Native Use Rates and Benefit Levels for Means-Tested Welfare and Entitlement Programs*, IMMIGR. RES. AND POL’Y. BRIEF NO. 6, (THE CATO INST.) May, 2018.

⁶⁸ *Id.*

⁶⁹ See Leighton Ku & Brian Bruen, *Poor Immigrants Use Public Benefits at a Lower Rate than Poor Native-Born Citizens*, THE CATO INST. (Mar. 4, 2013), <https://www.cato.org/publications/economic-development-bulletin/poor-immigrants-use-public-benefits-lower-rate-poor>.

⁷⁰ *See id.*

the research of the authors, more than one quarter of native citizens and naturalized citizens in poverty receive Medicaid, but only about one in five noncitizens do.⁷¹ About two-thirds of low income citizen children receive health insurance through Medicaid or CHIP, while about half of noncitizen children do so.⁷² Furthermore, immigrants who receive Medicaid or CHIP tend to have lower per beneficiary medical expenditures than native-born people.⁷³ These findings, that immigrants account for less public benefit expenditures than natives, was true for other programs such as SNAP and SSI.⁷⁴

The findings of the CATO Institute highlight discrepancies in the data that DHS uses, and thus places doubt on the justifications for the proposed rule. The proposed rule by DHS contains data showing that immigrants do in fact use public benefits at a higher rate than native born citizens.⁷⁵ However, the authors of the CATO institute make note of another study, conducted by the Center for Immigration Studies (CIS), that conflicts with the findings of DHS.⁷⁶ They point out several reasons for the conflicting results that likely can be applied to the data provided by DHS in its current proposal.

First, CIS did not adjust for income, so the percent of immigrants receiving benefits is higher in their study in part because a greater percent of immigrants are low income and more eligible for benefits.⁷⁷ The Cato Institute focused on low income populations in order to reduce misinterpretations about benefit utilization.⁷⁸ Second, the CIS studies focused on households headed by immigrants, while the Cato Institute focused on individuals by immigrant status.⁷⁹ The focus on individuals is key because immigrant-headed households often include multiple native-born Americans, including spouses and children. Third, the CIS study included naturalized citizens in their category of “immigrants”

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See* Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51123 (Oct. 10, 2018).

⁷⁶ *See generally* Ku & Bruen, *supra* note 69.

⁷⁷ *Id.* at 5.

⁷⁸ *Id.*

⁷⁹ *Id.* at 5-6.

despite the fact that naturalized citizens are afforded the same access to public benefits as native born citizens.⁸⁰

Overall, there was a combined effect of lower utilization rates amongst noncitizens and naturalized immigrants. Thus, the overall financial cost of providing public benefits to noncitizen immigrants and most naturalized immigrants is lower than for native-born people.⁸¹

In 2018, the Cato Institute published another research and policy brief on “Immigration and the Welfare State.”⁸² Using data from the Census Bureau’s 2017 Annual Social and Economic Supplement and the 2015 Medical Expenditure Panel Survey (MEPS), it concluded that the per capita cost of providing welfare to immigrants is substantially less than the per capita cost of providing welfare to native-born Americans.⁸³ The brief concluded that, when compared with the average native born citizen, the average immigrant consumed \$6 more in cash assistance, \$7 more in SNAP benefits, and \$98 more in Medicaid than the average native did.⁸⁴ However, the average immigrant consumed 56% less in SSI, \$610 less in Medicare, and \$1,808 less in Social Security retirement benefits.⁸⁵

B. The proposal’s execution could have drastic health consequences.

The proposed rule could have extreme negative health consequences that reach far beyond the aliens who fall directly within its provisions. In fact, if enacted, the proposed rule could negatively impact the health of U.S. citizens who have family members that are noncitizens. Furthermore, the complexities of the rule could lead to a lack of uniform enforcement by DHS officials.

While grounds of inadmissibility are only applied to those aliens who have not yet achieved citizenship, the proposed rule will likely negatively impact naturalized citizens. Naturalized citizens often live in mixed status families in which one or more family

⁸⁰ *Id.* at 6.

⁸¹ *Id.* at 7.

⁸² See Alex Nowrasteh & Robert Orr, *supra* note 67.

⁸³ *Id.*

⁸⁴ *Id.* at 2.

⁸⁵ *Id.*

members are noncitizens. For example, imagine the noncitizen mother of U.S. citizen children who might forego needed medical care because of the fear that she would be risking deportation.⁸⁶ Over 9 million U.S. born citizen children have at least one immigrant parent and live in a family that uses public benefits.⁸⁷ While these children are not directly encompassed within the provisions of the proposed rule, immigrant families have already been scared into disenrolling their citizen children from public benefit programs such as Women, Infants and Children (WIC), and SNAP. These programs provide children with access to health food and medical care, the lack of which will have negative long-term health effects.

The proposed rule could also discriminate against people with disabilities in its enforcement. As part of its “totality of the circumstances” test, DHS will consider whether an individual’s “medical conditions may impose costs that a person is unable to afford, and may also reduce that person’s ability to attend school, work, or financially support himself.”⁸⁸ An individual with a disability may not be able to attend school or work and thus his disability becomes encompassed within this negative factor weighed against his admissibility. In 2013, 30 % of adults receiving government assistance had a disability.⁸⁹ So, while DHS may claim that it will not discriminate against individuals with disabilities, the totality of the circumstances test, in practice, could actually harm them.

The United States has already seen how its immigration policy can have far-reaching negative health consequences. In the 1990’s, when Congress passed the PRWORA, states had the option of providing Medicaid coverage for pre-enactment qualified immigrants.⁹⁰ California opted to continue its Medi-Cal coverage to

⁸⁶ Jonathan Blitzer, *Trump’s Public-Charge Rule Is a One-Two Punch Against Immigrants and Public Assistance*, THE NEW YORKER (Sept. 28, 2018), <https://www.newyorker.com/news/dispatch/trumps-public-charge-rule-is-a-one-two-punch-against-immigrants-and-public-assistance>.

⁸⁷ Jeanne Batalova, et al., *supra* note 65 at 4.

⁸⁸ Inadmissibility on Public Charge Grounds, 83 Fed. Reg. 51114, 51123 (Oct. 10, 2018).

⁸⁹ Press Release, Census Bureau Report Shows 30 Percent of Adults Receiving Government Assistance Have a Disability, UNITED STATES CENSUS BUREAU (Feb. 26, 2013), <https://www.census.gov/newsroom/press-releases/2013/cb13-33.html>.

⁹⁰ Lisa Sun-Hee Park, *Perpetuation of Poverty through Public Charge*, 78 DENV. U. L. REV. 1161 (2001).

legal immigrants irrespective of their date of entry to the U.S.⁹¹ However, the state also enacted “port of entry fraud detection” programs, where non-residents returning to the country through certain California airports were required to repay certain benefits before re-entering the country, despite the fact that they had been previously legally receiving them.⁹² These types of programs created a lot of fear amongst noncitizens, and kept many of them from seeking medical care for which they were in fact eligible. One doctor recounted the story of a pregnant noncitizen who waited 30 days before going to the emergency room for a skin burn due to her fear of deportation; the woman died shortly after going to the hospital.⁹³

Furthermore, because of the failure of the federal government to provide clarification on the potential impact of the use of non-cash benefits on future immigration status, the enforcement of the congressional legislation heavily conflicted with the actual written policy. INS and state DHS officials were making public charge determinations based solely on the use of Medi-Cal, despite the law’s mandate that determinations should be made based on the individual’s total circumstances, such as age, health, family status assets, education, etc. These types of discrepancies generated considerable confusion regarding who was eligible for certain federal or state public benefits and whether noncitizens would face adverse consequences. More often than not, immigrants would forgo seeking healthcare that they were actually legally entitled to receive.⁹⁴

C. Swedish policy provides a model example

The US should look to Sweden to shape its Immigration policy. While on the surface the goals of DHS regarding immigration seem vastly different from those of the Swedish government, there is a shared ideal of “self-sufficiency” among its citizens. However, the ways in which these policy goals are achieved in these two countries is drastically different. As mentioned in Part II-B, Sweden does not deny citizenship or residency to aliens based on public

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

benefits usage. The lack of such a rule is likely due to the country's attitude towards its welfare state: the use of public benefits is a fundamental right for their citizens, and guaranteeing such a right insures that citizens will meet the demands of their civic duties. The Swedish government truly believes that its citizens will work hard to contribute to the labor market if they have access to public benefits, no matter their citizenship status.⁹⁵

In 2016, the Migration Studies Delegation issued a policy brief which detailed the effects of immigrants on Sweden's economy.⁹⁶ This policy brief highlights how the Swedish government responds to high immigration rates: "experience from previous large waves of immigration shows that it takes time before a large group of new arrivals enter and gain a foothold in the labor market, but after five to ten years most people manage to do so."⁹⁷ In the past five years, Sweden experienced high rates of unemployment among immigrants, largely due to the Refugee Crisis in 2016⁹⁸. Despite such high levels of unemployment, Swedish policymakers have advocated to invest in infrastructure, housing education, security and social measures; they have recognized that periods of strong economic growth follow large waves of immigration.⁹⁹

The positive effects that the Swedish economy has experienced is likely due to the fact that immigrants provide huge support for the working labor force. In recent years, the Public Employment Agency's director has predicted that Sweden needs as much as 64,000 immigrants annually if it wants to prevent labor shortages.¹⁰⁰ It should not come as a shock that the United States experiences similar trends among its working class; therefore, the United States should look to countries like Sweden that work hard to welcome and integrate working class immigrants.

There are many industries that are supported by, and in fact depend on, immigrant workers. In 2017, a study commissioned by the dairy industry suggested that if federal labor and immigration

⁹⁵ See generally Borevi, *supra* note 29.

⁹⁶ See Bo Malmberg, *Effects of Immigration on Sweden's Economic Development*, DELMI REPORT (2018).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Bernd Parusal, *Swedish Integration Policy*, BPB (Nov. 26, 2015), <http://www.bpb.de/gesellschaft/migration/laenderprofile/58635/integration-policy>.

policies reduced the number of immigrant workers by 50 percent, more than 3,500 dairy farms would close. The study found that such a labor shortage would lead to a big drop in milk production and price increases by 30 percent.¹⁰¹ The study also predicted very similar patterns for other agricultural industries, as well as industries such as serve and textile manufacturing.¹⁰² What may not seem obvious to DHS is that the majority of these immigrants in these working-class jobs are likely also those who receive public benefits. Therefore, the proposed rule could have drastic and long-lasting effects on the US economy within industries that are supported by immigrant workers.

The proposed rule could also have negative consequences for government programs such as Medicare, and Medicaid. DHS admits that the rule might lead to reduced revenues for healthcare providers participating in Medicaid, pharmacies that provide prescriptions to participants in Medicare Part D, and companies that manufacture medical supplies.¹⁰³ What is even more concerning about the proposed rule is the fact that DHS concedes that the new rule would lead to “reduced productivity and educational attainment.”¹⁰⁴

D. Legal challenges

Though the purpose of this paper was to conduct a comparative policy analysis between immigration laws in the United States and Sweden, it is prudent to recognize the possible legal challenges to the public charge doctrine.¹⁰⁵ Somewhat intuitively, one might believe that singling out low income immigrants, often who have medical problems or disabilities, might give rise to equal protection challenges. It is true that the Supreme Court has determined that aliens are a protected class under the equal protection clause.¹⁰⁶

¹⁰¹ Mary Jo Dudley, *These U.S. Industries Can’t Work Without Illegal Immigrants*, CBS NEWS, (Jan. 10, 2019). <https://www.cbsnews.com/news/illegal-immigrants-us-jobs-economy-farm-workers-taxes/>

¹⁰² *Id.*

¹⁰³ *Inadmissibility on Public Charge Grounds*, 83 Fed. Reg. 51114, 51118 (Oct. 10, 2018).

¹⁰⁴ *Id.*

¹⁰⁵ A full legal analysis of the public charge doctrine’s constitutionality and legality under the APA is beyond the scope of this paper.

¹⁰⁶ *Graham v. Richardson*, 403 U.S. 365 (1971).

However, when an immigrant challenges a classification under the equal protection clause, a court will not automatically subject the classification to strict scrutiny; strict scrutiny is only appropriate when the classification resulted from *state* action.¹⁰⁷ Even so, a state statute will sometimes be subject to a lesser standard, where the challenged classification is based on self-government and the democratic process, such as requirements of citizenship to be a police officer¹⁰⁸ or school teacher,¹⁰⁹ or where aliens are denied the right to vote.¹¹⁰

On the other hand, judicial oversight of federal immigration laws, is extremely narrow and highly deferential to the federal government. This is rooted in the idea that policies toward aliens are intertwined with the conduct of foreign relations, the war power, and the maintenance of a republican form of government; these matters are “exclusively entrusted” to the legislature as to be largely immune from judicial oversight.¹¹¹ As another example, in *Matthews v. Diaz*, the Supreme Court unanimously upheld a federal statute that denied Medicaid benefits to aliens.¹¹²

The different levels of scrutiny result not just from the different kind of government action (state vs. federal), but also from a divide between the kinds of activities that the government action seeks to regulate. Generally speaking, if a law involves the regulation of membership and borders, anti-immigrant discrimination will be upheld as legitimate. Where the law seeks to discriminate aliens in the regulation of general civil, economic, and social regulation, such discrimination will be invalidated as violating equal protection principles. It seems very unlikely that the Court will strike down the public charge as violative of the equal protective clause, because it will only be subject to “rational basis” scrutiny. Regulating our borders to the extent that those who enter must prove “self-sufficiency” has been a legitimate government interest for decades; and a rule that prevents aliens who are not self-sufficient is rationally related to that government objective.

Another possible legal challenge is based on the argument that the rule violates the Administrative Procedure Act. The

¹⁰⁷ *Id.*

¹⁰⁸ *Foley v. Conneile*, 435 U.S. 291, 296 (1978).

¹⁰⁹ *Ambach v. Norwich*, 441 U.S. 68 (1979).

¹¹⁰ *Sugarman v. Dougal*, 413 U.S. 634, 647 (1973).

¹¹¹ *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

¹¹² 426 U.S. 67 (1976).

Administrative Procedure Act specifies that a court may hold unlawful and set aside agency actions under certain circumstances;¹¹³ specifically, a court will set aside agency action where it finds the agency’s conclusions to be arbitrary and capricious.¹¹⁴

The “arbitrary and capricious” standard allows a court to delve into a “searching and careful” review of an agency’s policymaking process.¹¹⁵ While the Supreme Court has stated that it “is not empowered to substitute its judgment for that of the agency,”¹¹⁶ there have been instances where the Court has invalidated agency decisions that seem to indicate the contrary. For example, in the landmark *State Farm* case, rather than analyzing whether the agency’s decision making was rational, the Court looked to whether the agency had considered reasonable and viable alternatives.¹¹⁷ The Court also held that the agency failed to “offer the rational connection between facts and judgment required to pass muster under the arbitrary and capricious standard”.¹¹⁸

If a court were to review the DHS rule in the same manner as *State Farm*, there is hope that it will be struck down. As discussed *supra*, there is evidence to show that the data upon which DHS relied was misleading and misinformed. Furthermore, even if the court finds that “self-sufficiency” is a legitimate government objective, it might find that DHS has failed to consider reasonable alternatives to achieving that goal. Such reasonable alternatives might be the implementation of integration programs that help immigrants in the same way that integration programs work in Sweden. That is, provide individuals with the skills necessary to enter the work force and become self-sufficient.

CONCLUSION

While the proposed rule does not explicitly exclude a particular race, ethnicity, or immigrants from a specific country or region, its purpose is to exclude an entire class of aliens and their

¹¹³ 5 U.S.C. § 706.

¹¹⁴ § 706(2)(A).

¹¹⁵ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹¹⁶ *Id.*

¹¹⁷ *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-57 (1983).

¹¹⁸ *Id.*

families. Such a policy is reminiscent of the racism and xenophobia that fueled enactment of laws such as the Chinese Exclusion Act, mentioned in Part II-A. This Act barred Chinese immigrants because they were seen as a threat to the US economy and labor force. Despite the fact that such a law was promulgated over 150 years ago, it appears that xenophobia remains at the forefront of US immigration policy. This time, DHS makes claims that the government cannot financially sustain the current state of affairs among immigrants, and that in order to promote "self-sufficiency," aliens may not benefit from the state. However, what DHS has essentially proposed is a rule that demonstrates its fear of low-income migrants, not limited to a specific country, but an entire class of individuals, nonetheless. Such a proposal is the fruit of an administration whose campaign was fueled by racist and xenophobic rhetoric, and whose leader promised to build a wall on the Mexican border and exclude Muslims from entry.¹¹⁹

To sum, DHS should not adopt the proposed rule because DHS has failed to provide accurate and complete data to support its conclusions and because execution of the rule could have drastic negative health consequences for both immigrants and citizens alike.

While the data that DHS provides in the proposed rule may be demonstrative of significant patterns amongst noncitizens, it does not conclusively show that noncitizens use public benefits at a higher rate than citizens, nor does it conclusively demonstrate that noncitizens lack self-sufficiency. Most importantly, DHS' data conflicts with more reliable data which demonstrates that immigrants do not depend on public benefits to the extent that DHS purports they do. Furthermore, DHS ignores many factors and characteristics amongst noncitizens that should heavily weigh against expansion the public charge doctrine.

As a secondary matter, the proposed rule could have far reaching negative health consequences for both immigrants and citizens alike, as well as those with disabilities. The proposed rule has not yet been enacted, and there has already been widespread fear amongst immigrants and their families to the extent that they are already foregoing healthcare for which they are likely still eligible to receive. Health advocates have been fielding reports of immigrants with free or low-cost health coverage failing to visit

¹¹⁹ Oppenheimer, *supra* note 1 at 2.

health care clinics amongst rumors that using such public benefits might affect their ability to remain in the United States.¹²⁰ If the proposed rule does go into effect, DHS officials must make efforts to ensure that enforcement of the rule is uniform across the country. Immigrants and their families must be fully informed of their rights, or lack thereof, to public benefits access.

Finally, DHS should look to other countries such as Sweden where DHS would do much better to invest in other aspects of policymaking that ensures immigrants have access to public services like housing and education, as Sweden’s Public Employment Agency does. That way, over a long period of time, immigrants become more financially stable and less reliant on public benefits. From an analytical perspective that reads beyond the surface of the proposal, it is not hard to discern that DHS is simply acting in furtherance of Trump’s xenophobic agenda. Thus, DHS should not enact the Proposed Rule, and focus its efforts on integrating a population of people whose support this country greatly relies on in both its economy and culture.

¹²⁰ Chris Fuchs, *Driven by Fear, Green-Card Holders Are Avoiding Government Aid, Advocates Say*, NBC, (Dec. 6, 2018), <https://www.nbcnews.com/news/asian-america/driven-fear-green-card-holders-are-avoiding-government-aid-advocates-n944266>.