

ENTRANCE FEES: SELF-FUNDED AGENCIES AND THE ECONOMIZATION OF IMMIGRATION

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INTRODUCTION

The practice of charging user fees to fund executive administrative agencies has burgeoned in the past forty years. User fees have been a feature of government administration for as long as there has been a government—postal stamps being a classic example. However, it was the Reagan Administration's fixation with small government that spurred their efflorescence, using them as a means of raising revenue without resorting to general taxation.¹ Legal and economic theories were readily available to rationalize the implementation of fees, marshalling concepts of efficiency and rational-actor modeling as justifications.² Since the 1990s, a second dynamic has emerged: user-fee funding structures that facilitate the consolidation of executive power removed from congressional budgetary oversight.³ Both of these phenomena—raising revenue and consolidating executive power—contain troubling implications for federal immigration policy.

Of main concern to this Article is the financing structure of the U.S. Citizenship and Immigration Services (USCIS), an executive branch administrative agency that is almost entirely funded through fees paid by applicants and petitioners for immigration benefits.⁴ These user fees support the USCIS in administering the nation's immigration laws, processing benefits requests, and providing the infrastructure necessary to carry out those activities.⁵ This Article scrutinizes the fundamental economic and normative justifications for the use of user fees at the USCIS and argues that user-fee funding is inapt in the immigration context and leads to dysfunctional outcomes for hopeful immigrants.⁶ In other words, the economic rationales that are

1. See Christopher C. DeMuth Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555, 562 (2017).

2. See generally Clayton P. Gillette & Thomas D. Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U. L. REV. 795 (1987).

3. DeMuth Sr. & Greve, *supra* note 1.

4. *USCIS Announces Final Rule Adjusting Immigration Benefit Application and Petition Fees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 24, 2016), <https://www.uscis.gov/archive/archive-news/uscis-announces-final-rule-adjusting-immigration-benefit-application-and-petition-fees> [<https://perma.cc/3U5G-C6MT>].

5. *Id.*

6. In particular, the USCIS's self-funding has removed the immigration agency from regularized congressional budgetary oversight, which has facilitated

used to justify user-fee funding of administrative agencies—to manage the availability of public goods and to control or promote externalities⁷—fail on their own terms, as they do not adequately reflect the realities of the immigration system.

Two additional justifications for user fees beyond economics— notions of fairness and instrumental revenue enhancement—are more conceptually plausible and are thus often invoked in the context of the USCIS; however, these concepts principally implicate the democratic determination of immigration policy and are therefore, at base, political questions.

However, by effectively shielding the agency from regular budgetary oversight, the USCIS’s funding scheme removes an important democratic check on the executive branch, thereby frustrating the very political process that should be the means of addressing those political questions. Moreover, the abdication of regular oversight has facilitated the pursuit of operations that are fundamentally misaligned with Congress’s original intent in creating the USCIS, leading to democratic harms and dysfunctional outcomes for immigrants. Perhaps most troubling, the initiation of the USCIS’s self-funding scheme in the late 1980s⁸—implemented as part of a general Reagan-era turn towards neoliberal institutional practices—started the agency on a self-reinforcing path that has foreclosed political imaginations with respect to funding. Notwithstanding the fact that user fees have funded the USCIS for only a little over three decades, it now appears beyond the pale to consider alternative arrangements, such that proposals to address a recent budget crisis at the immigration agency were labeled as a “bailout”—an odd word choice for what is, in essence, a government plan to fund a government agency.⁹

its use in enforcement measures. *See infra* Section II.E. An important consequence has been an unprecedented backlog for naturalization applications. *See, e.g.*, COLO. STATE ADVISORY COMM. TO THE U.S. COMM’N ON C.R., CITIZENSHIP DELAYED: CIVIL RIGHTS AND VOTING RIGHTS IMPLICATIONS OF THE CITIZENSHIP AND NATURALIZATION BACKLOG (2019) [hereinafter CITIZENSHIP DELAYED], <https://www.usccr.gov/files/pubs/2019/09-12-Citizenship-Delayed-Colorado-Naturalization-Backlog.pdf> [<https://perma.cc/5DJA-TMPN>].

7. Gillette & Hopkins, *supra* note 2, at 801–04.

8. *See* Robert Pear, *Reagan Seeks to Cut Funds for New Immigration Law, House Panel Is Told*, N.Y. TIMES (Dec. 18, 1986), <https://www.nytimes.com/1986/12/18/us/reagan-seeks-to-cut-funds-for-new-immigration-law-house-panel-is-told.html> [<https://perma.cc/JVZ4-TF3L>].

9. *See, e.g.*, Geneva Sands, *Immigration Agency Seeks Bailout, Plans to Charge More for Visa Applications*, CNN, <https://www.cnn.com/2020/05/18/politics/uscis->

Part I of this Article defines user-fee funding structures, and their economic and normative justifications, as they apply across the broad administrative state. Additionally, Part I recounts the historical era in which Law and Economics supplied theory-grounded rationales for user fees as part of an emerging neoliberal political consensus. Part II examines the practice of charging user fees in the immigration context. It begins by describing the economics of immigration, then analyzes the application of user fees' economic justifications to the USCIS's mandated mission. The second Part continues the analysis of immigration by discussing the normative bases for charging fees for immigration services and concludes by describing the recent instrumentalization of user fees in the hands of the Trump Administration. Part III moves to the implications of user fees for democratic accountability, first through an examination of constitutional and administrative law, and then by reviewing the agency design choices that have exacerbated the types of democratic harms that are the result of the USCIS's self-funding structure. The last subsection of Part III serves as a meta-narrative of the preceding argument, recounting a story of a critical juncture and resulting path dependency.

I. USER-FEE-FUNDED AGENCIES

This Part is primarily descriptive, inasmuch as it lays out the definition of user-fee funding for administrative agencies and the economic and normative justifications for its use across the administrative state. But it is also partly a historical narrative. It recounts the influence of Law and Economics as a school of legal thought that found purchase in the political sphere in the 1980s, as well as the general neoliberal political turn of the era, which culminated in the Office of Management and Budget's 1993 guidance document Circular A-25 Revised.

A. *User-Fee Funding Explained*

It is easiest to define user-fee funding by what it is not: general taxation.¹⁰ Statutorily prescribed taxation is the standard means by which the government funds government functions,

emergency-funding-coronavirus/index.html [https://perma.cc/T6NJ-SVVU] (May 18, 2020, 12:22 PM).

10. Gillette & Hopkins, *supra* note 2, at 800.

such as national defense, road construction, interest on the national debt, and the like.¹¹ Notwithstanding the problems with our tax system, the underlying premise is that everyone in the United States pays—in the form of taxes—for their fair share of publicly distributed goods. The government’s sovereign power compels these taxes; they are not optional.¹² User fees, in contrast, are voluntarily paid by individuals or businesses for access to a service or product distributed by the government.¹³ User fees, then, are principally intended to allocate the cost of government services and products to the beneficiaries of those services and products, representing a normative concern.¹⁴

However, syncing costs with benefits is not the only reason that executive agencies utilize user fees; there are economic rationales that are relevant beyond the normative. Secondarily, user fees are employed as a tool of general economic policy to deal with the types of problems that arise in the allocation or distribution of scarce or public goods—that is, as a means of ensuring fair distribution and to prevent what is known as “the tragedy of the commons.”¹⁵ These economic justifications are the subject of the succeeding Section of this Article.

A third type of justification, which I label as “instrumental,” entails the use of user fees as a means of filling an agency’s (or the government’s) coffers without resorting to taxation and all the attendant political ramifications. Although revenue generated from user fees is not the principal means of funding the government, it is significant.¹⁶ In fiscal year 2017, for example,

11. *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CTR. ON BUDGET & POL’Y PRIORITIES 1, <https://www.cbpp.org/sites/default/files/atoms/files/4-14-08tax.pdf> [<https://perma.cc/G3F8-Q8WJ>] (Apr. 9, 2020).

12. D. ANDREW AUSTIN, CONG. RSCH. SERV., R45463, *ECONOMICS OF FEDERAL USER FEES* 1 (2019).

13. Gillette & Hopkins, *supra* note 2, at 800. Of course, the voluntariness of this type of payment is disputable; failure to pay some user fees make it impossible to carry out necessary tasks legally, such as obtaining a passport. AUSTIN, *supra* note 12, at 1.

14. *See infra* Section I.C. Government activity may be defined by three broad categories. Along with its allocative functions, the government serves redistributive functions (e.g., welfare payments) and stabilizing functions (e.g., the Federal Reserve). Gillette & Hopkins, *supra* note 2, at 801.

15. The tragedy of the commons refers to a situation in which individuals pursuing their personal interests (i.e., consumption of a public good) results in overuse of a common resource, thus denying the benefits of those goods to society at large. *See generally* Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968).

16. Despite the recent uptick in the use of user fees, the federal government still collects the bulk of its annual revenue through statutory taxation, making up

user fees accounted for \$331 billion in net income, about 10 percent of that year's total federal revenue.¹⁷ Many administrative agencies—such as the USCIS, as well as the Patent and Trademark Office (PTO), the Federal Energy Regulatory Commission, and the Federal Trade Commission—are wholly or partly funded through user fees.¹⁸

Fees and user charges can take a variety of forms, but broadly, they fall into two categories: regulatory and service-related.¹⁹ Regulatory fees are used to fund agencies' regulatory programs, such as the fees charged by the Environmental Protection Agency to review applications for new pesticides or the costs levied by the U.S. Food and Drug Administration to evaluate the safety of new medicines and medical devices.²⁰ Service-related fees, in contrast, are paid by individuals and businesses for access to or ownership of discrete products or services provided or controlled by the federal government through one of its many administrative agencies.²¹ Examples of service-related user fees include the entrance fees charged by the National Park Service for admittance to national parks, trademark registration and patent application fees paid to the PTO, the cost of stamps to send letters through the Postal Service, and the State Department's charge for obtaining or renewing a passport.²²

The history of user fees is coeval with the history of the United States.²³ The records are replete with early examples of

between 64 percent and 79 percent of gross receipts between 2005 and 2015. De-muth Sr. & Greve, *supra* note 1, at 560 n.33.

17. AUSTIN, *supra* note 12.

18. *Id.*

19. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-718, FEDERAL USER FEES: KEY CONSIDERATIONS FOR DESIGNING AND IMPLEMENTING REGULATORY FEES 1-2 (2015), <https://www.gao.gov/assets/gao-15-718.pdf> [<https://perma.cc/WGQ8-4Q39>].

20. *Id.*; *Medical Device User Fees*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/medical-devices/premarket-submissions/medical-device-user-fees> [<https://perma.cc/7DVT-AWDU>].

21. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 19, at 2.

22. *Id.*; see also Jesse Rifkin, *With 10 Percent of Federal Agency Funds Coming from User Fees, Agency Accountability Act Would Give Congress More Control Over that Money*, GOVTRACK.US (Mar. 5, 2020), <https://govtrackinsider.com/with-10-percent-of-federal-agency-funds-coming-from-user-fees-agency-accountability-act-would-c80f0ce9d5ef> [<https://perma.cc/VZK2-6S2P>].

23. For example, the United States Postal Service was created in 1792 by the nation's first major postal law, which heavily subsidized the delivery of newspapers and periodicals in the name of a robust free press, but also granted the new Postal Service the power to offset its budget by charging customers six to twenty-five cents per postage to send a letter. *Postage Rates for Periodicals: A Narrative History*, U.S. POSTAL SERV. (June 2010), <https://about.usps.com/who-we-are/postal-history/periodicals-postage-history.htm> [<https://perma.cc/8UFN-78X8>]. Today, the U.S. Postal

both service-related²⁴ and regulatory²⁵ user fees, but it was during the Reagan Administration that their use bloomed.²⁶ Between 1980 and 1991, service-related user fee collections grew at an average rate of 11 percent per year, while regulatory user fees grew at a 20 percent per-year average.²⁷ Tax revenue, by comparison, grew at a more modest 7 percent per-year average.²⁸ For President Reagan and his cabinet, user fees serviced the twin objectives of revenue enhancement without raising taxes and instantiating the administration's neoliberal economic policies.²⁹

The statutory basis for user fees rests on Title V of the Independent Offices Appropriations Act (IOAA) of 1952,³⁰ for which the Office of Management and Budget's (OMB) Circular A-25 provides guidance.³¹ First promulgated in 1959, the original iteration of Circular A-25 provided guidelines for agencies pursuant to the goal of developing an "equitable and uniform system of charges" and mandated that fees were to be assessed to "each identifiable recipient for a measurable unit or amount of government service or property from which he derives a special benefit."³² This "special benefit" formulation closely tracks the normative justification for user fees, as discussed above: "No charge should be made for services when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public."³³ The

Service is wholly dependent on the sale of postage, products, and services for its funding. *Top Thirteen Things You Should Know About the U.S. Postal Service*, U.S. POSTAL SERV.: POSTAL FACTS., <https://facts.usps.com/top-facts> [<https://perma.cc/GP8P-7Y7D>].

24. *E.g.*, Passport Act of 1926, ch. 772, 44 Stat. 887 (codified as amended at 22 U.S.C. § 211(a)).

25. *E.g.*, Federal Water Power Act of 1920, ch. 385, § 10(e), 41 Stat. 1063, 1068.

26. *See* Gillette & Hopkins, *supra* note 2, at 798 n.14 (citing numerous new or expanded user fee recommendations made by President Reagan's Office of Management and Budget to Congress in 1987).

27. CONG. BUDGET OFF., THE GROWTH OF FEDERAL USER CHARGES: AN UPDATE 4 (1995).

28. *Id.*

29. *See infra* Section I.D.

30. Independent Offices Appropriations Act of 1952, 31 U.S.C. § 9701. The IOAA states that "each service or thing of value provided by an agency . . . to a person . . . is to be self-sustaining to the extent possible." *Id.* at § 9701(a).

31. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-25, USER CHARGES (REVISED) (1993) [hereinafter OMB CIRCULAR A-25 (1993)].

32. BUREAU OF THE BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-25, USER CHARGES §§ 1, 3 (1959) [hereinafter OMB CIRCULAR A-25 (1959)].

33. *Id.* § 3(a)(2).

combination of the IOAA and OMB Circular A-25 provided broad authority to agencies to expand the use of user fees across multiple administrative contexts.³⁴

But it is not solely the purview of the executive branch to implement user-fee funding; administrative agencies are also creatures of statute and thus require congressional authority beyond the IOAA to charge user fees.³⁵ Such authorizing legislation may either specify fee structures and rates in detail or broadly grant the discretionary power to impose fees and collect user charges.³⁶ It is this ultimate congressional control over agencies' financing structures that fulfills the requirements of the nondelegation doctrine, as well as separation of powers principles.³⁷

So, where do user fees go after they are paid? The simple answer is the federal government, which is both correct and deceptively oversimple.³⁸ The OMB designates which accounts receive collections associated with user fees in its budget data system,³⁹ but does not make these designations public.⁴⁰ While the OMB's annual Budget Appendix often contains detailed subaccount-level data that indicate user-fee funding for federal programs, the Congressional Research Service (CRS) makes clear that "[t]he format of the Budget Appendix . . . makes it an impractical source of data for government-wide research."⁴¹ There

34. On the binding effects of agency guidance, see Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165 (2019).

35. AUSTIN, *supra* note 12.

36. *Id.*

37. See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (stating that for a delegation of legislative authority to be permissible, it must contain an "intelligible principle to which the [agency must] . . . conform"); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989) (upholding a statute authorizing agency imposition of user fees as a permissible delegation of Congress's taxing power). For a discussion of the nondelegation doctrine more broadly, see Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("[The nondelegation doctrine] has had one good year and 211 bad ones (and counting).").

38. In 2019, for example, the federal government took in around \$3.5 trillion in total revenue, while spending some \$4.4 trillion. CHRISTINE BOGUSZ ET AL., CONG. BUDGET OFF., *THE FEDERAL BUDGET IN 2019: AN INFOGRAPHIC* (2020), <https://www.cbo.gov/system/files/2020-04/56324-CBO-2019-budget-infographic.pdf> [<https://perma.cc/73ES-VDW5>].

39. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-11, PREPARATION, SUBMISSION, AND EXECUTION OF THE BUDGET § 79.4(e) (2021).

40. AUSTIN, *supra* note 12, at 2.

41. *Id.*

is simply no comprehensive and authoritative list of federal user fees publicly available.⁴²

Complicating the issue still further, the disposition of user fees varies greatly: fees generally are collected into the U.S. Treasury General Fund, but they may also be collected into an array of agency-specific accounts depending on how Congress authorizes them.⁴³ Fees designated as “offsetting collections”—called so because they are intended to offset the agency’s expenditures—are funneled into either receipt accounts, subject to congressional appropriations oversight,⁴⁴ or discretionary expenditure accounts, which the agency can generally use without congressional pre-approval.⁴⁵ Since it foreswore earmarks in 2011,⁴⁶ Congress has come to rely on limitation riders in appropriation bills and statutory or nonstatutory agency instructions to direct or prohibit the spending of receipt accounts, but by definition, it does not have regularized control over expenditure accounts.⁴⁷ Therefore, it is up to the agency to determine and justify how it spends these funds in the execution of its mandate.

B. Economic Justifications for User-Fee Funding

Because neoclassical economic theory supplied the logic for both the economic justifications (efficient distribution) and the normative justifications (fair distribution) for fee pricing, this Section begins by setting out the key concepts that were utilized by Law and Economics scholars—principally the efficiency criterion—in these theorizations. It then explains how these concepts were employed in the user-fee context on their own terms, before

42. *Id.*

43. *Id.* at 3.

44. *Id.* at 2–3; Gillette & Hopkins, *supra* note 2, at 863–64. As a baseline, federal agencies may not spend federal revenue unless Congress has appropriated them or authorized their use explicitly in a statute. *See generally* U.S. CONST. art. I, § 9, cl. 7 (establishing that “[n]o money shall be drawn from the treasury, but in consequence of appropriations made by law. . .”).

45. AUSTIN, *supra* note 12, at 2–3. Gillette & Hopkins, *supra* note 2, at 863–64.

46. Earmarks were congressional provisions that directed funds to specific projects, usually tacked onto unrelated or only tangentially related legislation. Scott Wong, *Senate Dems Give In on Earmark Ban*, POLITICO, <https://www.politico.com/story/2011/02/senate-dems-give-in-on-earmark-ban-048623> [<https://perma.cc/64DR-ALQV>] (Feb. 2, 2011, 7:57 AM).

47. JENNIFER L. SELIN & DAVID E. LEWIS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 107 (2d ed. 2018) (ebook).

moving on in the next Section to show how economic theory undergirded the normative justifications.

1. Law and Economics and the Efficiency Criterion

In 1987, Clayton Gillette and Thomas Hopkins published *Federal User Fees: A Legal and Economic Analysis* (“*User Fees*”) in the Boston University Law Review.⁴⁸ Based on a report they prepared for the Administrative Conference of the United States (ACUS), *User Fees* is an example of a particular style of legal analysis that is commonly referred to as Chicago Law and Economics (Chicago L&E), which took legal thought on a neoclassical economics turn in the late 1970s and early 1980s. As a school of legal thought, Chicago L&E is broadly defined as a “fully operationalized normative approach [for] counseling judges and other officials,” which takes as its point of departure the evaluative standard of *efficiency*.⁴⁹ The efficiency criterion is defined as the “allocating [of] resources to their most highly valued use, generally as indicated by the recipient’s willingness to pay for the resource.”⁵⁰ The willingness-to-pay conception of human behavior is itself based on rational-actor modeling, another hallmark of Chicago L&E.⁵¹ Although it originated in law schools, Law and Economics found purchase in broader swaths of public discourse, particularly as a means of justifying the neoliberal economic policies championed by political conservatives.⁵²

48. Gillette & Hopkins, *supra* note 2.

49. Pierre Schlag, *Coase Minus the Coase Theorem—Some Problems with Chicago Transaction Cost Analysis*, 99 IOWA L. REV. 175, 180 (2013); see Steven G. Medema, *Chicago Law and Economics*, in THE ELGAR COMPANION TO THE CHICAGO SCHOOL OF ECONOMICS 160, 160–174 (Ross B. Emmett ed., 2010) (providing a general introduction to Chicago L&E). See generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (8th ed. 2011).

50. Gillette & Hopkins, *supra* note 2, at 800.

51. A typical explanation of rational-actor modeling of human behavior is provided by Gary Becker: “[A]ll human behavior can be viewed as involving participants who (1) maximize their utility (2) from a stable set of preferences and (3) accumulate an optimal amount of information and other inputs in a variety of markets.” GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 14 (1976); accord Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (providing a critical evaluation of these models from a behavioral economics perspective). But see Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1559–61 (1998) (arguing that behavioral economics is undertheorized).

52. See generally STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

How do Law and Economics theorists assess the efficiency of a market? First and foremost, one must buy into the notion that when the government produces or supplies a good or service, it is intervening in a pre-political, or private, market rather than creating one.⁵³ From there, economic theories abound regarding how to define and evaluate targeted levels of efficiency (e.g., Kaldor-Hicks efficiency, pareto efficiency, etc.), the appropriate means and amount of government intervention necessary to achieve efficiency (e.g., Pigouvian taxation, Ramsey pricing, marginal cost theory, etc.), and the underlying justification for both (e.g., second-best theory, the Coase Theorem, etc.). The finer points of economic tinkering are beyond the scope of this Article, but Gillette and Hopkins's basic calculation works for our purposes: "Efficient pricing exists if one is deterred from consuming additional units of public service only when the benefits of that consumption are less than its costs to society."⁵⁴

The point of this Article is not to criticize Chicago L&E as such—this has already been done more dexterously than I ever could⁵⁵—but rather to take the economic justifications for the use of user fees at face value and to provide a critique of them in the immigration context: even if one were to assume that the neoclassical economic justifications for the use of user fees were useful, they would still fail on their own terms.⁵⁶ Gillette and Hopkins's text provides an entry point for this endeavor. More than three decades since its publication, *User Fees* remains the most comprehensive scholarly discussion of agency user fees.

53. See Justin Desautels-Stein, *The Market as a Legal Concept*, 60 BUFF. L. REV. 387, 461 ("The market has never regulated itself, can never regulate itself, nor can we accurately understand government as sometimes intervening more or less intrusively. The reason is that the 'market' is not an 'itself'—it is a set of choices, made by human beings, and human beings continue to choose how they want the background rules of the market to function. . . . The idea that coercion and control are relegated to a singular domain of sovereign authority while freedom and competition are sovereign in the market is an illusion."); cf. ROBERT B. REICH, *THE SYSTEM: WHO RIGGED IT, HOW WE FIX IT* 92–93 (2020) ("One of the most dangerously deceptive ideas is that we work and live in a free market that is neutral and natural—existing outside government. . . . Governments don't intrude on free markets. Governments organize and maintain markets.").

54. Gillette & Hopkins, *supra* note 2, at 805 (citing Charles J. Goetz, *The Revenue Potential of User-Related Charges in State and Local Governments*, in BROAD-BASED TAXES: NEW OPTIONS AND SOURCES 118 (Richard A. Musgrave ed., 1973)).

55. See, e.g., Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Schlag, *supra* note 49.

56. I use the term "useful" rather than explicitly critical terms like "correct" or "valid" deliberately, for I do believe that for all its flaws, the economic analysis of law has provided enriching insight into legal regimes and institutional behaviors.

Moreover, it is a work of its time—it was written and published during the Reagan years and so offers insight as to how neoliberal economic policies were legitimated in real time.⁵⁷ Therefore, for purposes of immanent critique, the following discussion of the economic and normative justifications for user fees closely tracks Gillette and Hopkins’s analysis. The instrumental justifications that I identify, on the other hand, benefit from a historical perspective and are thus examined by reference to newer theoretical analyses of neoliberalism.

2. Public Goods and Externalities

If one casts government action as interference with a free and efficient private market, then user fees are justified as a means of correcting market failures that result from both internal market processes and exogenous market pressures.⁵⁸ A user fee, thus, is employed to “induce a socially optimal amount of the underlying good or service.”⁵⁹ Gillette and Hopkins identify four principal causes of market failures that would justify government interference: the existence of public goods, substantial externalities, information problems, and natural monopolies.⁶⁰ Of those, public goods and externalities are of most concern to this discussion.⁶¹

57. That Chicago L&E was necessarily associated with a neoliberal turn in American politics is a debatable issue, but I find William Davies’ account tying the two together convincing. WILLIAM DAVIES, *THE LIMITS OF NEOLIBERALISM: AUTHORITY, SOVEREIGNTY AND THE LOGIC OF COMPETITION* 70–107 (2014). Others contend that economic theories of law, with its focus on efficiency, is separable from the antiredistributive political goals of neoliberalism. See, e.g., Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J., 1211, 1227–28 (1991) (arguing that redistribution analyses are an “inevitable and hence essential” part of efficiency analysis). Still others believe that any supposed dichotomy of economics and politics is an illusion. See, e.g., Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 420 (1981) (describing how the “notion of a tradeoff between the hard datum of efficiency and the inherently subjective, political datum of equity is apologetic nonsense”).

58. Schlag, *supra* note 49, at 181 n.17 (“When is it legitimate for government to intervene in private affairs? In the United States, the normative answer to this question has usually been based on the concept of market failure—a circumstance in which the pursuit of private interest does not lead to an efficient use of society’s resources or a fair distribution of society’s goods.” (quoting DAVID L. WEIMER & AIDAN R. VINING, *POLICY ANALYSIS: CONCEPTS AND PRACTICE* 37 (4th ed. 2004))).

59. Gillette & Hopkins, *supra* note 2, at 801.

60. *Id.* at 800.

61. Because immigration is an inherent aspect of the sovereign power, the government maintains a monopoly on immigration policy. See *Fong Yue Ting v. United States*, 149 U.S. 698, 711 (1893). Information problems, specifically the transaction

Public goods can create market failures when they demonstrate two key characteristics: their consumption is not rival, and their benefits cannot easily be reserved to those who pay for them.⁶² Street lights and national defense are examples of public goods that create market failures because of the free-rider problem, in which public goods may be undersupplied because individuals are unwilling to express their true preference in the market as indicated by their willingness to pay. In short, the information required to reach the optimal allocation of public goods cannot be supplied by the market (through, for example, user-fee pricing) because everyone *in* the market thinks someone *else* will pick up the tab; that is, some users assume they will get a free ride.⁶³ When a government-distributed good or service exhibits both of these characteristics, it is best to fund it through general taxation rather than user fees to avoid the free-rider problem.⁶⁴

However, when a good held in common exhibits only one or neither of these characteristics, a user fee may be an appropriate use-management tool. This is particularly relevant for rival common goods, such as public lands or resources, because the individual pursuit of personal interest results in overuse. Overconsumption of the public good ultimately denies the benefits of those goods to society at large—the aforementioned “tragedy of the commons.”⁶⁵ A government-imposed user fee may be an effective means of regulating consumption of a rival good, thereby forestalling its overuse.⁶⁶

This calculation becomes more complicated when one considers externalities. Externalities are the effects to third parties who are not privy to a marketplace transaction, the costs of which are not reflected in the original transaction’s pricing.⁶⁷ A

costs associated with information disparities, may be implicated in the immigration context, but user fees are not an obvious means of mitigating these costs. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8 (1960) (discussing the implications of transaction costs).

62. Gillette & Hopkins, *supra* note 2, at 801–02. A good is not rival if an additional consumer of a good does not minimize the benefit enjoyed by its first user of that good, and that additional consumption does not result in extra cost. *Id.* at 802.

63. *Id.*

64. *Id.* at 802–03.

65. *See* Hardin, *supra* note 15.

66. Gillette & Hopkins, *supra* note 2, at 811.

67. *Id.* at 803. Externalities can be beneficial or detrimental to the third party, sometimes both when the public happens to be the third party. *Id.* For example, building a coal-fired power plant in an economically depressed community brings

classic example of an externality is pollution, a situation in which the government will typically intervene on behalf of the affected third parties (for example, the public). The government can force the internalization of the cost of pollution in multiple ways: by imposing ex ante mitigation measures (e.g., requiring the installation of devices that lessen the amount or impact of pollutants) or by imposing fines ex post through the legal system (e.g., liability for noxious fumes). By adjusting the costs imposed—either ex ante or ex post—the government can induce the socially optimal amount of consumption of a product or service that creates significant externalities. User fees, of course, are one means of imposing an ex-ante cost.

A user fee can be an effective way of encouraging or deterring consumption of a good or service because it works as a rationing mechanism: if the market undervalues the total cost of a product to society because of unaccounted-for externalities, the government can force the internalization of those costs by the imposition of a regulatory or service-related user fee.⁶⁸ But the government's interventions do not always involve the imposition of additional costs. When consumption of a good or service produces a positive externality, the government can either subsidize the production of that good or service to encourage greater consumption or enter the marketplace as a producer and supply the good at a price lower than the market would otherwise.⁶⁹

As the preceding argument makes clear, the economic justifications for user fees (both regulatory and service-related) are strongest when the government intends to either encourage or discourage the consumption of rival common goods or nonrival public goods that create significant externalities. The pricing of user fees is considered efficient when one is deterred from consuming additional units of the good or service only when the costs to society outweigh the benefits of that additional consumption.

much-needed jobs and an influx of cash while simultaneously degrading the local environment.

68. *Id.* at 803–04.

69. For example, the Post Office subsidizes postal rates for some nonprofit organizations because of the significant positive social externalities that result from their charitable work. See Richard B. Kielbowicz & Linda Lawson, *Reduced-Rate Postage for Nonprofit Organizations: A Policy History, Critique, and Proposal*, 11 HARV. J.L. & PUB. POL'Y 347, 348–49 (1988).

C. Normative Justifications for User-Fee Funding

Objectives other than allocative efficiency recommend the use of user fees; one of the primary considerations is the difficult-to-define concept of fairness. Fairness takes many normative definitions,⁷⁰ but in the context of user fees, there are two basic positions. First, fair distribution entails imposing the cost of the underlying good or service on the intended beneficiary—those who use it, pay for it.⁷¹ The second position of fair distribution requires the government to provide access to goods and services regardless of one's willingness or ability to pay—those who need it, get it.⁷² These two positions are referred to as *pricing to recover cost* and *pricing for redistribution*, respectively.⁷³

In contrast to pricing for efficiency,⁷⁴ which often does not recoup the government's full expenditure, pricing to recover cost precludes subsidization by nonbeneficiaries through their tax dollars,⁷⁵ which is known as a *cross-subsidy*.⁷⁶ In other words, correctly priced user fees can ensure that the costs of a good are borne solely by the beneficiaries; it is an issue of fairness and not an issue of managing use.⁷⁷ An economic means of evaluating the fairness of *not* charging a user fee is to ask whether “the cost share of any group of customers in a common project . . .

70. Usually, these definitions broadly align with either utilitarian or deontological moral and ethical philosophy. See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 26 (rev. ed. 1999) (describing his “justice as fairness” theory as deontological, in contrast to utilitarian, in that it “does not interpret the right as maximizing the good”); T. M. Scanlon, *Rights, Goals, and Fairness*, in PUBLIC AND PRIVATE MORALITY 93, 93–112 (Stuart Hampshire ed., 1978) (discussing classic as well as more modern utilitarian philosophy); Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 PHIL. & PUB. AFFS. 313 (1994) (providing a general introduction to both the deontological and utilitarian positions).

71. Gillette & Hopkins, *supra* note 2, at 814.

72. *Id.*

73. *Id.* at 814, 816.

74. See *supra* Subsection I.B.1 and accompanying text.

75. See Gillette & Hopkins, *supra* note 2, at 814–15.

76. See John Brooks et al., *Cross-Subsidies: The Government's Hidden Pocket-book*, 106 Geo. L.J. 1229, 1235–36 (2018) (“A cross-subsidy exists when, within a pool of people (most often consumers), one segment of the pool pays more than they would pay outside the pool so that another segment of the pool pays less than they would pay outside the pool.”). This is to be distinguished from a positive externality, which concerns *unintended* benefits that accrue to third parties—essentially the knock-on effects. See *supra* note 67 and accompanying text.

77. That is, managing use is a question of efficiency and not of fairness. Gillette & Hopkins, *supra* note 2, at 814.

exceed[s] the ‘stand alone cost’ of serving only their needs.”⁷⁸ If the cost of serving that group’s needs is more than serving everyone’s needs, then it is “fair” to charge that group the incremental cost beyond the common cost.⁷⁹ If that seems simple enough, let us complicate it a bit further: if the calculation of the common cost must debit the value of any positive externalities created in the transaction, it must also add the costs associated with negative externalities. Even this, of course, vastly oversimplifies the matter, but it at least gestures at the complexity involved in ascertaining what a “fair” user fee should be.⁸⁰

Pricing for redistribution, on the other hand, is relatively straightforward. At base, the decision to make a good available, irrespective of ability or willingness to pay, is a political choice. One way that the government effectuates these choices is to set user fees at levels that correlate to the consumer’s relative ability to pay, effectively subsidizing the low-income user’s consumption. It does so through direct fee waivers or exemptions, or by charging relatively affluent users a different, higher price that exceeds the cost of production, thus intentionally creating a cross-subsidy.⁸¹ Moreover, even a modest user fee that does not recover full cost may be fairer to less-affluent groups that do not partake in the good or service because they are not required to subsidize its production with their tax dollars.⁸²

D. Instrumental Justifications for User-Fee Funding

Another justification for user fees is to raise revenue. In many respects, this is a conceptually transparent objective, but it belies larger processes at work—namely, the implementation of neoliberal policies.⁸³ Broadly described, neoliberalism

78. *Id.* at 815 (quoting WILLIAM W. SHARKEY, *THE THEORY OF NATURAL MONOPOLY* 41 (1982)).

79. *Id.*

80. Of course, the predictive power of economics to determine appropriate pricing is itself suspect. See Leff, *supra* note 55, at 477–79. The calculation becomes even more difficult when one accounts for contemporary usages of behavioral economics and “nudge” theory. See generally Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913 (2010) (identifying and addressing the “when to nudge” problem).

81. Gillette & Hopkins, *supra* note 2, at 816–17.

82. *Id.* at 817.

83. “Neoliberalism” is a contested term, to say the least, but one that I believe is useful to this discussion. For further discussion on the contextual utility of the term “neoliberalism” despite not being conceptually neat, see David Singh Grewal & Jedediah Purdy, *Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 2–3 (2014).

proposes the theory that the best means of achieving human flourishing is through the guarantees provided by strong individual property rights, market freedom, and free-trade policies.⁸⁴ Pragmatically, neoliberalism functions as a “set of recurring claims made by policymakers, advocates, and scholars in the ongoing contest between the imperatives of market economies and nonmarket values [that are] grounded in the requirements of democratic legitimacy.”⁸⁵ Implicit in these abstract conceptions is the notion of an aggressive expansion of the liberal market model into *all* aspects of social life, including the design of administrative agencies.⁸⁶

Neoliberalism is a multifaceted ideology, but what interests us here are the implications for agency design choices.⁸⁷ The neoliberal agenda of the Reagan Administration influenced the expansion of user fees by administrative agencies on two levels. First, user fees provided the cover necessary to raise money for government activities while simultaneously disclaiming the need to increase taxes—essentially, they could have their cake and eat it, too.⁸⁸ The promise of small government with limited intervention in private markets is an axiomatic expression of neoliberal ideology.⁸⁹

Second, proponents believe that sectors run by the government should be privatized and deregulated to foster competition

84. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

85. Grewal & Purdy, *supra* note 83.

86. See JULIE A. WILSON, NEOLIBERALISM: KEY IDEAS IN MEDIA & CULTURAL STUDIES 2–3 (2018). Wendy Brown suggests this process goes much deeper than political institutions, arguing that neoliberalism “configures human beings exhaustively as market actors, always, only, and everywhere as *homo oeconomicus*.” WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 31 (2015).

87. See generally WILSON, *supra* note 86, at 21–49.

88. It is important to foreground the fact that neoliberalism is decidedly *not* laissez-faire economic policy. *Id.* at 27, 37. It requires significant and continual intervention in private markets to effectuate the marketization of social realities. *Id.* Take as a primary example Reagan’s proclamation that “government is not the solution to our problem; government is the problem” in the context of justifying trickle-down economics. *Id.* at 37. The part left unsaid, of course, is that trickle-down economics themselves require significant government intervention in the market—in the form of dramatically reduced corporate tax burdens and the reordering of social programs and entitlements—to transfer the large amounts of wealth from public to private reserves necessary to create a “trickle-down effect.” *Id.* at 37–38.

89. These arguments are usually made in the context of the deregulation of private entities. See Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521 (1990).

and efficiency.⁹⁰ What privatization and deregulation should do, in effect, is force the government to run like a competitive business. Neoliberals assume that market pressures will “eliminate bureaucratic red tape” and deliver a slew of related benefits that will redound to the individual consumer and the public as a whole.⁹¹ However, some sectors are not amenable to privatization or deregulation; in such circumstances, the state has an obligation, proponents argue, to create or impose market systems such that services that could only be supplied by the government—immigration, for example—are run by market logics.⁹² User fees that are keyed to the criterion of efficiency are a means of creating a market system where one had not previously existed.⁹³

E. OMB Circular A-25 Revised, Revisited

As discussed earlier, Congress authorized administrative agencies to levy user fees and charges through the IOAA in 1952.⁹⁴ The language of the IOAA, however, is broad to the point of vagueness, granting to each agency head the power to “prescribe regulations establishing the charge for a service or thing of value provided by the agency,” limited only insofar that the charge is fair and based on “the costs to the government; the value of the service or thing to the recipient; public policy or interest served; and other relevant facts.”⁹⁵ To make sense of this broad grant of authority, the OMB’s predecessor issued Circular A-25 in 1959, a guidance document that delineated executive

90. HARVEY, *supra* note 84, at 65.

91. *Id.*

92. *See id.*

93. *See* Gillette & Hopkins, *supra* note 2, at 820. Gillette and Hopkins, for their part, raised no concerns over the use of user fees to raise revenue or to act as a marketizing force. They make the plausible claim that the government, if it were to use its considerable economies of scale to produce goods that would otherwise be supplied by business entities, could make substantial profit by pegging its prices to those set by the private market, thus lowering the overall tax burden of the general public. *Id.* This is an argument that makes sense with respect to the U.S. Postal Service, for example: by setting postal fees at rates that are competitive with the rates of private postal companies, the additional profits that accrue due to the government’s expansive capabilities create a net positive effect for the economy overall, as compared to the smaller profits that would be made if the USPS were a private business. *See id.* at 818–22.

94. *See supra* note 30 and accompanying text.

95. Independent Offices Appropriations Act of 1952, 31 U.S.C. § 9701(b).

policies regarding the implementation of the IOAA.⁹⁶ This original circular was largely keyed to the normative justification of user fees; that is, it allocated the costs of government services and products to the intended beneficiaries, using the “special benefits” formulation.⁹⁷ Notably, it precluded the imposition of user fees when the “ultimate beneficiary is obscure and the service can be primarily considered as benefiting broadly the general public.”⁹⁸

Under President Clinton, the OMB promulgated a revised Circular A-25 in July of 1993, part of a larger push by the Administration to overhaul agency oversight.⁹⁹ The new circular expanded the scope of and modified the original guidance in important ways, inscribing in policy the justifications that were behind Reagan’s and Bush’s expansion of agency self-funding.¹⁰⁰ OMB Circular A-25 Revised added a list of objectives that reads like a manifesto of neoliberal ideology:

It is the objective of the United States Government to . . . promote *efficient* allocation of the Nation’s resources by establishing charges . . . to the recipient that are at least as great as costs to the Government . . . and allow the private sector to compete with the Government without disadvantage.¹⁰¹

With respect to the latter objective, the original guidance counseled that agencies recover “fair market value” when they sold

96. Agency statements are considered guidance documents if they are either “general statements of policy” or an “interpretive rule” per the Administrative Procedure Act (APA), in contrast to the full-blown legislative rules that must go through the formal procedures prescribed by the APA. 5 U.S.C. § 553(b)(3)(A). Policy statements are supposed to be nonbinding, while interpretive rules may have some binding effect due to the underlying statutory authorization upon which they are based. Parrillo, *supra* note 34, at 168 n.6. OMB Circular A-25 is best understood as an interpretive rule because it is a “rule[] or statement[] issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.” U.S. DEP’T OF JUST., ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947). This understanding would be in line with the OMB’s own definition of “rules.” See Paul J. Larkin, Jr., *OMB’s New Approach to Agency Guidance Documents*, REGUL. REV. (June 10, 2019), <https://www.theregreview.org/2019/06/10/larkin-omb-new-approach-agency-guidance-documents> [<https://perma.cc/D7KV-GVXB>].

97. OMB CIRCULAR NO. A-25 (1959), *supra* note 32.

98. *Id.* § (3)(a)(2).

99. See generally Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71 (1997).

100. OMB CIRCULAR NO. A-25 (1993), *supra* note 31.

101. *Id.* § (5) (emphasis added).

or leased government property only;¹⁰² the revised guidance now contemplates the government as a market participant, mandating that “user charges will be based on market prices . . . when the Government, not acting in its capacity as sovereign . . . is providing a service.”¹⁰³

Importantly, the revised guidance retained the “special benefits” formulation as a normative justification, but it qualified the original’s limitation on charging fees for services that principally redounded to the public’s benefit.¹⁰⁴ Immediately preceding the carried-over clause concerning obscure and public beneficiaries, the new circular precludes agencies from taking positive externalities into consideration of user-fee pricing: “[W]hen the public obtains benefits as a necessary consequence of an agency’s provision of special benefits . . . an agency need not allocate any costs to the public and should seek to recover . . . either the full cost . . . or the market price.”¹⁰⁵ The upshot is that agencies have been left with less discretion in determining when the existence of public benefits should lower user-fee pricing.¹⁰⁶

While the original A-25 guidance document was broad enough to serve the Republicans’ needs in the 1980s and early 1990s, it was Democrat Bill Clinton that inscribed a neoliberal economic agenda into explicit executive policy with respect to agency self-funding. What was *de facto* was now *de jure*, as the objectives of the revised OMB Circular A-25 made clear: federal agencies were to be run like businesses with economic considerations—evaluated by the efficiency criterion—dispositive in determining fee structures.¹⁰⁷

II. USER FEES IN THE IMMIGRATION CONTEXT

The skein of legal, political, and moral considerations that overlap and interact in the domain of immigration policy often leads to conflicting and sometimes competing conclusions, each

102. OMB CIRCULAR NO. A-25 (1959), *supra* note 32, § (3)(b).

103. OMB CIRCULAR NO. A-25 (1993), *supra* note 31, § (6)(a)(2)(b).

104. *Id.* § (6)(a)(1).

105. *Id.* § (6)(a)(3).

106. See *infra* note 221 and accompanying text on the modern judicial interpretations of the scope of OMB Circular A-25.

107. Throughout the remainder of this Article, reference to “OMB Circular A-25” will refer to the current iteration that replaced the original 1959 version, unless otherwise noted in text. See OMB CIRCULAR NO. A-25 (1993), *supra* note 31.

of which may be valid from its own perspective.¹⁰⁸ Competing normative claims leave space for political contestation and, at the extreme, overt politicization. This Part builds on the previous, moving from the broad abstractions of the entire administrative state to examine the economic and normative justifications for the use of user fees in the immigration context. It also explains how user fees have become an instrument in the hands of presidential administrations to instantiate immigration policy. While the neoclassical economic rationales fall short in justifying the use of user fees at the USCIS, the normative justifications are, in the main, reducible to politics. Moreover, as was exemplified by the Trump Administration's use of the USCIS, the agency's instrumentalization is both aided by its self-funding scheme and insulated from an important horizontal check in the form of regularized congressional oversight.

A. *The Economics of Immigration*

Exclusive and plenary power over immigration is vested in the political branches of the federal government.¹⁰⁹ Pursuant to that power, Congress has set U.S. immigration policy through the Immigration and Nationality Act (INA), first codified in 1952 and amended several times since.¹¹⁰ Like many areas of federal legislation, the implementation, administration, and enforcement of federal immigration law is delegated to administrative agencies housed within the executive branch. Passed in response to the 9/11 terrorist attacks, the Homeland Security Act of 2002 subsumed immigration and border protection services in the new Department of Homeland Security (DHS) and created three new sub-agencies: a border agency called Customs and Border Protection (CBP), an interior enforcement agency called Immigration and Customs Enforcement (ICE), and the USCIS.¹¹¹

The USCIS serves three primary functions: the adjudication of immigration petitions, the adjudication of naturalization

108. See generally SARAH SONG, IMMIGRATION AND DEMOCRACY (2019).

109. U.S. CONST. art. I, § 8, cl. 4; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 460 (2009).

110. Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. § 1101).

111. Ruth Ellen Wasem, *Immigration Governance for the Twenty-First Century*, 6 J. ON MIGRATION & HUM. SEC. 97, 105 (2018).

petitions, and the consideration of refugee and asylum claims.¹¹² The agency processes roughly six million petitions a year on average, one million of which concern foreign nationals seeking lawful permanent resident (LPR) status, including family-sponsored immigration, employment-based immigration, adjustment from nonimmigrant status, and those seeking origin-country diversity visas.¹¹³ LPR status permits the recipient to live and work permanently in the United States; when one speaks of an “immigrant,” what is typically meant is a person with LPR status, and for that reason the two terms should be considered synonymous for purposes of this Article.¹¹⁴ Refugees and asylees may seek to adjust their status to LPR after admittance to the United States, but they are classified differently under the INA because their reasons for immigrating are understood as involuntary.¹¹⁵

The INA delegates broad discretion to the USCIS to set its fee pricing pursuant to the mandate that its charges may “be set at a level that will ensure recovery of the full costs of providing all such services.”¹¹⁶ These fees are meant to recover the full cost of *all* USCIS services, including those for which fee waivers or exemptions are available and those for which no fee is required, such as refugee and asylee applicants. Like all administrative agencies, the USCIS promulgates substantive rules—such as determinations of a fee schedule—through notice-and-comment rulemaking subject to the Administrative Procedure Act (APA).¹¹⁷ On August 3, 2020, the USCIS published a final rule adjusting its fee schedule significantly by increasing charges across the board by a weighted average of 20 percent, adding new fees, removing certain exemptions, altering waiver

112. WILLIAM A. KANDEL, CONG. RSCH. SERV., R44038, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FUNCTIONS AND FUNDING 2 (2015). The USCIS also provides related services such as employment authorization and change-of-status petitions. *Id.*

113. *Id.* at 3.

114. Naturalization (the process of becoming a U.S. citizen) requires at least five years of residency in the U.S. as an LPR before becoming eligible. 8 U.S.C. § 1427(a). Some consider LPR status as a weigh station on the route to full citizenship, but for various reasons, many LPRs choose not to naturalize. *See generally* MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020).

115. Refugees and asylees refer to persons fleeing their countries “because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” 8 U.S.C. § 1101(a)(42).

116. 8 U.S.C. § 1356(m).

117. 5 U.S.C. § 553.

requirements, and creating a bevy of other modifications.¹¹⁸ Fees range from a couple hundred dollars to over four-thousand dollars for certain business-related categories, while the most common application—the I-485 Application to Register Permanent Residence or Adjust Status—would now cost a potential immigrant \$1,130 plus an additional \$85 for biometric screening.¹¹⁹ The new fee structure was set to come into force on October 2, 2020, but at the time of this writing in February 2022 has not yet been implemented due to legal challenges.¹²⁰

B. The Economization of Immigration

As a point of departure, it is important to understand that there is nothing natural or necessary about requiring hopeful immigrants to pay for their application process. It is true that for most of its history, the USCIS (and its earlier iteration, the Immigration and Naturalization Service (INS)) has charged some user fees for its services, but it was only during the second term of the Reagan Administration that the INS's adjudicatory functions began to rely on self-funding.¹²¹ In 1990, the INS still received more than 76 percent of its budget from congressional appropriations,¹²² but by 2002 that number had dwindled to just 20 percent.¹²³ By 2019, only \$132 million of the USCIS's \$4.6 billion budget came from taxpayers, and almost all of those funds were specifically allocated to implement the E-Verify

118. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788, 46,788 (Aug. 3, 2020).

119. *Id.*

120. The new fee structure has been preliminarily enjoined by the U.S. District Court for the District of Columbia in a case challenging Chad Wolf's appointment as Acting Secretary. *See* *Nw. Immgr. Rts. Project v. U.S. Citizenship & Immgr. Servs.*, 496 F. Supp. 3d 31 (D.D.C. 2020). The DHS has indicated that it will repromulgate a similar rule in 2021, but has yet to do so. *USCIS 2020 Final Rule on Fees, Forms, and Related Changes*, NAFSA: ASS'N OF INT'L EDUCATORS (June 14, 2021), <https://www.nafsa.org/regulatory-information/uscis-2020-final-rule-fees-forms-and-related-changes> [<https://perma.cc/S4D2-KN93>].

121. KANDEL, *supra* note 112, at 16–17.

122. ACCT. & FIN. MGMT DIV., U.S. GEN. ACCOUNTABILITY OFF., GAO/AFMD-91-20, FINANCIAL MANAGEMENT: INS LACKS ACCOUNTABILITY AND CONTROLS OVER ITS RESOURCES 8 (1991) (stating that \$840 million of INS's \$1.1 billion budget was appropriated by Congress in fiscal year 1990).

123. *See* KANDEL, *supra* note 112, at 5–6.

system.¹²⁴ Path dependency—the idea that the way something has been done in the past limits real or imagined future possibilities—may help explain the continuation of the USCIS’s funding structure, but it falls far short of providing a colorable justification.¹²⁵

It seems reasonable that some of the functions of the USCIS are quite amenable to one or more of the justifications described in Part I. For example, businesses that sponsor employment-based visas are acting as self-interested market participants; therefore, user fees might make sense from both a fairness perspective—alleviating the average taxpayer’s fiscal burden for increasing a private firm’s market competitiveness, and from an economic perspective—managing the perceived externalities created when a foreign national is hired (e.g., not hiring an American citizen, etc.). Furthermore, the dictates of public conscience and basic morality counsel that charging refugees and asylees an entrance fee would be unconscionable, and the USCIS rightly precludes such charges.¹²⁶

The “hard case” in between these two examples is also the most common: family-sponsored immigration. Roughly two-thirds of all persons seeking permanent migration fall into this category, which is further subdivided into two immigrant groups.¹²⁷ *Immediate relatives* include spouses and unmarried children (under twenty-one years old) of U.S. citizens and parents of U.S. citizens; and *preference immigrants* include the unmarried children of U.S. citizens over the age of twenty-one, spouses and unmarried children of LPRs, and the siblings of adult citizens.¹²⁸ Immediate-relative visas are not numerically

124. *Marriage Green Card and Citizenship Application Fees 2020*, BOUNDLESS (Jan. 19, 2020), <https://www.boundless.com/blog/uscis-fees-increase-comparison> [<https://perma.cc/W32C-5G9M>].

125. See Lawrence Solum, *Legal Theory Lexicon: Path Dependency*, LEGAL THEORY BLOG (Sept. 2, 2018, 3:54 PM), <https://lsolum.typepad.com/legaltheory/2018/09/legal-theory-lexicon-path-dependency.html> [<https://perma.cc/PSV5-E2M2>]; see also *infra* Subsection III.C.2.

126. However, the agency has instituted a fifty-dollar fee for asylum applications in its recent Final Rule, which is deductible from the I-485 fee if they subsequently choose to seek LPR status. U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,788, 46,790 (Aug. 3, 2020). Other categories exempt from the petition fees are victims of human trafficking (T Visa), victims of certain crimes (U Visa), and those who can demonstrate an inability to pay. *Id.* at 46,812 tbl.3.

127. WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42866 PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 9 (2018).

128. *Id.* at 2 & n.10, 5 tbl.1.

limited, but do count toward a 480,000 overall limitation created by the INA for family-reunification visas, thus making it a “porous,” or expandable, cap—unlike other visa categories, the USCIS has the power to exceed this statutory limit at its discretion. The INA establishes a 226,000-per-year floor for preference immigrants, which may only be exceeded if there are unused visas in the pool of 480,000 for immediate relatives. This has not occurred since 1999, thus making the 226,000-visa floor a ceiling as well.¹²⁹

C. Efficiency and Externalities

From the preceding discussion, two interrelated questions emerge. First, do the economics of immigration require economic solutions in the form of user fees? And second, is it reasonable to use economics as the evaluative framework from which to understand the principles undergirding our immigration policies? The next two Subsections will address these questions in turn.

1. Is Efficiency a Useful Criterion for Evaluating Immigration Demand?

In gauging the appropriateness of efficiency in the immigration context,¹³⁰ the key propositions to be determined (from a purely economic perspective) are: (1) whether we can measure the use-value of immigration by the willingness-to-pay metric, and (2) whether the current pricing structure deters the overconsumption of immigration benefits—namely, the administrative burden of processing excess immigration applications.

The first proposition concerns the validity of efficiency as an evaluative context for immigration. The willingness-to-pay criterion is rife with its own internal contradictions, not least of which is the fact that it is a propositional statement based on assumptions that are empirically unfalsifiable.¹³¹ As Arthur Leff pointed out in his critique of Law and Economics, the

129. Preference immigrants are also subject to a 7 percent per-country limitation. *Id.* at 2.

130. As was described above, efficiency is a function of allocating resources to their most highly valued use, as measured by the consumer's willingness to pay. Efficient pricing, moreover, exists when one is deterred from consuming additional units of public service only when the benefits of that consumption are less than its cost to society. *See supra* note 50 and accompanying text.

131. Leff, *supra* note 55, at 457.

efficiency criterion is built on a tautology: because “people are rationally self-interested, what they *do* shows what they value, and their willingness to pay for what they value is proof of their rational self-interest.”¹³² Self-interested rationality is smuggled into the proposition as an axiom and then used to prove itself. As common experience should make clear, it is unreasonable to expect immigrants wishing to be reunited with their families to calculate a “rational” price for the opportunity to do so, and so it should not be assumed that the price they pay reflects rational self-interest.¹³³

Moreover, and most apt in the immigration context, the willingness-to-pay metric takes for granted that if one does not pay for something, then one is “unwilling” to do so.¹³⁴ This assumes away situations in which one is *incapable* of paying for a good because of low resources; moreover, it does not adequately reflect the marginal utility of the dollar—the simple notion that someone with many dollars values each particular dollar much less than someone with few dollars, thus skewing any sense of their “willingness to pay” as measured by absolute dollars.¹³⁵ For those seeking LPR status through the family-sponsored visa programs, these conceptions run in reverse. That is, it is reasonable to expect them to pay whatever is required to be with their loved ones, notwithstanding their ability to pay or the particular utility of their dollars.¹³⁶ It is meaningless to assume that someone is capable of putting a price on family reunification as measured by the willingness-to-pay metric; family bonds are simply not reducible to monetary value.

The second proposition concerns the validity of user fees as a rationing mechanism to deter overconsumption of public goods. The same reasons that make willingness-to-pay an inapt metric for measuring the use-value of immigration similarly frustrate the use of user fees to efficiently allocate scarce goods,

132. *Id.* at 457–58.

133. This is true notwithstanding the fact that immigrants seeking family reunification have multiple and sometimes hard-to-define reasons for coming to the United States, including economic opportunities. But it does not follow that every motivation or set of motivations can be reduced to an economic calculus.

134. Leff, *supra* note 55, at 478–79.

135. See *generally* EMIL KAUDER, A HISTORY OF MARGINAL UTILITY THEORY (1965).

136. Alternatively, some circumvent the legal route to citizenship altogether. *Fact Sheet: Why Don't Immigrants Apply for Citizenship?*, AM. IMMIGR. COUNCIL (Nov. 25, 2019), <https://www.americanimmigrationcouncil.org/research/why-don't-they-just-get-line> [<https://perma.cc/D2QB-BNHR>].

to wit: permanent-resident visas. If potential immigrants are willing to pay any price to be reunited with their families, then no reasonable price point will dissuade them.¹³⁷ The data bear this out: petitions for LPR status have steadily risen since the 1980s,¹³⁸ despite large fee increases in 1998 and 2007,¹³⁹ thus demonstrating that there is an inelastic demand for immigration, which makes it insensitive to price variation.¹⁴⁰ User fees, in short, are ineffective as a rationing mechanism in the immigration context.

2. To What Extent Are Externalities Negative?

When one speaks about the potential negative economic impacts of immigration—its negative externalities—two related and largely unsubstantiated phenomena are typically referenced: displacement and wage depression. The former refers to the idea that immigrants will take jobs that would otherwise go to U.S. citizens, and the latter concerns the perception that average wages will be driven downward as more competitors enter the job market. Thus, the externalities in this equation are the effects to U.S. citizens in terms of overall availability of jobs and commensurate wage levels. If conservative political discourse is to be believed, the externalities of immigration are overwhelmingly negative,¹⁴¹ but with respect to displacement and wage

137. Of course, there is *some* price point at which potential immigrants will stop petitioning the USCIS for LPR status, but that does not mean they will then not attempt reunification. Second-best theory counsels that when government fees become prohibitive, individuals will undertake less costly and more dangerous activities to satisfy their consumer needs. This means that if the path to legal residency status is too costly, immigrants will instead seek to enter the country illegally, thus paradoxically engendering immigration that is costlier both to immigrants and to society. See Gillette & Hopkins, *supra* note 2, at 860.

138. Brittany Blizzard & Jeanne Batalova, *Naturalization Trends in the United States*, MIGRATION POL'Y INST. (July 11, 2019), <https://www.migrationpolicy.org/article/naturalization-trends-united-states-2017#HistoricalTrends> [<https://perma.cc/6B2J-W82M>].

139. The cost of applying for LPR status increased 69 percent (from \$135 to \$330) and 157 percent (from \$500 to \$1,285) in 1998 and 2007, respectively. *Marriage Green Card and Citizenship Application Fees 2020*, *supra* note 124.

140. See *infra* note 170 and accompanying text elaborating on the increase in costs, adjusted for inflation.

141. See, e.g., Otto Santa Ana, 'Like an Animal I was Treated': Anti-Immigrant Metaphor in US Public Discourse, 10 DISCOURSE & SOC'Y 191, 212–14 (1999); Derek Thompson, *How Immigration Became So Controversial*, ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125> [<https://perma.cc/CJ76-DQ7D>].

depression, the evidence strongly suggests that the opposite is true. Academic studies demonstrate that immigrants complement U.S. citizens, rather than replace them, because immigrants tend to be imperfect substitutes.¹⁴² When it comes to wage depression, on the whole, immigration has been shown to *increase* the average wages of citizens rather than decrease them.¹⁴³ One reason is that when businesses see an increase in the labor supply as a result of immigration, they respond by increasing investment in their productive capacities, thus sustaining wage rates as overall productivity rises.¹⁴⁴

If immigration does not, on average, displace American workers or drive their wages down, does it nevertheless increase the taxpayer's average burden? Put another way, does the

142. See *The Effects of Immigration on the United States' Economy*, PENN WHARTON BUDGET MODEL (June 27, 2016) [hereinafter *The Effects of Immigration*], <https://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy> [<https://perma.cc/EQL7-QDZU>] (“[I]n many cases immigrants appear to complement American-born workers rather than replacing them. Because less-educated immigrants often lack the linguistic skills required for many jobs, they tend to take jobs in manual labor-intensive occupations such as agriculture and construction Similarly, highly educated immigrants face a disadvantage in communication-intensive jobs, and therefore tend to work in scientific and technical occupations.”); see also Darrell M. West, *The Costs and Benefits of Immigration*, 126 POL. SCI. Q. 427, 435–36 (2011) (noting that although there is some evidence of negative wage effects from immigration on Americans without high school diploma, for most other workers “immigrants complement rather than substitute for the efforts of native workers”); Giovanni Peri & Chad Sparber, *Task Specialization, Immigration, and Wages*, 1 AM. ECON. J.: APPLIED ECON. 135, 135–36 (2009) (emphasizing that because of differences in language capabilities, most foreign-born workers tend to be imperfect substitutes for natives, even when education levels are comparable).

143. West, *supra* note 142, at 436.

144. *The Effects of Immigration*, *supra* note 142. Studies show that the average of all native-born workers' wages have grown roughly half of a percent between 1990 and 2010, and that for 90 percent of native-born workers, their wage gains ranged from 0.7 percent to 3.4 percent, relative to their education levels. Giovanni Peri, *Rethinking the Effects of Immigration Wages: New Data and Analysis from 1990–2004*, AM. IMMIGR. COUNCIL (Oct. 1, 2006), <https://www.americanimmigrationcouncil.org/research/rethinking-effects-immigration-wages-new-data-and-analysis-1990-2004> [<https://perma.cc/V9G9-SKSZ>]. For one group, however, this general pattern does not hold: native-born Americans without a high school diploma, whose yearly average wages have dropped 1.1 percent as a result of immigration pressures. *Id.* This is because the immigration wage effect tends to be bimodal—that is, immigrants are most likely to be either low educated (less than a high school degree or equivalent) or highly educated (completed college and hold advanced degrees), and thus affect subsets of the American workforce differently. *The Effects of Immigration*, *supra* note 142. For the reasons described above, highly educated immigrants complement rather than displace U.S. citizens, but this appears not to hold true for low-educated workers competing for manual labor-intensive jobs in fields like agriculture and construction.

average taxpayer cross-subsidize the supposed beneficiaries of immigration—that is, immigrants? The short answer is no: overall, immigrants create a net-positive effect on the U.S. economy and, in many respects, they themselves cross-subsidize the benefits enjoyed by native-born Americans.¹⁴⁵ The National Research Council estimates that the average immigrant pays \$1,800 more in taxes each year than what they cost in benefits.¹⁴⁶ Not only are immigrants paying for their fair share of the social safety net but they are propping it up for all Americans in important ways. As the Baby Boomer generation ages, the financial solvency of the two largest federal entitlement programs, Social Security and Medicare, looks less and less secure. Because the average age of the U.S. population is rising, relatively fewer native-born workers are contributing to these entitlement programs, resulting in massive deficits that threaten to undermine the social safety net.¹⁴⁷ Without the influx of working-age immigrants, the long-term viability of these social welfare programs would be shaky at best.¹⁴⁸

145. *Building a More Dynamic Economy: The Benefits of Immigration: Hearing Before the H. Comm. on the Budget*, 116th Cong. 123, 127–28 (2019) (statement of Tom Jawetz, Vice President for Immigration Policy, American Progress) [hereinafter Jawetz Statement].

146. West, *supra* note 142, at 435 (citing THE NEW AMERICANS: ECONOMIC, DEMOGRAPHICS, AND FISCAL EFFECTS OF IMMIGRATION (James P. Smith & Barry Edmonston eds., 1997)). An explanation for this lies with the demographic composition of immigrant groups. Most immigrants tend to be young and in their prime working years: in 2005, for example, around 25 percent were adults between 25 and 34, while a further 28 percent were between the ages of 35 and 44. *Id.* at 433. Only 4.4 percent were age 65 or older. *Id.* These groups are more likely to have no children or children past the age requiring costly education and are not yet in need of significant support in the form of elderly health care and pension services provided by the government. *Id.*

147. See Stephen C. Goss, *The Future Financial Status of the Social Security Program*, 70 SOC. SEC. BULL. 111 (2010), <https://www.ssa.gov/policy/docs/ssb/v70n3/ssb-v70n3.pdf> [<https://perma.cc/6CXF-2NDN>]. One study by the National Academy of Sciences, Engineering, and Medicine found that immigrants and their children have accounted for virtually all U.S. population growth in the last ten years, without which the country's population would face a nearly \$7 million decrease in the coming decade. NAT'L ACADS. SCI., ENG'G, & MED., THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION (Francine D. Blau & Christopher Mackie eds., 2017).

148. Moreover, in terms of *overall* tax contributions, immigration is responsible for a significant portion of the government's coffers. In 2014, to look at just one year, immigrants paid an estimated \$328 billion in federal, state, and local taxes, which accounted for more than a quarter of all taxes paid in California and nearly the same proportion in New York and New Jersey. Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, NAT'L IMMIGR. F. (Sept. 6, 2018), <https://immigrationforum.org/article/immigrants-as->

Immigrants contribute to the economy in significant ways beyond their tax payments. Studies show that immigration is a net positive to the country's gross domestic product (GDP),¹⁴⁹ with a 2007 White House Council of Economic Advisor study finding that immigrants had an average positive effect on the U.S. GDP by \$37 billion per year.¹⁵⁰ Beyond generating economic activity as taxpayers and consumers,¹⁵¹ immigrants are job-creators as well. Despite being only 13.7 percent of the U.S. population in 2017, immigrants accounted for nearly 30 percent of American entrepreneurs that year.¹⁵² Studies are somewhat more ambivalent regarding the fiscal impact of recently arrived

economic-contributors-immigrant-tax-contributions-and-spending-power [https://perma.cc/B3SP-MSLW].

149. See, e.g., West, *supra* note 142, at 435; Jawetz Statement, *supra* note 145; *The Effects of Immigration*, *supra* note 142; LEAH ZALLMAN, P'SHIP FOR NEW AM. ECON., STAYING COVERED: HOW IMMIGRANTS HAVE PROLONGED THE SOLVENCY OF ONE OF MEDICARE'S KEY TRUST FUNDS AND SUBSIDIZED CARE FOR U.S. SENIORS (2014), <http://research.newamericaneconomy.org/wp-content/uploads/2014/08/pnae-medicare-report-august2014.pdf> [https://perma.cc/W6YF-S2B7].

150. Council Econ. Advisors, *Immigration's Economic Impact*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH (June 20, 2007), https://georgewbush-whitehouse.archives.gov/cea/cea_immigration_062007.html [https://perma.cc/DM3V-MMCX].

151. Over a seventy-five-year period, it is estimated that each individual immigrant contributes a net average of \$259,000 to all levels of government, a rate that spikes for college-educated immigrants—which between 2011 and 2014 was nearly half of all immigrants—to \$800,000. Kosten, *supra* note 148. Even refugees, who come to America not in search of new economic opportunities but to escape persecution, have been shown to have a net-positive fiscal impact of \$63 billion per year, according to a 2017 Department of Health and Human Services report that the Trump Administration subsequently attempted to suppress. Julie Hirschfeld Davis & Somini Sengupta, *Trump Administration Rejects Study Showing Positive Impact of Refugees*, N.Y. TIMES (Sept. 18, 2017), <https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html> [https://perma.cc/JK6D-CJC7].

152. Jawetz Statement, *supra* note 145, at 126–27; see also EWING MARION KAUFFMAN FOUND., 2017 KAUFFMAN INDEX: STARTUP ACTIVITY 5 (2017), https://www.kauffman.org/wp-content/uploads/2019/09/2017_Kauffman_Index_Startup_Activity_National_Report_Final.pdf [https://perma.cc/NQ8C-NMWK]. Between 1995 and 2005, foreign-born Americans were behind over 25 percent of all technology and engineering businesses, a rate that was much higher in California's Silicon Valley. West, *supra* note 142, at 437. According to study cited by West, 52.4 percent of tech startups in Silicon Valley were founded by immigrants, and overall, foreign-born-founded tech companies produced \$52 billion in sales and employed 450,000 workers in 2005. *Id.* Nearly half of all the companies on the Fortune 500 list in 2018 were founded by foreign-born entrepreneurs; taken together, in fiscal year 2017, these companies created \$5.5 trillion in revenue, which would place them third on the list of the world's largest GDPs behind the United States and China. Jawetz Statement, *supra* note 145, at 126–27.

immigrants with limited education,¹⁵³ but overall, the subsequent contributions of second-generation immigrants more than offset the short-term costs to state and local governments.¹⁵⁴

On the whole, the cost-benefit analysis of immigration appears clear: despite some initial costs to local and state governments, immigration is a boon to the U.S. economy at all levels over the long haul. When one speaks of the externalities of immigration—that is, the effects felt by the average American—the data suggest that, in economic terms, they are by and large *positive* externalities. If user fees are intended to ration the consumption of a government-controlled good, then the lack of negative externalities fails to provide an economic justification. If it were truly a matter of economic principle, the government should be *subsidizing* immigration costs rather than imposing them. However, it will be recalled, federal policy as inscribed in OMB Circular A-25 precludes such determinations as a matter of policy.¹⁵⁵

D. Normative Justifications, or the Fairness Question

In August of 2019, Ken Cuccinelli, the acting director of the USCIS, caused a furor with a small bit of revisionist poetry. “Give me your tired and your poor who can stand on their own two feet, and who will not become a public charge,” he said, rephrasing Emma Lazarus’s iconic poem, “The New Colossus.”¹⁵⁶ He later added that the text only referred to “people coming from Europe.”¹⁵⁷ Lazarus wrote her sonnet in 1883 to raise money for the Statue of Liberty’s pedestal, upon which is inscribed the

153. These groups tend to work in lower-paying jobs and have larger families, which create burdens on state and local governments in terms of public assistance and education. *The Effects of Immigration*, *supra* note 142. Over the period of 1994 to 2013, for example, the net fiscal impact of first-generation immigrants was less than that of the native-born population, but over the same period, the children of immigrants outperformed the native-born and their first-generation parents. NAT’L ACADS. SCI., ENG’G, & MED., *supra* note 147, at 369. Moreover, lower-educated immigrant groups are less likely to receive public assistance than comparably low-income native-born populations, and when they do, the benefits they receive tend to be below average. *The Effects of Immigration*, *supra* note 142.

154. *The Effects of Immigration*, *supra* note 142.

155. See *supra* note 105 and accompanying text.

156. Jacey Fortin, ‘Huddled Masses’ in Statute of Liberty Poem Are European, *Trump Official Says*, N.Y. TIMES (Aug. 14, 2019), <https://www.nytimes.com/2019/08/14/us/cuccinelli-statue-liberty-poem.html> [<https://perma.cc/FDK6-4GRU>].

157. *Id.*

poet's paean to our country's immigrant roots.¹⁵⁸ Two years later, the Statue of Liberty was installed in New York Harbor, and it would soon become inextricably linked with the plight of the foreign-born after an immigrant-processing station was opened on nearby Ellis Island. Ironically, the very same year as the statue's installation, Congress worked diligently to shut America's borders by passing the Alien Contract Labor Law, which forbade the importation of all but a few categories of foreign workers.¹⁵⁹

The preceding comments highlight a tension that was present in America in 1885—and that continues today—between two groups of people who want to make inconsistent kinds of worlds. On one hand, America is a “nation of immigrants,” as John F. Kennedy famously phrased it,¹⁶⁰ that has a long tradition of welcoming foreigners to fuel the economy and populate the continent. On the other hand, immigration can engender fears of losing a social identity situated in a fixed conception of “what it means to be an American.” This leads to two broad ideological positions (and many gradations in between) with respect to America's character: for one group, the fabric of American society is interwoven with multiculturalism and plurality; for the other, it is a largely homogenous identity predicated on the conservation of a unique cultural tradition.

These competing views regarding the nature of American identity inevitably lead to conflict over the nation's immigration policies, a conflict that informs the structure of the USCIS. The economic impacts tend to dominate the political discourse of the USCIS's user fees, but the normative question—is it *fair* to charge immigrants to recover costs?—lurks in the background. How one answers this question depends on how one values the intangible benefits of immigration beyond the monetary—value in terms of diversity and multiculturalism, such as contributions to the arts, culture, food, and our civic identity. To answer the

158. Lazarus's poem, “The New Colossus,” includes the following portion:

Here at our sea-washed, sunset gates shall stand
A mighty woman with a torch, whose flame
Is the imprisoned lightning, and her name
Mother of Exiles. From her beacon-hand
Glows world-wide welcome . . .

EMMA LAZARUS, THE NEW COLOSSUS (1883).

159. Alien Contract Labor Law of 1885, ch. 164, 23 Stat. 332, 333 (amended 1887).

160. JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1958).

normative questions about user fees (i.e., Should the beneficiaries of immigration services directly pay for the services received? Should pricing be set for recovery or for redistribution? Should the taxpayer be asked to subsidize immigration?), one must first identify who the beneficiary is. For those who believe immigration is a grant of privilege that risks the adulteration of America's cultural identity, the beneficiaries are the immigrants; for those who value multiculturalism and, hence, view immigration as an end in itself, the benefits redound to all of society. Law, as a formal matter, has little to say about which position is correct. The proper field for this contestation is politics, but as will be discussed in Part III, the USCIS's funding structure frustrates that political process.

E. The Instrumentalization of Immigration

It was a little over three decades ago that Congress granted the immigration bureaucracy the authority to recover the full cost of its adjudicatory functions by charging user fees.¹⁶¹ The Immigration Examinations Fee Account (IEFA), the offsetting collections account that obviates the USCIS's need for congressional appropriations,¹⁶² was introduced as part of the massive Appropriation Act for Fiscal Year 1989.¹⁶³ If the proposal sparked much debate, little was recorded in the official records; the sole reference to the funding change occurs in the House Conference Report in the course of considering a technical amendment: "The conferees expect that funds generated by this Account shall not be used for any purpose other than enhancing naturalization and adjudication programs. Additionally, naturalization and adjudication fees shall not be increased beyond the extent they would have been increased absent the existence of the Account."¹⁶⁴ There is no indication that House Committee members contemplated the long-term implications of the bill.

The agency spent little time putting the new tool into effect. In April 1989, the USCIS published a final rule laying out a fee schedule intended to recover the cost of providing immigration

161. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, §209, 102 Stat. 2186, 2203 (codified as 8 U.S.C. § 1356(m)).

162. See *supra* note 45 and accompanying text.

163. H.R. 4782, 100th Cong. (1988).

164. H.R. REP. NO. 100-979, at 38 (1988) (Conf. Rep.).

services.¹⁶⁵ The agency summarized the new fees as “necessary to place the financial burden of providing special services and benefits, which do not accrue to the public at large, on the recipients,”¹⁶⁶ echoing the OMB’s guidelines as laid out in the original 1959 Circular A-25.¹⁶⁷ Prior to the 1989 adjustment, the filing fee for Form I-485 for permanent resident status was \$50; after the adjustment, it was \$60.¹⁶⁸ Today, that same form would cost an applicant \$1,130, plus an \$85 biometric screening fee, if the currently enjoined fee schedule is upheld by the courts.¹⁶⁹ That is an 842 percent increase in the cost of applying for LPR status, adjusted for inflation.¹⁷⁰

Congress had long approved of the practice of charging *some* user fees for immigration services, but it was not until this seemingly small change that immigration services would plot a course to self-sufficiency. Because the agency (then, the INS, now, the USCIS) no longer paid user fees into the General Treasury, it was effectively removed from congressional budgetary oversight. Whether this was a neoliberal coup by the Reagan and subsequent Administrations or an abdication of responsibility by Congress is a matter of interpretation. The upshot is, however, that this move eliminated a crucial democratic check on the power of the executive.

In late May 2020, the USCIS requested a \$1.2 billion bailout from Congress, citing the coronavirus pandemic as the primary cause of a budgetary shortfall,¹⁷¹ which would require the agency to furlough some thirteen-thousand workers—more than one-third of its workforce.¹⁷² The USCIS’s official statement

165. INS/EOIR Fee Schedule, 54 Fed. Reg. 13,513 (Apr. 4, 1989) (codified at 8 C.F.R. § 1103.7).

166. *Id.*

167. OMB CIRCULAR NO. A-25 (1993), *supra* note 31. The same language was used to justify fee increases in 1991, 1998, and 2007. *See, e.g.*, INS/EOIR Fee Review, 56 Fed. Reg. 12,647 (Mar. 27, 1991) (codified at 8 C.F.R. § 1103.7); *see also* USCIS, IMMIGRATION EXAMINATIONS FEE ACCOUNT: FEE REVIEW SUPPORTING DOCUMENTATION WITH ADDENDUM 48–49 (2020), <https://beta.regulations.gov/document/USCIS-2019-0010-12271> [<https://perma.cc/M89G-9M9J>].

168. INS/EOIR Fee Schedule, 54 Fed. Reg. at 13,514.

169. *See supra* text accompanying note 118.

170. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/LHD9-XGN2>] (last visited Sept. 6, 2021).

171. Sands, *supra* note 9.

172. Stuart Anderson, *USCIS Staff Furloughs Will Grind Legal Immigration to a Halt*, FORBES (Aug. 17, 2020, 12:07 AM), <https://www.forbes.com/sites/stuartanderson/2020/08/17/uscis-staff-furloughs-will-grind-legal-immigration-to-a-halt/> [<https://perma.cc/V2JS-STBU>].

posited that the fiscal crisis was caused by what it projected would be a 60 percent drop in receipts coming from fees due to pandemic-related closures between March and September 2020, but evidence suggests that the agency had forecast the budget deficit well before the pandemic struck.¹⁷³ Due in part to a 2016 Obama-era fee hike and carryover balances from 2017 and 2018, the agency had roughly \$787 million in its coffers at the end of fiscal year 2018 that could be spent to continue its operations.¹⁷⁴ However, as late as November 2019, the agency predicted a deficit of nearly \$250 million for fiscal year 2019 and estimated that the deficit would grow to over \$1.5 billion in 2020.¹⁷⁵

If the agency's own numbers are to be believed, it would appear that the coronavirus pandemic was not the cause of the USCIS's fiscal crisis. Doug Rand, a former Obama Administration official, placed the blame on ideologically driven policy decisions. In testimony before the House Judiciary Committee, Rand stated that the USCIS had projected a fiscal shortfall because it "knew, well before the pandemic, that it was jacking up expenses even faster than revenues—especially payroll expenses."¹⁷⁶ Under the Trump Administration, the agency increased its workforce from fifteen thousand in 2016 to over eighteen thousand by 2020.¹⁷⁷ The reasons for this hiring blitz were twofold: first, the agency prioritized anti-fraud measures, despite not providing evidence that such measures were needed;¹⁷⁸ and second, the USCIS issued a series of policies that made individual case adjudications more complicated and onerous, thus requiring more

173. Doug Rand & Lindsay Milliken, *The Case of the Insolvent Federal Agency: A Forensic Analysis of Public Data on U.S. Citizenship & Immigration Services*, N.Y.U. J. LEGIS. & PUB. POL'Y QUORUM (June 15, 2020), <https://nyujlpp.org/quorum/the-case-of-the-insolvent-federal-agency-a-forensic-analysis-of-public-data-on-u-s-citizenship-immigration-services> [<https://perma.cc/GAV2-27PP>].

174. *Id.*

175. *Id.*

176. *Oversight of U.S. Citizenship and Immigration Services: Hearing Before the Subcomm. on Immigr. and Citizenship, H. Comm. on the Judiciary*, 116th Cong. 2 (2020) (statement of Doug Rand, Senior Fellow, Federation of American Scientists) [hereinafter Rand Statement], <https://docs.house.gov/meetings/JU/JU01/20200729/110946/HHRG-116-JU01-Wstate-RandD-20200729-U1.pdf> [<https://perma.cc/WB6A-TJJK>].

177. Rand & Milliken, *supra* note 173.

178. The agency has declared that it wished to more than double the one-thousand employees who work in the Fraud Detection and National Security (FDNS) Directorate, but no publicly available data are available concerning what portion of the influx of employees were assigned to the FDNS. Rand Statement, *supra* note 176, at 3.

staff to complete fewer cases.¹⁷⁹ Despite the anticipated budget shortfall, in 2019, the DHS asked Congress for permission to transfer over \$200 million from the USCIS IEFA account to ICE, its immigration enforcement arm,¹⁸⁰ while simultaneously proposing that a 10 percent surcharge be added to the 2019 hike in USCIS user fees to help defray the cost of the bailout.¹⁸¹

These, and a slew of related administrative actions, highlight a new period in American immigration policy that Ming Hsu Chen has termed “the Enforcement Era.”¹⁸² The Trump Administration’s plans had the intended effects of “grind[ing] legal immigration to a halt,”¹⁸³ and deporting or inciting the self-deportation of hundreds of thousands of persons.¹⁸⁴ The USCIS was a central feature of this concerted push: naturalization backlogs reached unprecedented levels,¹⁸⁵ disenfranchising some three-hundred-thousand potential voters before the 2020 presidential election;¹⁸⁶ the costs to become a U.S. citizen nearly doubled;¹⁸⁷ and according to an American Civil Liberties Union

179. Three such policies are quite consequential: one makes in-person interviews for employment-based green cards mandatory, even if the applicant is only renewing; another eliminates a “prior deference” policy that subjects skilled workers to additionally scrutiny; and the third is the “public charge” rule that the Trump Administration interpreted broadly to reduce the number of people who were eligible for visas. *Id.*; see also *The Public Charge Rule*, BOUNDLESS (Apr. 22, 2021), <https://www.boundless.com/blog/public-charge-rule-explained> [https://perma.cc/9WG2-LTBP].

180. DEP’T OF HOMELAND SEC., FISCAL YEAR 2019 CONGRESSIONAL JUSTIFICATION: UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES, at CIS–IEFA–8 (2019), <https://www.dhs.gov/sites/default/files/publications/U.%20S.%20Citizenship%20and%20Immigration%20Services.pdf> [https://perma.cc/XA7P-9L4N]. The president would require specific statutory authorization to transfer funds appropriated by Congress for specific agency use to a different agency; authorization of such a transfer is not provided by the IEFA. 31 U.S.C. § 1532 (“An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law.”).

181. Sands, *supra* note 9; Michelle Hackman, *USCIS Seeks Surcharge to Immigration Applications*, WALL ST. J., <https://www.wsj.com/articles/uscis-to-add-surcharge-to-immigration-applications-11589707800?mod=searchresults&page=1&pos=1> [https://perma.cc/WS2W-AP23] (May 19, 2020, 10:33 AM).

182. CHEN, *supra* note 114.

183. Anderson, *supra* note 172.

184. Ed Kilgore, *Trump’s Immigration Blitz: A ‘Self-Deportation’ Strategy Taken to Extremes*, N.Y. MAG.: INTELLIGENCER (Jan. 26, 2017), <https://nymag.com/intelligencer/2017/01/trump-goes-to-extremes-to-encourage-self-deportation.html> [https://perma.cc/BH8J-4KLG].

185. See CITIZENSHIP DELAYED, *supra* note 6.

186. Rand Statement, *supra* note 176, at 2, 6.

187. *Marriage Green Card and Citizenship Application Fees 2020*, *supra* note 124.

(ACLU) lawsuit, the USCIS coordinated with ICE to create deportation “trap[s]” during regularly scheduled immigration interviews.¹⁸⁸ Even the description of America as a “nation of immigrants” was stripped from the USCIS’s mission statement.¹⁸⁹ These policies were undoubtedly easier to achieve because of the USCIS’s self-funding and the lack of regularized congressional budgetary oversight.

As much as the Trump Administration brought it to the fore, the instrumentalization of the USCIS’s funding structure has not solely been a feature of the Republican political agenda. In 2014, President Obama issued an executive order to expand the popular Deferred Action for Childhood Arrivals (DACA) and create the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs.¹⁹⁰ Opponents in Congress were determined to thwart the president’s actions by attaching a rider to the USCIS’s 2014 appropriations, only to discover, much to their chagrin, that the agency’s self-funding foreclosed this type of congressional control absent new legislation.¹⁹¹ The funding structure that has removed the USCIS from meaningful congressional budgetary oversight removed an important check on executive power, resulting in democratic harms that unfold along multiple dimensions, which is the subject of the next Part.

188. *ICE and USCIS Conspired to Arrest, Detain Immigrants Wishing to Remain with Families*, ACLU R.I. (Aug. 14, 2018, 6:11 AM), <http://www.riaclu.org/news/post/ice-and-uscis-conspired-to-arrest-detain-immigrants-wishing-to-remain-with> [<https://perma.cc/8VM4-ZWVG>].

189. Richard Gonzales, *America No Longer a ‘Nation of Immigrants,’ USCIS Says*, NPR (Feb. 22, 2018, 6:18 PM), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says> [<https://perma.cc/J3FD-YWRY>]; see also *Mission and Core Values*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/about-us/mission-and-core-values> [<https://perma.cc/NZ8S-HRP7>] [<https://perma.cc/Q9AQ-65P2>] (July 5, 2020).

190. WILLIAM A. KANDEL ET AL., CONG. RSCH. SERV., *THE PRESIDENT’S IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION OF NOVEMBER 20, 2014: OVERVIEW AND ISSUES* (2015).

191. DeMuth Sr. & Greve, *supra* note 1, at 562–63 (“The fact that many in Congress were unaware that an agency as important as the [US]CIS was not dependent on congressional appropriations illustrates both the increasing informality of federal taxing and spending and Congress’s loss of interest in using its power of the purse over the evolution of policy.”).

III. DEMOCRACY AND THE ADMINISTRATIVE STATE

The first two Parts of this Article focused on the utilization of user fees in the administrative state broadly and their application and aptness in the immigration context more narrowly. This final Part draws the two together through the lens of democratic norms and public accountability over administrative actions. Our constitutional system demands a robust process of checks and balances, both horizontally between branches and vertically between the people and their elected government. Both of these checks are frustrated in the immigration context, in part because of the USCIS's self-funding structure. First, the possibility of judicially challenging the agency's funding structure is largely foreclosed because of the current prevalent judicial interpretations of the nondelegation doctrine and the separations of powers principle. Second, absent a judicial check, Congress is meant to counterbalance executive overreach, but the USCIS's self-funding has removed one of Congress's principal tools at its disposal: the power of the purse. Moreover, through agency design choices, Congress has exacerbated the insulation of executive power—made possible by self-funding—by placing the agency within the DHS, which has only facilitated the USCIS's instrumentalization. These features create significant democratic harms—all the more so because, to a large degree, it has been the result of unconscious bureaucratic drift and processes of self-reinforcing path dependency.

A. *Democracy Norms*

“It may be a reflection on human nature, that [checks and balances] should be necessary to control the abuses of government,” wrote James Madison in Federalist No. 51, which lays out the Framers' prescriptions for a divided government beyond the basics of representative participation.¹⁹² That Congress is designed to provide a robust restraint on executive power, in the same manner as the judiciary, is a cornerstone of the “Madisonian” theory of democracy that undergirds the American

192. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961). “In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.” *Id.*

state.¹⁹³ Consequently, our system of checks and balances is inscribed in the Constitution itself: the requirements of bicameralism and presentment, the presidential veto, senate confirmation and presidential removal of appointed officials, and certain features of federalism are but a few of the most visible examples.¹⁹⁴ Importantly, American constitutional democracy is also a *liberal* democracy, which requires not only horizontal accountability of government actors but also extensive protections for the kinds of individual and group freedoms necessary to reconcile the competing values and ideas inherent in a pluralistic polity.¹⁹⁵ It is hard to overstate the importance of meaningful transparency in accomplishing these goals, particularly in relation to the administrative state wherein accountability to the general public is a “hallmark of modern democratic governance.”¹⁹⁶

From these democratic norms emerge three axioms. First, democratic accountability through presidential election is, alone, insufficient in providing meaningful public accountability over administrative agency action. Thus, the second axiom: Congressional oversight and judicial review are necessary predicates to meaningful public accountability of agencies. And, as a consequence of the first two axioms, the third: the technocratic (or political) determinations of the administrative state represent the democratic will of the American public only insofar as its policies are legitimated vertically, through presidential elections, and horizontally, by duly elected congressional representatives exercising meaningful oversight.

The Constitution and other sources of federal law instantiate these axioms.¹⁹⁷ In the context of the administrative state, the separation-of-powers principle and the nondelegation doctrine demarcate the limits of executive power to act absent congressional authority.¹⁹⁸ These constitutional strictures and their implications for agency self-funding at the level of judicial

193. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 4–33 (1956).

194. *Id.* at 14.

195. See LARRY DIAMOND, DEVELOPING DEMOCRACY: TOWARD CONSOLIDATION 1–19 (1999).

196. Mark Bovens, *Public Accountability*, in THE OXFORD HANDBOOK OF PUBLIC MANAGEMENT 182 (Ewan Ferlie et al. eds., 2007).

197. See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983) (illustrating the complex dynamics of political control and vertical accountability on one hand, and congressional and judicial checks of the executive on the other).

198. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

review are discussed in the next section. But beyond the legal ramifications, the design of the USCIS—even if it fulfills baseline constitutional requirements—gives rise to significant democratic harms.

B. Constitutional and Administrative Law

In accordance with the separation-of-powers principles enshrined in the Constitution, the nondelegation doctrine generally limits the ability of Congress to delegate its Article I legislative powers to other branches of government, thus creating a horizontal check on the power of the executive branch.¹⁹⁹ Modern doctrine, however, gives a wide berth to congressional delegations of lawmaking authority to administrative agencies, provided that such delegations are informed by an “intelligible principle.”²⁰⁰ This constitutional standard, first espoused by the Supreme Court in *J.W. Hampton, Jr. & Co. v. United States*,²⁰¹ has only been found deficient in two instances.²⁰² Both cases were decided in 1935, and both concerned the New Deal-era National Industrial Recovery Act,²⁰³ leading noted constitutional scholar Cass Sunstein to famously quip in 2000 that the nondelegation doctrine “has had one good year, and 211 bad ones (and counting).”²⁰⁴ Nothing in the last two decades has occurred that would change Sunstein’s analysis.²⁰⁵ Thus, the limited potential of judicial review of agency fee structures contributes to the overall lack of effective checks on the USCIS.

Congress vested broad powers to recover the cost of government services to the administrative state through the IOAA,²⁰⁶ a sparse text that provides little guidance to agencies regarding

199. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress . . .”); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That [C]ongress cannot delegate legislative power is . . . vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.”).

200. *J.W. Hampton*, 276 U.S. at 409 (stating that for a delegation of legislative authority to be permissible, it must contain an “intelligible principle to which the [agency must] . . . conform”).

201. *Id.*

202. *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

203. *Id.*

204. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

205. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (invoking the “intelligible principle” standard).

206. Independent Offices Appropriation Act of 1952, 31 U.S.C. § 9701.

the metes and bounds of their fee-collection powers.²⁰⁷ The statute says that agencies may prescribe regulations that impose charges for “a service or thing of value provided by the agency,” provided that it is consonant with the objective that agencies should become “self-sustaining to the extent possible.”²⁰⁸ Moreover, the law mandates that each charge shall be “fair” and “based on the costs to the Government; the value of the service or thing to the recipient; public policy or interest served; and other relevant facts,” but provides no guidance on how to calculate the weight of each factor or what to do when the factors conflict or diverge significantly.²⁰⁹ Such open-textured language necessarily requires interpretation, hence the need for OMB Circular A-25.²¹⁰

Judicial determinations of the limits of the IOAA have centered on challenges to agency fee structures as unconstitutional delegations of Congress’s taxing power.²¹¹ A pair of companion cases came before the Supreme Court in the mid 1970s—*National Cable Television Ass’n v. United States (NCTA)*²¹² and *Federal Power Commission v. New England Power Co. (NEPCO)*²¹³—in which the Court pronounced its judicial interpretation of the IOAA’s scope. Unsurprisingly, the Court supported Congress’s authority to delegate the power to levy fees in both cases, but in doing so, sharply distinguished fees from taxes. In *NCTA*, the Court held that the dispositive factor in determining whether a user charge is a fee or a tax depends on to whom the benefit is conferred and that its ultimate legality is tied to the reasonable connection between the charge and the benefit.²¹⁴ Taxes are charges that can be levied without an identified beneficiary; fees, on the other hand, are “incident to a voluntary act, e.g., a request that a public agency permit an applicant to . . . construct a house or run a broadcast station,” and “bestow[] a benefit on the applicant, not shared by other

207. Gillette & Hopkins, *supra* note 2, at 826–27.

208. 31 U.S.C. § 9701(a)–(b).

209. *Id.* § 9701(b).

210. *See supra* Section I.E.

211. These cases do not opine on whether Congress has the authority to delegate its taxing power, only that the IOAA is not such a delegation. *See, e.g., Skinner v. Mid-Am. Pipeline Co.*, 490 U.S. 212, 214 (1989) (upholding a statute authorizing agency imposition of user fees as a permissible delegation of Congress’s taxing power).

212. *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336 (1974).

213. *Fed. Power Comm’n v. New England Power Co.*, 415 U.S. 345 (1975).

214. *Nat’l Cable Television Ass’n*, 415 U.S. at 340–41.

members of society.”²¹⁵ Thus, the price of the fee should be the “value to the recipient” of the service or good provided, according to the Court.²¹⁶ Consequently, the Court struck down the Federal Communications Commission’s fee determinations as too broadly construed because they did not sufficiently tie the price of the fee to the benefit conferred.²¹⁷

In *NEPCO*, the Supreme Court similarly invalidated the Federal Power Commission’s annual assessment fee structure as too broad to be anything other than a tax.²¹⁸ The Court determined that the reach of the IOAA did not extend to whole industries but only to “specific charges for specific services to specific individuals or companies.”²¹⁹ The Court referenced with approval OMB Circular A-25’s admonition in the original 1959 version that “no charge should be made for services rendered, ‘when the identification of the ultimate beneficiary is obscure and the service can be primarily considered as benefitting broadly the general public.’”²²⁰

In 1996, the District of Columbia Court of Appeals was provided the opportunity to interpret the scope of the IOAA in light of the recently promulgated revised OMB Circular A-25 of 1993.²²¹ In *Seafarers International Union v. United States Coast Guard*, the D.C. Circuit court was asked whether charging fees to process merchant mariner licenses was reasonable given that the licensing was done in the service of the public interest and therefore not solely for the benefit of those seeking the licenses.²²² In concluding that the charges were permissible, the court elucidated a new standard, stating that the Supreme Court “made it clear” in *NCTA* and *NEPCO* “that a user fee will be justified under the IOAA if there is a *sufficient nexus* between the agency service for which the fee is charged and the individuals who are assessed.”²²³

215. *Id.*

216. *Id.* at 342–43.

217. *Id.* at 343.

218. *New England Power Co.*, 415 U.S. at 346–47, 351. In part, the Federal Power Commission’s regulatory scheme assessed annual fees to all regulated companies of a certain size to recover the cost of administering gas pipeline programs under the Natural Gas Act. *Id.* at 347.

219. *Id.* at 349.

220. *Id.* at 350 (citing OMB CIRCULAR NO. A-25 (1959), *supra* note 32).

221. *Seafarers Int’l Union of N. Am. v. U.S. Coast Guard*, 81 F.3d 179 (D.C. Cir. 1996).

222. *Id.* at 182.

223. *Id.* at 182–83 (emphasis added).

In identifying a “sufficient nexus” standard, the court indicated that at least some, if not a significant, amount of public benefits could accrue from regulatory fee structures, but it rejected the proposition that fees could be based on a literal reading of the IOAA’s permission to charge costs solely based on “public policy or interest served.”²²⁴ Such a policy determination by an agency would “carr[y] an agency far from its customary orbit’ and infringe on Congress’s exclusive power to levy taxes.”²²⁵ This construction of the IOAA is consonant with the revised OMB Circular A-25 of 1993. The revised Circular provides that “when the public obtains benefits as a necessary consequence of an agency’s provision of special benefits to an identifiable recipient,” the agency “should seek to recover from the identifiable recipient either the full cost . . . or the market price,” without needing to “allocate any costs to the public.”²²⁶

The picture that emerges is one in which Congress, pursuant to the IOAA, has the broad authority to delegate to agencies the power to levy fees without offending the nondelegation doctrine. Courts, moreover, are more than likely to uphold agency discretion in leveling fees as long as they can identify *some* beneficiary that is defined more narrowly than an entire industry and the price of the fee is reasonably tied to the benefit received. For these reasons, judicial challenges to the statutory authority of agencies to levy user fees are few and far between.²²⁷ More often, challenges are based on the arbitrary and capricious standard of the APA,²²⁸ but given the broad judicial deference

224. *Id.* at 183 (quoting Independent Offices Appropriation Act of 1952, 31 U.S.C. § 9701(b)(2)(C)).

225. *Id.* (quoting Nat’l Cable Television Ass’n v. United States, 415 U.S. 336, 341 (1974)).

226. OMB CIRCULAR NO. A-25 (1993), *supra* note 31, § (6)(a)(3).

227. The few successful cases challenging agency fee assessments typically involve interpretations of the term “fee.” *See, e.g.*, *Steele v. United States*, 260 F. Supp. 3d 52 (D.D.C. 2017) (holding that the Internal Revenue Service did not provide a “service or thing of value” when it required a fee for a preparer tax identification number (PTIN)); *Honeywell Int’l Inc. v. United States*, 142 Fed. Cl. 91 (2019) (challenging the Nuclear Regulatory Commission’s characterization of a civil penalty as a “fee”).

228. 5 U.S.C. § 706(2)(A). “[A]n agency rule would be [considered] arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

under the *Chevron*²²⁹ and *Auer*²³⁰ standards, these cases are difficult to win.²³¹

The implications for immigration-related user fees are evident. Courts have consistently upheld the USCIS's power to set and implement fee schedules pursuant to the authority granted by the IOAA and section 286(m) of the INA.²³² Amended once in 1990, section 286(m) codified Congress's 1988 creation of the Immigration Examinations Fee Account (IEFA), which delegated the power to "set [fees] at a level that will ensure recovery of the full costs of providing [immigration] services."²³³ (Because section 286(m) of the INA is a context-specific instantiation of the type of delegation authorized by the IOAA—a *lex specialis*—it tends to be the focus of judicial determinations.) In 2011, a challenge to the USCIS's 2007 and 2010 fee hikes came before the Southern District of New York, alleging that the agency's fee determinations were arbitrary and capricious, not in accordance with the precedents set in *NCTA* and *NEPCO*, and an unconstitutional delegation of Congress's taxing power.²³⁴

Barahona v. Napolitano illustrates how courts are inclined to dispose of these types of challenges. The court gave short shrift to the petitioner's challenge to the USCIS's interpretation of section 286(m) as arbitrary and capricious by relying on the

229. *Chevron* review employs a two-step analysis: "First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter," because courts (as well as agencies) "must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute," but rather defers to the agency's interpretation by asking only if it is based on a reasonable construction of the statute. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

230. *Auer*'s general rule affords deference to an agency's interpretation of its own regulation unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (internal quotations omitted)).

231. See, e.g., *Air Transp. Ass'n of Am., Inc. v. U.S. Dep't of Agric.*, 303 F. Supp. 3d 28 (D.D.C. 2018), amended in part by 317 F. Supp. 3d 385 (D.D.C. 2018) (upholding the Agriculture Quarantine Inspection program's fee schedule rule as not arbitrary and capricious).

232. See *supra* note 161 and accompanying text.

233. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1991, Pub. L. No. 101–515, § 210, 104 Stat. 2101 (codified at 8 U.S.C. § 1356(m)) (emphasis added).

234. *Barahona v. Napolitano*, No. 10 CIV. 1574 SAS, 2011 WL 4840716, at *1 (S.D.N.Y. Oct. 11, 2011).

deferential *Chevron* analysis.²³⁵ The petitioner argued that the agency's interpretation of the term "full cost" was too broad inasmuch as the agency had set fee levels to recover the full cost of operating the USCIS rather than just the "costs incurred in 'providing adjudication and naturalization services.'"²³⁶ The court found that the USCIS's interpretation was reasonable under *Chevron*'s second step, as the scope of the term "full cost" was ambiguous, and therefore it was a reasonable construction of the statute "to include the full costs of operating USCIS because the function of USCIS is to provide adjudication and naturalization services."²³⁷

The court similarly rejected the contention that the agency's interpretation of section 286(m) rendered Congress's delegation unconstitutional.²³⁸ The petitioner argued that the Supreme Court's decisions in *NCTA* and *NEPCO* precluded the agency's interpretation that it could recover costs that were not directly resulting from the provision of benefits because the pricing was insufficiently tied to the "specific services to specific individuals or companies" and was, therefore, a tax.²³⁹ The court distinguished the precedent set in *NCTA* and *NEPCO* by pointing out that those cases involved the wholesale shifting of fees to an entire industry, "regardless of whether the entities requested or received *any* agency service."²⁴⁰ In contrast, the court found that USCIS's fees were reasonably tied to the direct *and* indirect costs of adjudicating specific immigration applications or requests, thereby denying that the costs were related solely to the provision of a purely public benefit.²⁴¹

As *Seafarers International* makes clear, agencies are not required to segregate private and public benefits in its fee calculations.²⁴² The court in *Barahona* showed even less interest in the "metaphysical distinction" between "fees" and "taxes;" rather, it focused on whether Congress had provided an intelligible principle to the USCIS when it delegated authority to levy fees under

235. *Id.* at *6.

236. *Id.* (emphasis omitted).

237. *Id.* at *7. Moreover, the court noted that the USCIS's "interpretation of 'full costs' [was] consistent with the broad definition of the term [provided by] OMB Circular A-25." *Id.* at *8.

238. *Id.* at *9–11.

239. *Id.* at *10 (quoting *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 349 (1975) (internal quotations omitted)).

240. *Id.*

241. *Id.*

242. *See supra* note 224 and accompanying text.

section 286(m) of the INA.²⁴³ Unsurprisingly, in lock step with the nondelegation doctrine's jurisprudence, it found that the USCIS's fee determinations "do[] not pose any constitutional difficulty."²⁴⁴ The main takeaway is as follows: because of the broad judicial deference granted to agencies' statutory interpretation and the similarly wide berth accorded to congressional delegations of lawmaking authority, there is little possibility to challenge the USCIS's fee structure—notwithstanding how it is ultimately instrumentalized—as long as those fees are at least somewhat associated with an identifiable beneficiary.

C. Democratic Harms and Administrative Design

Absent a robust judicial check, Congress should counterbalance executive overreach; however, the USCIS's self-funding frustrates one of Congress's principal tools: the power of the purse, as exercised through regularized budgetary oversight. Moreover, the USCIS's placement within the larger structure of the DHS has exacerbated the insulation of executive power (made possible by self-funding), facilitating the agency's instrumentalization in pursuit of enforcement policies. These features create significant democratic harms, all the more so because, to a large degree, they have been the result of bureaucratic drift and the dynamics of self-reinforcing path dependency. The next two Subsections examine the democratic harms that have accrued because of Congress's choices and revisit the historical narrative introduced in Part I in order to deconstruct the coherence of the USCIS's self-funding scheme.

1. Congressional Oversight and Interagency Separation of Powers

Two features of the USCIS's structure have contributed to the types of democratic harms that the Constitution's system of checks and balances was designed to prevent—the shift in financing from congressional appropriation to self-funding and the post-9/11 government reorganization that created the USCIS as one of three immigration subagencies within the DHS. This first structural design has been discussed in detail already:

243. *Barahona*, 2011 WL 4840715, at *10 (quoting *Fla. Power & Light Co. v. United States*, 846 F.2d 765, 773 (D.C. Cir. 1988)).

244. *Id.* at *11.

the creation of the IEFA offsetting account coupled with the removal of the USCIS from the appropriations process. In the absence of a judicial check, Congress must counterbalance the executive branch and its administrative agencies. A principal means of exercising this control is through the power of the purse. Congress enjoys near plenary power over agency funding,²⁴⁵ including the inherent power to set overall funding levels; dictate temporal and subject-matter limitations;²⁴⁶ and prohibit or condition the use of funds to direct agency action or to achieve specific policy goals.²⁴⁷ Crucially, agencies may not spend or withhold appropriated funds in a manner that is contrary to the congressional intent of the original appropriation.²⁴⁸ But now, thanks to its offsetting account, the USCIS can expend the funds it receives from user fees as it and the president see fit. Further, as the agency's actions betray, those priorities have become more and more centered on enforcement and not on the congressionally mandated mission of benefits adjudication.²⁴⁹ Congress has effectively written itself out of its regularized horizontal oversight responsibility.

The second structural feature is the placement of the USCIS alongside ICE and CBP within the DHS, which—when coupled with the agency's self-funding—has contributed to the consolidation of executive power removed from congressional

245. U.S. CONST. art. I, § 8, cl. 1; *see also* *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (“[N]o money can be paid out of the Treasury unless it has been appropriated by an act of Congress.”). Because administrative agencies are created by legislation, Congress retains the inherent authority to pass laws to constrain and direct agency action, subject to the burdensome constitutional requirements of bicameralism and presentment. Budgetary oversight is, therefore, a much quicker and more direct tool.

246. TODD GARVEY & DANIEL J. SHEFFNER, CONG. RESEARCH SERV., R45442, CONGRESS'S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 13 (2018).

247. *Id.*

248. *Train v. City of New York*, 420 U.S. 35, 42–49 (1975) (holding that agencies must follow the will of Congress with respect to spending allocations, absent a grant of discretionary authority).

249. Homeland Security Act of 2002 § 451(b), 6 U.S.C. § 271(b); *see also Our History*, U.S. CUSTOMS & IMMIGR. SERV., <https://www.uscis.gov/about-us/our-history> [<https://perma.cc/22PH-Y57H>] (Aug. 24, 2020) (“On March 1, 2003, U.S. Citizenship and Immigration Services (USCIS) assumed responsibility for the immigration service functions of the federal government. USCIS was founded to enhance the security and efficiency of national immigration services *by focusing exclusively on the administration of benefit applications.*” (emphasis added)).

oversight.²⁵⁰ One of the consequences of this structural feature, the instrumentalization of immigration and the use of the USCIS's self-funding to facilitate and augment enforcement policies, was discussed obliquely above and has been detrimental to the agency's congressionally mandated objective of benefits adjudication.²⁵¹ Dysfunctions within the immigration bureaucracy caused by competing service and enforcement missions predated the creation of the DHS,²⁵² but were exacerbated in the wake of the terrorist attacks of September 11, 2001. In the post-9/11 world, the watchword was fragmentation, and so the DHS was created to deal with information-sharing problems by consolidating functional roles rather than promoting divisibility. Our current immigration agencies were forged in the crucible of national emergency, meaning that their DNA is imprinted with structural features designed in response to that emergency. Yet many, if not most, of the issues that arose because of the incompatibility between the INS's service and enforcement functions²⁵³—competition for resources, lack of coordination and cooperation, and the colonization of the enforcement culture—re-emerged in the post-9/11 landscape.²⁵⁴

The upshot is that the structural features of the USCIS, both its self-funding and its placement within the DHS complex, combine in such a way as to both undermine the agency's mandate to administer immigration benefits (in favor of enforcement priorities) and to remove meaningful oversight to correct such failures. In setting up the IEFA offsetting account and placing the USCIS within the same agency structure as ICE and the CBP,²⁵⁵ Congress not only abdicated an important aspect of its checks and balances responsibility but also set the agency on a

250. This agency structure implicates the normative ideal of the "statutory separation of powers" discussed by administration law scholar Sharon Jacobs. See Sharon B. Jacobs, *The Statutory Separation of Powers*, 129 YALE L.J. 378 (2019).

251. See *supra* notes 182–189 and accompanying text.

252. Grover Joseph Rees, who served as INS General Counsel under George H.W. Bush, commented that when the "opposite organization objectives" of the INS conflicted, "the answer [was] easy: we are the Anti-Immigration and Naturalization Service, and we are about keeping people out. . . . [If we were] torn between contradictory missions of 'service' and 'enforcement,' from the inside it seldom looked like a tough choice." Grover Joseph Rees, III, *Advice for the New INS Commissioner*, 70 INTERPRETER RELEASES 1534 (1993).

253. See Robert Charles Hill, *Restructuring the INS: Reflections on Calls for Separating Service from Enforcement*, 24 IN DEFENSE OF THE ALIEN 1 (2001).

254. See *supra* notes 180–188 and accompanying text.

255. See Wasem, *supra* note 111, at 105.

path that has had enduring consequences for would-be Americans seeking immigration services.

2. Of Critical Junctions and Path Dependency

What emerges from this Article is the story of a particular moment in the late twentieth-century synthesis of neoliberal thought that has entrenched a reliance on user-fee funding in the immigration context.²⁵⁶ The idea that immigrants should pay for the benefits-adjudication process, particularly for the vast majority who seek family reunification, has become naturalized in a way that disguises the contingent nature of the USCIS's self-funding scheme.²⁵⁷ One goal of this Article is to recontextualize those contingencies in an attempt to denaturalize our understanding of the use of self-funding at the USCIS—that is, to historicize it.²⁵⁸ To reveal contingencies, however, is not to

256. Cf. Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1784 (2020) (highlighting how neoliberal premises “have helped authorize policies and practices that reaffirm the inequities of the current era”).

257. I presented a working version of this paper at the UC Davis Global Migration Center, where a professor of economics commented something to the effect, “Of course, no one is going to think that *not* charging user fees is politically possible,” which I believe is a telling statement of the current zeitgeist. For an example of how these assumptions are at work in the policies and theories of immigration law, see *supra* Sections II.B, II.C.1.

258. I use the terms “naturalize” and “denaturalize” intentionally. Justin Desautels-Stein argues that liberal legal thought (the dominant modality of contemporary legal consciousness) is defined by three foundational theses: (1) the *thesis of free competition*, founded on the autonomous, rights-bearing individual, in which society is a good to the extent that the clash of individual wills yields natural outcomes; (2) the *thesis of social control*, which holds that the contest of individual wills cannot result in a stable environment in which people are capable of pursuing their subjective ends without a correlated police power to define the proper scope of the contest of individual wills; and (3) the *thesis of naturalizing juridical science*, which is the “grammar of liberal legal thought,” necessary to mediate the antimony of the first two theses—a negotiation strategy he calls the *naturalizing sensibility*. JUSTIN DESAUTELS-STEIN, *THE JURISPRUDENCE OF STYLE: A STRUCTURALIST HISTORY OF AMERICAN PRAGMATISM AND LIBERAL LEGAL THOUGHT* 3–9 (2018). Elsewhere, critical legal scholars have described the tension between the first two theses as a “fundamental contradiction,” building off the work of Duncan Kennedy. See, e.g., Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 18 BUFF. L. REV. 205 (1979). Thus, to naturalize a contingent political choice characterized by the fundamental contradiction is to make it appear as a legal necessity through acceptable legal argumentative practices—in this case, the achievement of neoliberal governing policies legitimated by Law and Economics theory. To “denaturalize,” or, alternatively, to “historicize,” the story of the USCIS's path to self-funding is to expose the discursive practices (*viz.* neoclassical economics) that were used to disguise the historical-contingent nature of the process, which has resulted in the idea of self-

downplay the fact that circumstances have real-world consequences, and that the accumulation of current arrangements have social weight and a degree of “stickiness” within the immigration bureaucracy.²⁵⁹

Therefore, this is also a story about path dependency. The concept of path dependency has a deep tradition in political science in a myriad of contexts.²⁶⁰ Political theorist Paul Pierson emphasizes the notion that “large consequences may result from relatively ‘small’ or contingent events . . . and consequently, political development is often punctuated by critical moments or junctures that shape the basic contours of social life.”²⁶¹ Pierson extends the economic application of path dependency theory to political phenomena by focusing on the idea of “‘increasing returns,’ which could also be described as self-reinforcing or positive feedback processes.”²⁶²

The increasing-return concept captures the idea that the probability of continuing along a certain path increases as one moves down that path because “the *relative* benefits of the

funding appearing to be a “natural” social necessity. However, to historicize a phenomenon is not the same as revealing an unmediated “truth,” because, as Hayden White reminds us, “to *historicize* any structure, to write its history, is to mythologize it: either in order to effect its transformation by showing how ‘unnatural’ it is (as with Marx and late capitalism), or in order to reinforce its authority by showing how consonant it is with its context, how adequately it conforms to ‘the order of things.’” Hayden White, *Historicism, History, and the Figurative Imagination*, 14 HIST. & THEORY 48, 51 (1975). I am fully conscious of the fact that my historical narrative has a necessary political valence; however, I do not hide the fact in this Article: I believe that the USCIS’s self-funding has created considerable harms to our society and to individual immigrants.

259. On the concept of “stickiness” in administrative regulations, see, e.g., Aaron L. Nielson, *Sticky Regulations*, 85 U. CHIC. L. REV. 85 (2018). On contingency generally, see Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, in THE MARX-ENGELS READER 595 (Robert C. Tucker, ed., 2d ed. 1978) (“Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past.”). See also Susan Marks, *False Contingency*, 62 CURRENT L. PROB. 1 (2009).

260. See, e.g., Seymour Martin Lipset & Stein Rokkan, *Cleavage Structures, Party Systems and Voter Alignments: An Introduction*, in PARTY SYSTEMS AND VOTER ALIGNMENTS (Seymour Martin Lipset & Stein Rokkan eds., 1967) (on path dependency in political parties); Jacob Hacker, *The Historical Logic of National Health Insurance: Structure in the Development of British, Canadian, and U.S. Medical Policy*, 12 STUD. AM. POL. DEV. 57 (1998) (on path dependency in health care systems); Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332 (1985) (on path dependency in the development of technology).

261. Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251 (2000).

262. *Id.*

current activity compared with other possible options increase over time.”²⁶³ The same could be stated from the alternate position, in which the cost of exiting a given path increases with every step forward along that path. Pierson argues that increasing returns as a theory of political entrenchment is apposite because of four “prominent and interconnected aspects of politics . . . : (1) the central role of collective action; (2) the high density of institutions; (3) the possibilities for using political authority to enhance asymmetries of power; and (4) its intrinsic complexity and opacity.”²⁶⁴ Moreover, these features combine with the overarching political preoccupation with the provision of public goods, which was discussed earlier in relation to economic theories undergirding user-fee structures.²⁶⁵ Taken together, these characteristics of political life “anticipate that steps in a particular direction can trigger a self-reinforcing dynamic.”²⁶⁶

The idea of increasing returns as a process of path dependency has salience for the USCIS’s user-fee funding structure. With the creation of the neoliberal-oriented IEFA offsetting account in 1989, Congress set the agency on a path that has had immeasurable consequences for the lives of hopeful immigrants. Even with the initial understanding that “funds generated by this Account shall not be used for any purpose *other than enhancing naturalization and adjudications programs*,”²⁶⁷ the USCIS’s self-funding scheme—in conjunction with the logics of OMB Circular A-25—has metastasized from providing less than a quarter of the agency’s budget in 1990 to now almost wholly funding its \$4.6 billion annual budget.²⁶⁸ Step by step, promulgated rule by promulgated rule, the USCIS has set itself down a path of ever-greater reliance on user fees. The average family-reunification visa application, which used to cost \$60, now runs \$1215—an 842 percent increase, adjusted for inflation.²⁶⁹ It is hard to overstate what a burden this is for the average immigrant. Notwithstanding the humanitarian *and* economic reasons that the United States should support immigrants seeking

263. *Id.* at 252.

264. *Id.* at 257.

265. *See supra* Section I.B.2.

266. Pierson, *supra* note 261, at 260.

267. H.R. REP. NO. 100-979, *supra* note 164, at 38 (emphasis added).

268. With the exception of \$132 million that were specifically allocated by Congress to implement a new technological feature. *See supra* note 124 and accompanying text.

269. *See supra* note 170 and accompanying text.

family reunification,²⁷⁰ it now seems that collective funding of the immigration process is beyond the pale of political possibility—indeed, recall how the plans to address the agency’s projected budget shortfall in 2020 were invariably referred to as a nothing less than a “bailout.”²⁷¹ Only when one steps back and looks at the issue with a fresh perspective does it seem odd to refer to the government funding a government agency as a “bailout”—underscoring the extent to which the USCIS’s funding scheme has been naturalized.

Two consequences follow from the self-reinforcing path that the USCIS has traversed. First, through the elevation of neo-classical economic logics justifying user-fee funding of agencies, the political contestation at the heart of immigration policies has been displaced by the “objective” processes of the free market. Increasingly, this has meant that the USCIS operates as if it were a for-profit business, and immigrant applicants have been treated as sovereign consumers capable and willing to express their rational preferences through the dynamics of price signaling. Second, the USCIS’s self-funding scheme has created a positive feedback loop that not only naturalized the use of user fees but also frustrated the political process that could be the means to contest its aptness. By removing the agency from the regular appropriations process, Congress can no longer exercise the regularized oversight intrinsic to the power of the purse.

The consequences of these conditions are significant. The burden that they place on the average immigrant grows with each new fee hike promulgated by the USCIS—fees that hopeful applicants continue to pay, irrespective of the burden, because they do not conform to rational-actor models predicated on price-signaling theory. With the courts ineffective at providing a robust check on the appropriateness of these fees,²⁷² it is left to the political process to provide a venue for contestation. But immigrants and immigrant advocates—despite recent gains in political influence²⁷³—tend to be the type of “discrete and insular minority” that have relatively less political clout in the U.S.

270. See *supra* Section II.C.2.

271. See *supra* note 172 and accompanying text.

272. See *supra* Section III.B.

273. See Anna Maria Mayda et al., *The Political Impact of Immigration: Evidence from the United States* (Nat’l Bureau of Econ Rsch., Working Paper No. 25410, 2018), https://www.nber.org/system/files/working_papers/w24510/w24510.pdf [<https://perma.cc/PG5U-ZWTC>].

system.²⁷⁴ Moreover, the removal of regularized congressional oversight has more or less allowed the executive branch to dictate immigration policy at the USCIS with few checks from the other branches. The result has been the instrumentalization of immigration for political purposes, lacking both horizontal and vertical checks, and the removal of the meaningful transparency necessary to provide the kind of accountability to the general public that is a “hallmark of modern democratic governance.”²⁷⁵

CONCLUSION

So why does this matter? Immigration policy has been a site of heated political contestation at least since the Chinese Exclusion Act of 1882, if not earlier.²⁷⁶ Racism, xenophobia, war, and bald interest-group pandering have all shaped our immigration policies, irrespective of the party in control of the White House. Each successive Administration sets the terms of an ongoing debate regarding whom to let into our country and what policies will best effectuate those priorities. But that is exactly the point: the very term *policy* presupposes a functioning political process, a process predicated on democratic norms and constitutional protections. The lack of congressional oversight over the execution of our nation’s immigration laws frustrates the political process and circumvents accountability mechanisms. The funding structure of the USCIS matters not because the Trump Administration’s immigration policies were bad—though undoubtedly, some were—but because the structure permits such policy changes to happen unchecked. Perhaps more troubling, this narrative has highlighted the massive implications for the lives of immigrants and hopeful immigrants that have accrued because of the type of “drift and default” against which Willard Hurst famously warned,²⁷⁷ and not through public deliberation.

This Article highlights the funding structure of the USCIS because executive immigration policies have considerable impacts on the lives of Americans and those who wish to become Americans. But the USCIS’s funding structure is not an isolated

274. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 161–62 (1980).

275. Bovens, *supra* note 196, at 182.

276. See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

277. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 75 (1956).

phenomenon; it is part of a much larger trend of power consolidation in the executive branch.²⁷⁸ The USCIS is one (particularly egregious) example of this process at play and deserves scrutiny, but it is important to foreground the fact that many administrative agencies receive their funding wholly or partly from user fees. Immigration is a visible issue; others are less so. Administrative agencies shape the lived experiences of millions of Americans, yet many of their policies are effectively implemented without appropriate scrutiny. The point of this Article is to question the suitability of user fees—in the immigration context and beyond—and to contribute to a larger discussion regarding the proper allocation of power in the U.S. political system.

278. See Margaret H. Lemos & Max Minzner, *For Profit Public Enforcement*, 127 HARV. L. REV. 853, 874 (2014) (detailing the profits that the DOJ, HHS, and Treasury have made to supplement their own budgets and the general treasury). See generally DeMuth Sr. & Greve, *supra* note 1, at 562.