

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

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Introduction

The use of user fees to fund administrative agencies has bourgeoned in the past forty years. Although user fees have been a feature of government administration as long as there has been a government (postal stamps being a classic example), it was the Reagan administration’s obsession with small government that spurred their recent efflorescence, as it became a means of raising revenue without resorting to general taxation.¹ Legal and economic theories were readily available to rationalize their implementation, marshalling concepts of efficiency and rational-actor modelling as justifications.² Since the 1990s, a second dynamic has emerged: user-fee funding structures that facilitate ever-increasing efforts to consolidate executive power removed from congressional budgetary oversight.³ Both of these phenomena contain particularly troubling implications for federal immigration policy.

Of main concern to this paper 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 paper interrogates the fundamental economic and normative justifications for the use of user fees in the immigration context to argue that the USCIS’s funding structure is both inapt and ineffective at implementing Congress’ immigration policies.⁶ Moreover, by effectively shielding the executive branch from budgetary oversight, these user fees fund operations that are fundamentally misaligned with Congress’ original intent in creating the USCIS, which frustrates the constitutional system of checks and balances based on separation of powers principles.

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 & Greve, *supra* note 1.

⁴ USCIS Announces Final Rule Adjusting Immigration Benefit Application and Petition Fees, USCIS.GOV, available at <https://www.uscis.gov/archive/archive-news/uscis-announces-final-rule-adjusting-immigration-benefit-application-and-petition-fees> (last visited Feb. 25, 2020).

⁵ *Id.*

⁶ See, e.g., *Citizenship Delayed: Civil Rights and Voting Rights Implications of the Citizenship and Naturalization Backlog*, Report of Colorado Advisory Committee for the U.S. Commission on Civil Rights (September 2019) (reprinted in 91 U. COLO. L. REV. FORUM (2019)).

In short, this paper argues that the legal and economic rationales that have traditionally been used to justify user-fee funding for administrative agencies—to manage the availability of public goods, to control or promote externalities, to overcome information disparities, and to deter natural monopolies⁷—all fail on their own terms as they do not adequately reflect the realities of the immigration system. Two further justifications for user fees—notions of fairness and instrumental revenue enhancement—are more plausible conceptually and are thus more often invoked in the context of the USCIS, but are themselves fundamentally misaligned with the realities of the immigration and naturalization process.

National immigration policy is effectuated through the legal system. As such, this paper’s methodology consists of a comparative analysis of Law and Economics and normative legal theories to question the desirability of user fees from a law and society perspective. As a multi-method paper, this research relies upon publicly available data,⁸ legislative history,⁹ and foundational¹⁰ and current legal scholarship¹¹ to challenge the most common and intuitively persuasive justifications for the USCIS’s fee structure. Part I of this paper describes user-fee funded agency structures, and examines the economic, normative, and instrumental justifications for their use. Part II offers a critique of these justifications in turn, and finds that, while economic justifications are inapt, the plausibility of normative justifications are reducible to political choice. However, this paper argues that the instrumental rationale of revenue enhancement to fund enforcement activities removes the executive’s actions from congressional oversight, creating constitutional and democratic harms.

I. User-Fee Funded Agencies

A. User-Fee Funding Explained

It might be easiest to define user-fee funding by what it is not: general taxation.¹² Statutorily-prescribed general taxation is the standard means by which the government funds government functions, such as national defense, road construction, interest on the national debt, a

⁷ Gillette & Hopkins, *supra* note 2, at 801–05.

⁸ E.g., Immigration and Nationality Act, Pub. L. No. 82-414, § 101, 66 Stat. 163, 167 (1952) (codified as amended at 8 U.S.C. § 1101).

⁹ E.g., D. ANDREW AUSTIN, CONG. RESEARCH SERV., R45463 ECONOMICS OF FEDERAL USER FEES (2019).

¹⁰ E.g., Gillette & Hopkins, *supra* note 2.

¹¹ E.g., Jon D. Michaels, *Running Government Like a Business... Then and Now*, 128 HARV. L. REV. 1152 (2015).

¹² Gillette & Hopkins, *supra* note 2, at 800.

\$30,000 recreation of Hamlet with a cast of dogs, and the like.¹³ Notwithstanding the myriad valid complaints regarding our tax system, the general underlying premise is that everyone in the U.S. pays—in the form of taxes—for their fair share of publicly-distributed goods. These taxes are compelled by the federal government’s sovereign power; they are not optional.¹⁴ User fees, in contrast, are voluntarily paid by particular persons or businesses for access to a service or product whose distribution the government controls.¹⁵ User fees, then, are principally intended to allocate the cost of government services and products to the intended beneficiaries of those services and products—a normative concern.¹⁶ However, syncing costs with benefits is not the only reason that user fees are employed by administrative agencies; economic and instrumental rationales are relevant as well, and are discussed below.

Despite the recent uptick in the use of user fees, the federal government still collects the bulk of its annual revenue through statutory taxation, with general taxes accounting for 63% and 64% of the federal government’s receipts in 2015 and 2010, respectively.¹⁷ Although revenue generated from user fees is not the principle means of funding the government, it is still significant. In fiscal year 2017, for example, user fees accounted for \$331 billion in net income, about 10% of that year’s total federal revenue.¹⁸ Many administrative agencies—such as the USCIS, as well as the Patent and Trademark Office (PTO), the Federal Energy Regulatory Commission (FERC), and the Federal Trade Commission (FTC)—are wholly or partly funded through user fees.¹⁹

¹³ *Policy Basics: Where Do Our Federal Tax Dollars Go?*, CBPP.ORG (Apr. 9, 2020), <https://www.cbpp.org/research/federal-budget/policy-basics-where-do-our-federal-tax-dollars-go>; Joe Perticone, *The Most Ridiculous Projects the Government Funded in 2017*, BUSINESS INSIDER (Nov. 28, 2017), <https://www.businessinsider.com/james-lankford-federal-fumbles-report-of-government-waste-2017-11>.

¹⁴ AUSTIN, *supra* note 9, at 1.

¹⁵ 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 9, at 1.

¹⁶ 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). *Id.* at 801.

¹⁷ See U.S. DEP’T OF THE TREASURY, BUREAU OF THE FISCAL SERV., COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES tbl.A (2015), <https://fiscal.treasury.gov/files/reports-statements/combined-statement/cs2015/rta.pdf>; see U.S. DEP’T OF THE TREASURY, BUREAU OF THE FISCAL SERV., COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES tbl.A (2010), <https://www.fis-cal.treasury.gov/fsreports/rpt/combStmt/cs2010/rta.pdf>.

¹⁸ AUSTIN, *supra* note 9, at 1.

¹⁹ *Id.*

Fees and user charges can take a dizzying variety of form, but broadly they fall into two categories: regulatory and service related.²⁰ Regulatory fees are used to fund agencies' regulatory programs, such as the fees charged by the Environmental Protection Agency (EPA) to review applications for new pesticides, or the costs levied by the U.S. Food and Drug Administration (FDA) to evaluate the safety of new medicines and medical devices.²¹ 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.²² 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.²³

The annals of American history are replete with early examples of both service-related²⁴ and regulatory user fees,²⁵ 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 for the same time period.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 general taxes—a third rail of Republican politics—and instantiating the administration's neoliberal economic policies.²⁹

But it is not solely the purview of the executive branch to implement user-fee funding; administrative agencies are creatures of statute and thus require congressional authority for their

²⁰ U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-718, FEDERAL USER FEES: KEY CONSIDERATIONS FOR DESIGNING AND IMPLEMENTING REGULATORY FEES 2 (2015).

²¹ *Id.*; *Medical Device User Fees*, FDA.GOV, <https://www.fda.gov/medical-devices/premarket-submissions/medical-device-user-fees> (last visited Aug. 24, 2020).

²² U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 20, at 2.

²³ *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>.

²⁴ E.g., Passport Act of 1926, Pub. L. No. 69–493, 44 Stat. 887.

²⁵ E.g., Federal Communications Commission Act of 1934, Pub. L. 73–416, § 9, 48 Stat. 1064.

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* Part I(D).

implementation.³⁰ Such authorizing legislation may be narrowly tailored, specifying in detail fee structures and rates, or may be broad grants of discretionary power to impose fees and collect user charges.³¹ It is this ultimate congressional control over the financing structures of agencies that help fulfill the requirements of the nondelegation doctrine as well as separation of powers principles.³² Whether it be Congress, through authorizing legislation, or the executive branch, through agency action, that is justifying its use of user-fee funding structures, they invariably find recourse to one or more of the economic, normative, or instrumental arguments to which we now turn.

B. Economic Justifications for User-Fee Funding

1. Law and Economics and the Efficiency Criterion

In the late 1970s and early 1980s, legal thought took a neoclassical economic turn. As a method of legal analysis, Law and Economics (L&E) is broadly defined as a “fully operational normative approach [for] counseling judges and other officials,” which takes as its point of departure the evaluative standard of *efficiency*.³³ The efficiency criterion is defined as the “allocation of resources to their most highly valued use, generally as indicated by the recipient’s willingness to pay for the resource.”³⁴ The willingness-to-pay conception of human behavior is itself based on rational-actor modelling, another hallmark of L&E.³⁵ Although originating in law

³⁰ AUSTIN, *supra* note 9, at 1.

³¹ *Id.*

³² 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.”); see 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’ 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.”).

³³ Pierre Schlag, *Coase Minus the Coase Theorem—Some Problems with Chicago Transaction Cost Analysis*, 99 IOWA L. REV. 175, 180 (2013). For a general introduction to Chicago L&E, see Steven G. Medema, *Chicago Law and Economics*, in THE ELGAR COMPANION TO THE CHICAGO SCHOOL OF ECONOMICS 160 (Ross B. Emmett ed., 2010); see generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2011).

³⁴ Gillette & Hopkins, *supra* note 2, at 800.

³⁵ A typical explanation of rational-actor modelling 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). For a critical evaluation of these models from a behavioral economics perspective, see Christine Jolls, Cass R. Sunstein, & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); 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).

schools, L&E found purchase in broader swaths of public discourse, particularly as a means of justifying the neoliberal economic policies championed by political conservatives.

But how do economists assess the efficiency of government action? First and foremost, one must buy into the fiction that when the government produces or supplies a good or service it is intervening in a pre-political market, rather than creating one.³⁶ From there, economic theories abound regarding how to achieve and measure efficiency,³⁷ but for our purposes a basic calculation works: “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.”³⁸

2. Public Goods and Externalities

If one casts government action as interference with a supposedly free and efficient private market, as the proponents of neoclassical economics are wont to do, then user fees are justified as a means of correcting market failures that result from both internal market processes and exogenous market pressures.³⁹ A user fee, thus, is an instrument that is employed to “induce a socially optimal amount of the underlying good or service.”⁴⁰ Four principle causes of market failures typically justify government interference: the existence of public goods, substantial externalities, information problems, and natural monopolies.⁴¹ Of those four, public goods and externalities are of most concern to this discussion.⁴²

Public goods are products and services that are defined by two key features: their consumption is not rival, and their benefits cannot easily be reserved to those who pay for

³⁶ See ROBERT B. REICH, THE SYSTEM: WHO RIGGED IT, HOW WE FIX IT 93 (2020).

³⁷ For example, economic theories concern the means of defining and evaluating targeted levels of efficiency (e.g., Kaldor-Hicks efficiency, pareto efficiency, etc.), the appropriate means and amount of government intervention necessary to achieve those objectives (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.).

³⁸ 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 (R. Musgrave ed. 1973)).

³⁹ Schlag, *supra* note 33, at 181, citing DAVID L. WEIMER & AIDAN R. Vining, POLICY ANALYSIS: CONCEPTS AND PRACTICE 37 (4th ed. 2004) (“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.”).

⁴⁰ Gillette & Hopkins, *supra* note 2, at 801.

⁴¹ *Id.* at 800.

⁴² Because immigration is by definition an inherent aspect of the sovereign power, the government maintains a monopoly on immigration policy. Information, specifically the transaction costs associated with information disparities, may be implicated in the immigration context, but user fees are not an obvious means of mitigating these costs.

them.⁴³ Street lights and national defense are examples of public goods that create market failures because of what is known as 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.⁴⁴ 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 off of other users. When a government distributed good or service exhibits both of the defining characteristics of a public good, it is best to fund it through general taxation, rather than through user fees to avoid the free-rider problem.⁴⁵

However, when a good held in common exhibits only one or neither of the defining characteristics, a user fee may be an appropriate use management tool. This is of particular relevance for rival common goods, such as public lands or resources, wherein individuals pursuing their personal interests (i.e., consumption of the public good) results in overuse of the common good, thus denying the benefits of those goods to society at large: what is referred to as the “tragedy of the commons.”⁴⁶ A government-imposed user fee may be an effective means of regulating consumption of a rival good, thereby forestalling its overuse.⁴⁷

This calculation becomes more complicated when one considers externalities. Externalities are the effects to third parties who are not privy to a market-place transaction, the costs of which are not reflected in the original transaction’s pricing.⁴⁸ Externalities can be beneficial or detrimental to the third party; sometimes both if the public happens to be the third party (for example, building a coal-fired power plant in an economically depressed community brings much needed jobs and an influx of cash, while simultaneously degrading the local environment). A classic example of an externality is pollution, a situation in which the government will typically intervene on behalf of the affected third parties (i.e., the public). The government can force the internalization of the cost that pollution creates in multiple ways: by imposing ex ante mitigation measures (e.g., requiring the installation of EPA-mandated devices

⁴³ 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. Gillette & Hopkins, *supra* note 2, at 802.

⁴⁴ *Id.*

⁴⁵ *Id.* at 802–03.

⁴⁶ See Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

⁴⁷ Gillette & Hopkins, *supra* note 2, at 810–11.

⁴⁸ *Id.* at 803.

that lessen the amount or impact of pollutants), or by imposing fines *ex post* through the legal system (e.g., legislation that imposes liability for noxious fumes, etc.). 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.

User fees can be an effective way of encouraging or deterring consumption of a government-controlled good or service because it works as a rationing mechanism: if the market undervalues the total cost of a product to society—usually 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, as was described above.⁴⁹ But the government’s interventions do not always involve the imposition of additional cost. 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 more consumption, or enter the marketplace as a producer itself and supply the good, through a user fee, at a price lower than the market would otherwise. For example, the Post Office subsidizes postal rates for some non-profit organizations because of the significant positive social externalities that result from these organization’s charitable work.⁵⁰

As the proceeding argument hopefully makes clear, the economic justifications for the use of user fees (both regulatory and service related) are strongest when the government intends to induce or discourage the consumption of rival common goods or non-rival 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.

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 may normative definitions,⁵¹ but in the context of user fees there are two basic positions: first, fair

⁴⁹ See *supra* note 48 and accompanying text.

⁵⁰ 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, 348–349 (1988).

⁵¹ Usually these definitions broadly align with either utilitarian or deontological moral and ethical philosophy. For a discussion of the deontological position, see JOHN RAWLS, *A THEORY OF JUSTICE* (1971). For a discussion of the

distribution entails imposing the cost of the underlying good or service with the intended beneficiary—those who use it, pay for it.⁵² 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.⁵³ These two positions are referred to as *pricing to recover cost* and *pricing for redistribution*, respectively.⁵⁴

In contrast with pricing for efficiency, which often does not recoup the government’s full expenditure, pricing to recover cost precludes subsidization by non-beneficiaries through their tax dollars.⁵⁵ That is, recovering costs prevents what is known as a *cross-subsidy*, in which the direct beneficiaries of a government service pay no user fee, or an underpriced user fee, such that other members of society are paying for their benefits.⁵⁶ 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 (which is the primary concern of the efficiency criterion).⁵⁷ If that seems simple enough, let us complicate it a bit further: the calculation of the common cost must debit the value of any positive externalities created in the transaction, and must also add the costs associated with negative externalities. Even this, of course, is vastly oversimplifying the matter, but it at least gestures at the complexity involved in ascertaining what a “fair” user fee should be.⁵⁸

Pricing for redistribution, on the other hand, seems 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 are correlated to the consumer’s relative ability to pay, effectively subsidizing the low-income user’s consumption—either through fee waivers or exemptions, or by charging relatively affluent users

utilitarian position, see T. M. Scanlon, *Rights, Goals, and Fairness*, in PUBLIC AND PRIVATE MORALITY (Stuart Hampshire ed. 1978). For a general introduction to both positions, see Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 PHIL. & PUB. AFF. 313 (1994).

⁵² Gillette & Hopkins, *supra* note 2, at 814.

⁵³ *Id.*

⁵⁴ *Id.* at 816.

⁵⁵ *Id.* at 814–15.

⁵⁶ 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 48 and accompanying text.

⁵⁷ Gillette & Hopkins, *supra* note 2, at 814.

⁵⁸ Of course, the predictive power of economics to determine appropriate pricing is itself suspect. See Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 477–79 (1974). The calculation becomes even more difficult when one accounts for contemporary usages of behavioral economics and “nudge” theory. See Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913 (2010) (identifying and addressing the “when to nudge” problem).

a different, higher price that exceeds the cost of production, thus intentionally creating a cross-subsidy.⁵⁹ Moreover, even a modest user fee that doesn't recover full cost may be fairer to less-affluent groups that do not partake of the good or service because they are not required to subsidize its production with their tax dollars.⁶⁰

D. Instrumental Justifications for User-Fee Funding

The easiest to grasp justification for user fees is also its most problematic: 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 that fundamentally challenge democratic norms. Neoliberalism is a contested term, to say the least,⁶¹ but one that I believe useful in this discussion.⁶² Broadly described, neoliberalism is a theory that proposes that the best means of achieving human flourishing is through the guarantees provided by strong individual property rights, market freedom, and free-trade policies.⁶³ David Grewal and Jedediah Purdy describe neoliberalism 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 grounded in the requirements of democratic legitimacy.”⁶⁴ 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.⁶⁵

Neoliberalism is a multifaceted ideology, but what interests us here are the implications for agency design choice.⁶⁶ The neoliberal agenda of the Reagan administration influenced the expansion of user fees by administrative agencies on two levels: First, and at the most basic level, user fees provided the administration the cover necessary to raise money for government activities while simultaneously disclaiming the need to increase revenues through taxation—

⁵⁹ Gillette & Hopkins, *supra* note 2, at 816–17.

⁶⁰ *Id.* at 817.

⁶¹ See David Singh Grewal & Jedediah Purdy, *Law and Neoliberalism*, 77 LAW & CONTEMP. PROBS. 1, 2–3 (2014).

⁶² I take as my point of departure Julian Go’s admonition that “Definitions cannot be wrong or right. They can only be useful or not.” JULIAN GO, PATTERNS OF EMPIRE: THE BRITISH AND AMERICAN EMPIRES, 1688 TO THE PRESENT 6 (2011).

⁶³ DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

⁶⁴ Grewal & Purdy, *supra* note 61, at 2–3.

⁶⁵ See JULIE A. WILSON, NEOLIBERALISM 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 economicus*.” WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM’S STEALTH REVOLUTION 31 (2015).

⁶⁶ See WILSON, *supra* note 65, at 21–49.

essentially, they could have their cake and eat it, too.⁶⁷ The promise of small government with limited involvement in private markets is a axiomatic expression of neoliberal ideology.⁶⁸

Second, proponents believe that sectors run by the government should be privatized and deregulated to foster competition and efficiency, another core tenet of neoliberalism.⁶⁹ What privatization and deregulation should do, in effect, is force the government to run like a competitive business. Neoliberals assume that through the workings of the market this will “eliminate bureaucratic red tape, increase efficiency and productivity, improve quality, and reduce costs, both directly to the consumer through cheaper commodities and services and indirectly through reduction of the tax burden.”⁷⁰ Some governmental sectors, however, are not amenable to either privatization or deregulation; in such circumstances the state has an obligation to create or impose market systems such that even services that could only be supplied by the government—immigration, for example—are run by the logic of the market.⁷¹ User fees that are keyed to the normative criterion of efficiency are a means of creating a market system where one had not previously existed.⁷²

If user fees are a means of raising revenue, where do they go after they are paid? The simple answer is the federal government, which is both correct and deceptively oversimple. In 2019, for example, the federal government took in around \$3.5 trillion in total revenue, while spending some \$4.4 trillion.⁷³ Keeping track of all that money is a monumental endeavor. The White House’s Office of Management and Budget (OMB), which is tasked with the administration of the federal budget,⁷⁴ regularly produces comprehensive budgetary data, as does the U.S. Treasury.⁷⁵ With respect to the receipt of user fees, however, much is opaque. The OMB

⁶⁷ It is important to foreground the fact that neoliberalism is decidedly *not* laissez faire economic policy. It requires significant and continual intervention in private markets to effectuate the marketization of social realities. Take as a primary example Reagan’s Janus-faced proclamation that “government is not the solution to our problem; government is the problem,” in the context of justifying trickle-down economics. 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 re-ordering 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.

⁶⁸ 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).

⁶⁹ HARVEY, *supra* note 63, at 65.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Gillette & Hopkins, *supra* note 2, at 820.

⁷³ CONG. BUDGET OFF., THE FEDERAL BUDGET IN 2019: AN INFOGRAPHIC (2020).

⁷⁴ *Agency: Management and Budget Office*, FED. REG., <https://www.federalregister.gov/agencies/management-and-budget-office> (last visited Sep. 16, 2020).

⁷⁵ *Agency: Treasury Department*, FED. REG., a <https://www.federalregister.gov/agencies/treasury-department>.

designates which accounts receive collections associated with user fees in its MAX budget data system,⁷⁶ but these designations are not made public.⁷⁷ Moreover, the OMB’s annual Budget Appendix often contains detailed subaccount-level data that indicate user-fee funding for federal programs, but as the Congressional Research Service (CRS) makes clear, “[t]he format of the Budget Appendix . . . makes it an impractical source of data for government-wide research.”⁷⁸ There is simply no comprehensive and authoritative list of federal user fees publicly available.⁷⁹

Complicating the issue still further, the disposition of user fees varies greatly: generally they are collected into the U.S. Treasury General Fund or into agency-specific fund accounts, depending on how they are authorized by Congress.⁸⁰ Fees designated as “offsetting collections”—called so because they are intended to offset the agency’s expenditures—are funneled either into receipt accounts, subject to congressional appropriations oversight,⁸¹ or into expenditure accounts, which generally can be used by the agency without further congressional approval.⁸² Since the House and Senate foreswore earmarks in 2011, Congress has come to rely on limitation riders in appropriation bills and statutory or non-statutory agency instructions to direct or prohibit the spending of receipt accounts, but by definition do not have direct control over expenditure accounts.⁸³

II. User Fees in the Immigration Context

A. The Economics of Immigration

Exclusive and plenary power over immigration is vested in the legislative branch of the federal government.⁸⁴ Pursuant to that power, Congress has set U.S. immigration policy through the Immigration and Nationality Act (INA), which was first codified in 1952 and amended several times since.⁸⁵ But like most areas of federal legislation, implementation, administration,

⁷⁶ OFF. MGMT. & BUDGET, OMB CIRCULAR No. A-11 § 79.4(e) (2020), <https://www.whitehouse.gov/wp-content/uploads/2018/06/s79.pdf>.

⁷⁷ AUSTIN, *supra* note 9, at 2.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 3.

⁸¹ As a baseline, federal agencies may not spend federal revenue unless Congress has appropriated them or authorized their use explicitly in statute. U.S. CONST. art. I, § 9.

⁸² Gillette & Hopkins, *supra* note 2, at 863–64; AUSTIN, *supra* note 9, at 2–3.

⁸³ JENNIFER L. SELIN & DAVID E. LEWIS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES: SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 107 (2d ed. 2018).

⁸⁴ U.S. CONST. art. I, § 8, clause 4.

⁸⁵ 8 U.S.C. § 1427.

and enforcement of federal immigration law is delegated to executive branch administrative agencies. 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), creating a border agency called Customs and Border Protection (CBP), an interior enforcement agency called Immigration and Customs Enforcement (ICE), and USCIS.⁸⁶

The USCIS serves three primary functions: the adjudication of immigration petitions, the adjudication of naturalization petitions, and the administering of refugee and asylum claims.⁸⁷ 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, as well as those seeking to take advantage of the origin-country diversity visas.⁸⁸ 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 paper.⁸⁹ Refugees and asylees may seek to change their status to LPR after admittance to the U.S., but because their motivations for migrating are typically different than those seeking initial LPR status, they are not classified as immigrants under the INA.⁹⁰

The INA establishes a global cap on immigration to the United States at 675,000 persons,⁹¹ pursuant to three general principles: family reunification (480,000 family-sponsored visas), U.S. labor market contribution (140,000 employment-based visas), and origin-country diversity (55,000 allocated Diversity Immigrant Visas). A fourth principle—humanitarian

⁸⁶ Ruth Ellen Wasem, *Immigration Governance for the Twenty-First Century*, 6 J. MIGRATION & HUM. SECURITY 97, 105 (2018).

⁸⁷ WILLIAM A. KANDEL, CONG. RESEARCH 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.*

⁸⁸ WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42866 PERMANENT LEGAL IMMIGRATION TO THE UNITED STATES: POLICY OVERVIEW 2–3 (2018).

⁸⁹ Naturalization (the process of becoming a U.S. citizen) requires at least five years of residency in the U.S. as an LPR before they become eligible. Some consider LPR status as a weigh station on the route to full citizenship, but for various reasons many LPRs choose not to naturalize. For an in-depth discussion, see MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020).

⁹⁰ 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).

⁹¹ This limit is best understood as a “porous cap,” because the number of immediate-relative immigrants is not subject to a numerical limitation. *Id.*

assistance—is primarily effectuated through the U.S. refugee and asylee programs, which are not subject to numerical limitations.⁹²

The INA delegates broad discretion to the USCIS to set its fee schedule pursuant to the mandate that its charges for providing adjudication and naturalization services shall “be set at a level that will ensure recovery of the full costs of providing all such services.”⁹³ These fees are meant to recover the full cost of *all* USCIS services, included for those whom fee waivers or exemptions are available, and those for whom no fee is required, i.e. refugee and asylee applicants. Like all administrative agencies, the USCIS promulgates substantive rules—such as determining a fee schedule—through notice and comment rulemaking subject to the Administrative Procedures Act (APA).⁹⁴ Pursuant to the APA, on August 3, 2020, the USCIS published a Final Rule adjusting its fee schedule significantly, increasing charges across the board by a weighted average of twenty percent, adding new fees, removing certain fee exemptions and altering waiver requirements, and a bevy of other modifications.⁹⁵ Fees run the range from a couple of 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—will cost a potential immigrant \$1,130 plus additional \$85 for biometric screening.⁹⁶ The new fee structure is set to come into force on October 2, 2020.

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 became reliant on self-funding.⁹⁷ In 1990, the INS still received more than 76% of its budget from congressional appropriations, but by 2002 that number had dwindled to just 15%.⁹⁸ By 2019, only \$132 million

⁹² CONG. RESEARCH SERV., R45020 A PRIMER ON U.S. IMMIGRATION POLICY 2 (2018).

⁹³ 8 U.S.C. § 1356(m).

⁹⁴ 5 U.S.C. § 553.

⁹⁵ U.S. CITIZENSHIP AND IMMIGRATION SERVICES FEE SCHEDULE AND CHANGES TO CERTAIN OTHER IMMIGRATION BENEFIT REQUEST REQUIREMENTS, 85 Fed. Reg. 46916 (Aug 3, 2020).

⁹⁶ *Id.*

⁹⁷ KANDEL, *supra* note 87, at 16.

⁹⁸ U.S. GOV’T ACCOUNTABILITY OFF., GAO-AFMD-91-20, FINANCIAL MANAGEMENT: INS LACKS ACCOUNTABILITY AND CONTROLS OVER ITS RESOURCES (1991).

of the USCIS's \$4.6 billion budget came from taxpayers.⁹⁹ 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.¹⁰⁰

It seems fairly apparent that some of the functions of the USCIS are quite amenable to one or more of the justifications described above. On one hand, U.S. businesses that sponsor employment-based immigrant visas are acting as self-interested market participants, and therefore user fees makes 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 externalities created when a foreign national is hired (e.g., foreclosing the possibility of engaging an American citizen, etc.). On the other hand, the dictates of public conscious and basic morality counsel that charging refugees and asylees an entrance fee would be an unconscionable act, and the USCIS rightly precludes these financial burdens (although 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).¹⁰¹

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.¹⁰² *Immediate relatives* include spouses and unmarried minor children of U.S. citizens, and parents of adult U.S. citizens; and *preference immigrants*, a group that contains the unmarried adult children of U.S. citizens, spouses and children of LPRs, married children, and the siblings of adult citizens.¹⁰³ Immediate relatives are not numerically limited, but do count towards the 480,000 limitation created by the INA for family-reunification visas, thus making it a “porous” cap. The INA establishes a 226,000 per year floor for preference immigrants, which may only be exceeded if there are unused immediate relative visas in the 480,000 pool (and this has not occurred since 1999), thus

⁹⁹ *Marriage Green Card and Citizenship Application Fee 2020*, BOUNDLESS (Jan. 19, 2020), <https://www.boundless.com/blog/uscis-fees-increase-comparison/>.

¹⁰⁰ See Lawrence Solum, *Legal Theory Lexicon: Path Dependency*, LEGAL THEORY BLOG (Sep. 2, 2018), <https://lsolum.typepad.com/legaltheory/2018/09/legal-theory-lexicon-path-dependency.html>.

¹⁰¹ U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements, 85 Fed. Reg. 46,916. 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.*

¹⁰² CONG. RESEARCH SERV., *supra* note 92, at 2–3.

¹⁰³ *Id.*

making the 226,000 floor a ceiling, as well. Preference immigrants are also subject to a 7% per-country limitation.¹⁰⁴

Form the preceding discussion, three interrelated questions emerge: First, do the economics of immigration require economic solutions in the form of user fees? Second, is it reasonable to use economics as the evaluative framework from which to understand the principles undergirding our immigration policies? And finally, what are the consequences and implications that obtain as a direct consequence of the USCIS's self-funding structure? The next three sub-sections will address these questions in turn.

C. Efficiency and Externalities

1. Efficiency is Not a Useful Criterion for Immigration Demand

As will be recalled, efficiency is a function of allocating resources to their most highly valued use, as measured by the consumer's willingness to pay.¹⁰⁵ 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.¹⁰⁶ In the immigration context, 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, to wit: 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 contradiction, not least of which is the fact that it is a propositional statement based on assumptions that are empirically unfalsifiable.¹⁰⁷ As Arthur Leff pointed out, the 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.”¹⁰⁸ Self-interested rationality is smuggled into the proposition as an axiom and then used to prove itself. As should be clear by common experience, it is unreasonable to expect immigrants wishing to be reunited

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* note 34 and accompanying text.

¹⁰⁶ See *supra* note 38 and accompanying text.

¹⁰⁷ Leff, *supra* note 58, at 457.

¹⁰⁸ *Id.* at 457–58.

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.

Second, and most apt in the immigration context, this metric takes for granted that if you do not pay for something, then you are “unwilling” to do so.¹⁰⁹ 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.¹¹⁰ For those seeking LPR status through the family-sponsored visa programs, these conceptions run in reverse—they will pay whatever is required to be with their loved ones, notwithstanding their ability to pay or the particular utility of their dollars. It is meaningless to assume that someone is capable of putting a price on family reunification as measured by willingness-to-pay; 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, *viz.* permanent resident visas. If potential immigrants are willing to pay any price to be reunited with their families, then no price point will dissuade them.¹¹¹ The data bear this out; petitions for LPR status have remained steady since the 1980s,¹¹² despite massive fee increases in 1998 and 2007,¹¹³ thus demonstrating that there is an inelastic demand for immigration and so it is insensitive to price variation. User fees, in short, are ineffective as a rationing mechanism in the immigration context.

2. Externalities are By-and-Large Positive

¹⁰⁹ *Id.* at 478–79.

¹¹⁰ See generally EMIL KAUDER, A HISTORY OF MARGINAL UTILITY THEORY (1965).

¹¹¹ 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, less costly and more dangerous activities will be undertaken to satisfy a consumer’s need. 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.

¹¹² 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>.

¹¹³ The cost of applying for LPR status increased 69% and 157% in 1998 and 2007, respectively. BOUNDLESS, *supra* note 99.

When one speaks about the potential negative economic impacts of immigration—its externalities—what is typically referenced are two related and connected phenomena: displacement and wage depression. The former refers to the idea that immigrant workers will take jobs that would otherwise go to native-born workers, 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 native-born workers that occur when a U.S. firm hires an immigrant employee in terms of availability of jobs and commensurate wage levels. As was discussed earlier, the economic justifications for user fees are most apt when they are used to manage the consumption of public goods that create significant externalities.¹¹⁴ If political discourse is to be believed, the externalities of immigration are overwhelmingly negative,¹¹⁵ but with respect to displacement and wage depression, the evidence strongly suggests that the opposite is true. Moreover, in terms of the overall fiscal burden to the average taxpayer—a cross-subsidy borne by all Americans—on the whole immigration is a net positive contribution to the U.S. economy.¹¹⁶

“Immigrants are taking American jobs!” has long been a *cri de cœur* of America-first style conservatives, even if it is usually reserved for naked political rhetoric or confined to the opinion pages.¹¹⁷ While intuitively plausible, academic studies demonstrate that immigrants complement native-born workers, rather than replace them.¹¹⁸ In the main, immigrants tend to be imperfect substitutes for native-born workers; a principle reason for this concerns relative linguistic skills. On one hand, because less-educated immigrants often lack English proficiency, they are more likely to take manual labor-intensive jobs that already rely heavily on immigrant

¹¹⁴ See *supra* Part I(B)(2).

¹¹⁵ See, e.g., Otto Santa Ana, ‘*Like an Animal I was Treated*’: Anti-immigrant Metaphor in US Public Discourse, 10 DISCOURSE SOC’Y 224 (1999); Derek Thompson, *How Immigration Became So Controversial*, THE ATLANTIC (Feb. 2, 2018), <https://www.theatlantic.com/politics/archive/2018/02/why-immigration-divides/552125/>.

¹¹⁶ *The Effects of Immigration on the United States’ Economy*, Penn Wharton: Budget Model (June 27, 2016), available at <https://budgetmodel.wharton.upenn.edu/issues/2016/1/27/the-effects-of-immigration-on-the-united-states-economy>.

¹¹⁷ See, e.g., *The Latest: Trump Says Immigrants Taking Minorities’ Jobs*, ASSOCIATED PRESS (Aug. 30, 2016), <https://apnews.com/article/09215cf7f37f4c6ea05f92f8c83e6125>; Henry Olsen, Yes, *Undocumented Immigrants Take Jobs from Americans. Here’s the Proof.*, WASH. POST: OPINIONS (Aug. 16, 2019), <https://www.washingtonpost.com/opinions/2019/08/16/yes-undocumented-immigrants-take-jobs-americans-heres-proof/>.

¹¹⁸ *The Effects of Immigration*, *supra* note 116; Darrell M. West, *The Costs and Benefits of Immigration*, 126 Pol. Sci. Q. 427, 435 (2011).

labor.¹¹⁹ On the other hand, highly-educated immigrants face a competitive disadvantage for high-skilled jobs that require sophisticated communication abilities, such as management, media, and other language-intensive positions, and thus opt for scientific and technical positions.¹²⁰ Like manual-labor jobs, immigrants tend to be overrepresented in these types of professions as well. Consequently, one expects job displacement to most strongly affect earlier immigrants who are competing for jobs with newly arrived immigrants, and the data reflect this.¹²¹

When it comes to wage depression, on the whole, immigration has been shown to *increase* the average wages of native-born workers, rather than decrease them.¹²² One reason for this 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.¹²³ Studies show that the average of all native-born worker's wages have grown roughly half a percent between 1990 and 2010,¹²⁴ 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.¹²⁵ 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.¹²⁶ 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 subsects of the American workforce differently.¹²⁷ For the reasons described above, highly-educated immigrants complement rather than displace native-born workers, but this appears not

¹¹⁹ *The Effects of Immigration*, *supra* note 116 (citing Giovanni Peri and Chad Sparber, *Task Specialization, Immigration, and Wages*, 1 AM. ECON. J.: APPLIED ECON. 35 (2009), available at <http://pubs.aeaweb.org/doi/pdfplus/10.1257/app.1.3.135>).

¹²⁰ *Id.*

¹²¹ See Gianmarco Ottaviano & Giovanni Peri, *Rethinking the Effects of Immigration on Wages*, 10 J. EUR. ECON. ASS'N 10, 152 (2012), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1542-4774.2011.01052.x/epdf> (demonstrating a 6.7 percent decrease in average wages for foreign-born workers as a result of immigration pressure); GEORGE BORJAS, IMMIGRATION ECONOMICS (2014) (demonstrating a 4.4 percent decrease in average wages for foreign-born workers as a result of immigration pressure).

¹²² West, *supra* note 118, at 435.

¹²³ *The Effects of Immigration*, *supra* note 116.

¹²⁴ *Id.*

¹²⁵ Giovanni Peri, *Rethinking the Effects of Immigration Wages: New Data and Analysis from 1990-2004*, AM. IMMIGR. COUNCIL (Oct. 1, 2006), available at <https://www.americanimmigrationcouncil.org/research/rethinking-effects-immigration-wages-new-data-and-analysis-1990-2004>.

¹²⁶ *Id.*

¹²⁷ *The Effects of Immigration*, *supra* note 116.

to hold true for low-educated workers competing for manual labor-intensive jobs in fields such as agriculture and construction.

If immigration does not, on average, displace American workers or drive their wages down, do they nevertheless increase the taxpayer's average financial burden? Put another way, does the average taxpayer cross-subsidize the beneficiaries of immigration, i.e., 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.¹²⁸

Many who oppose immigration do so on the grounds that they believe that immigrants will drain public resources; this was the justification behind the Trump administration's recent "public charge" rule (now being contested in the courts), which seeks to impose increased restrictions for petitioners seeking LPR status who do not meet financial eligibility requirements.¹²⁹ However, this argument is undercut by the fact that immigrants pay taxes at a rate that exceeds their use of public benefits. Immigrants pay income, Social Security, and Medicare taxes the same as any other U.S. resident; even those without legal status contribute to the Treasury through sales taxes and property taxes related to accommodations, even though they are largely ineligible to receive any public assistance.¹³⁰ Moreover, many public assistance programs have restrictions that foreclose access to most immigrants altogether, such as Medicaid, Supplemental Security Income, food stamps, Temporary Assistance to Needy Families, and the State Children's Health Insurance Program.¹³¹ Even Social Security and Medicare, for which immigrants directly pay taxes, must contribute to the programs for a minimum of ten years before they are eligible to receive benefits.¹³²

¹²⁸ *Building a More Dynamic Economy: The Benefits of Immigration, Before the H. Comm. on the Budget*, 116th Cong. 126–31, 127–28 (2019) (statement of Tom Jawetz, Vice President for Immigration Policy at American Progress).

¹²⁹ *Final Rule on Public Charge Ground of Inadmissibility*, USCIS.GOV, available at <https://www.uscis.gov/archive/final-rule-on-public-charge-ground-of-inadmissibility>; see Holly Straut-Eppsteiner, *Trump's Public Charge Rule Created Harm Even Before it was Implemented*, NAT'L IMMIGR. L. CTR. (Mar. 2, 2020), <https://www.nilc.org/2020/03/02/public-charge-rule-created-harm-before-it-was-implemented/>.

¹³⁰ West, *supra* note 118, at 435.

¹³¹ *Id.* at 433–34. For example, under the Affordable Care Act (ACA), immigrants are only eligible for certain programs under Medicaid, such as those that provide emergency medical assistance, and then only after five years of residency. *Immigrant Eligibility for Health Care Programs in the United States*, NAT'L CONF. ST. LEGISLATORS (Oct. 19, 2017), <https://www.ncsl.org/research/immigration/immigrant-eligibility-for-health-care-programs-in-the-united-states.aspx>.

¹³² West, *supra* note 118, at 434.

The National Research Council has estimated that the average immigrant pays \$1,800 more in taxes each year than they cost in benefits.¹³³ 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 44.¹³⁴ Only 4.4 percent were age 65 or older. These groups are more likely to have no children, or children past the age requiring costly education, and not yet in need of significant support in the form of elderly health care and pension services provided by the government.¹³⁵

Not only are immigrants paying for their fair share of the social safety net, but are in important ways propping it up for all Americans. 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. Without the influx of working-age immigrants, their long-term viability would be shaky, at best.¹³⁶ One study by the National Academy of Sciences, Engineering, and Medicine found that immigrants and their children have accounted for virtually all of U.S. population growth in the last ten years, without which the country's population would face a nearly seven million decrease in the coming decade.¹³⁷ Immigrants' tax contributions are shoring up the shortfalls that would have been created by this aging population. For example, between 1996 and 2011, immigrants paid in a net positive contribution of \$182 billion to Medicare's core trust fund, while the relatively older native-born population was responsible for a net loss of \$69 billion.¹³⁸ Moreover, in terms of overall tax contributions, immigration is responsible for a significant portion of the government's coffers. In

¹³³ *Id.* at 435 (citing THE NEW AMERICANS: ECONOMIC, DEMOGRAPHICS, AND FISCAL EFFECTS OF IMMIGRATION 319 (James P. Smith & Barry Edmonston eds., 1997)).

¹³⁴ West, *supra* note 118, at 433.

¹³⁵ *Id.*

¹³⁶ See Stephen C. Goss, *The Future Financial Status of the Social Security Program*, 30 SOC. SECURITY BULL. 111 (2010), available at <https://www.ssa.gov/policy/docs/ssb/v70n3/ssb-v70n3.pdf>.

¹³⁷ NATIONAL ACADEMIES OF SCIENCE, ENGINEERING, AND MEDICINE, THE ECONOMIC AND FISCAL CONSEQUENCES OF IMMIGRATION (2017), available at <https://www.nap.edu/catalog/23550/the-economic-and-fiscal-consequences-of-immigration> (hereinafter NASEM Report).

¹³⁸ Leah Zallman, *Staying Covered: How Immigrants Have Prolonged the Solvency of One of Medicare's Key Trust Funds and Subsidized Care for U.S. Seniors*, NEW AM. ECON. RES. FUND (Aug. 6, 2014), <https://research.newamericanconomy.org/report/staying-covered-immigrants-prolonged-solvency-one-medicares-key-trust-funds-subsidized-care-u-s-seniors/>.

2014, to look at just one year, immigrants paid an estimated \$328 billion in federal, state, and local taxes, which accounts for more than a quarter of all taxes paid in California, and nearly the same proportion in New York and New Jersey.¹³⁹

Immigrants contribute to the economy in significant ways beyond their tax payments. Studies overwhelmingly show that immigration is a net positive to the country's gross domestic product (GDP),¹⁴⁰ with a 2007 White House Council of Economic Advisor study finding that immigrants had an average positive effect to U.S. GDP by \$37 billion per year.¹⁴¹ Beyond generating economic activity as taxpayers and consumers, immigrants are job-creators, as well. Despite making up only 13.7 percent of the U.S. population in 2017, immigrants accounted for nearly 30 percent of American entrepreneurs that year.¹⁴² Between 1995 and 2005, foreign-born Americans were behind over 25 percent of all technology businesses, a rate that was much higher in California's Silicon Valley.¹⁴³ Nearly half of all the companies on the Fortune 500 list in 2018 were founded by foreign-born entrepreneurs; taken together, these companies created \$5.5 trillion revenue, which would place it third on the list of world's GDPs behind the U.S. and China.¹⁴⁴ Over a 75-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 \$800,000.¹⁴⁵ 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,

¹³⁹ Dan Kosten, *Immigrants as Economic Contributors: Immigrant Tax Contributions and Spending Power*, NAT'L IMMIGR. F. (Sep. 6, 2018), available at <https://immigrationforum.org/article/immigrants-as-economic-contributors-immigrant-tax-contributions-and-spending-power/>.

¹⁴⁰ See, e.g., West, *supra* note 118, at 435; Jawetz, *supra* note 128, at 126–27; Zallman, *supra* note 138; *The Effects of Immigration*, *supra* note 116.

¹⁴¹ Council of Economic Advisors, *Immigration's Economic Impact*, WHITEHOUSE.GOV 3 (June 20, 2007), available at https://georgewbush-whitehouse.archives.gov/cea/cea_immigration_062007.html.

¹⁴² Ewing Marion Kauffman Foundation, *The Kauffman Index of Startup Activity: National Trends* (May 2017), available at https://www.kauffman.org/wp-content/uploads/2019/09/2017_Kauffman_Index_Startup_Activity_National_Report_Final.pdf.

¹⁴³ West, *supra* note 118, 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.*

¹⁴⁴ Jawetz, *supra* note 128, at 126–27.

¹⁴⁵ Kosten, *supra* note 139.

according to a 2017 Department of Health and Human Services report that the Trump administration subsequently attempted to suppress.¹⁴⁶

Studies are somewhat more ambivalent regarding the fiscal impact of recently arrived immigrants with limited education. 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.¹⁴⁷ Over the period of 1994-2013, 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.¹⁴⁸ However, 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.¹⁴⁹ Overall, the short-term costs on state and local governments are generally more than offset by the subsequent contributions of the second generation.¹⁵⁰

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. Moreover, immigration has either negligible or positive effects on the wages of native-born workers because immigrant labor tends to complement native labor, rather than replace it. Immigrants are more likely than the native-born to start businesses, and are subsidizing an aging population's entitlement programs. When we speak of the externalities of immigration—that is, the effects felt by the average American—the data suggests 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. Even refugees and asylees, who pay no user fees, create positive externalities for the U.S. economy. As a matter of economic principle, the government should be subsidizing immigration costs, rather than imposing them.

D. Normative Justifications; or, is it Fair?

¹⁴⁶ Julie Hirschfeld Davis & Somini Sengupta, *Trump Administration Rejects Study Showing Positive Impact of Refugees*, NY TIMES (Sep. 18, 2017), available at <https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html>.

¹⁴⁷ *The Effects of Immigration*, *supra* note 116.

¹⁴⁸ NASEM Report, *supra* note 137.

¹⁴⁹ *The Effects of Immigration*, *supra* note 116.

¹⁵⁰ *Id.*

In August of 2019, Ken Cuccinelli, the then 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’ iconic poem, *The New Colossus*.¹⁵¹ He later added that the poem only referred to “people coming from Europe.” Lazarus’ sonnet was written in 1883 to raise money for the Statue of Liberty’s pedestal, upon which is inscribed the poet’s paean to our country’s immigrant roots:

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 . . .¹⁵²

Two years later, the Statue of Liberty was installed at the confluence of the Hudson and East Rivers in New York harbor, and would soon become inextricably linked with the plight of the foreign-born when an immigrant processing station was opened on nearby Ellis Island. The very same year as the statue’s installation, Congress was working diligently to shut America’s borders, passing the Alien Contract Labor Law, which forbade the importation of all but a few categories of foreign workers.¹⁵³

The preceding comments highlight a tension that was present in America in 1885, and 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,¹⁵⁴ 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 social identities that are 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 identity: for one group, the fabric of American society is interwoven with multiculturalism and plurality; for the other, it is of a heterogenous character predicated on the conservation of unique cultural traditions and Republican heritage. Both positions are legitimate and often sincerely held, and both are susceptible to political appropriation for pretextual reasons.

¹⁵¹ Jacey Fortin, ‘Huddled Masses’ in Statute of Liberty Poem Are European, Trump Official Says, NYTIMES (Aug. 14, 2019), available at <https://www.nytimes.com/2019/08/14/us/cuccinelli-statue-liberty-poem.html>.

¹⁵² EMMA LAZARUS, THE NEW COLOSSUS (1883).

¹⁵³ Alien Contract Labor Law of 1885, ch. 164, 23 Stat. 332, 333.

¹⁵⁴ JOHN F. KENNEDY, A NATION OF IMMIGRANTS (1958).

These competing views regarding the nature of American identity inevitably leads to conflict over the nation’s immigration policies, a conflict that informs the structure of the USCIS. The economic questions over user fees tend to dominate the political discourse of immigration, but the normative question—is it *fair*—lurks in the background. How one answers this question depends on how one values the intangible benefits of immigration beyond the economic, in terms of diversity and multiculturalism, contributions to the arts, culture, and food, and to our civic identity. To answer the normative questions about user fees—should the beneficiary 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 that believe immigration is a grant of privilege that risks the adulteration of America’s unique cultural identity, the beneficiaries are the immigrants; for those that value multiculturalism and hence view immigration as an end in itself, the benefits redound to all of society. Law, and consequently, this paper, have little to say about which position is correct. The proper field for this contestation is politics, but as will be discussed in the next section, the USCIS’s funding structure frustrates the political process.

E. The Instrumentalization of Immigration

It was a little over two decades ago that Congress granted to the USCIS the authority to recover the full cost of its adjudicatory functions by charging user fees.¹⁵⁵ The Immigration Examinations Fee Account (IEFA), the offsetting collections account that obviates the USCIS’s need for congressional appropriations,¹⁵⁶ was introduced as part of a massive Appropriation Act for Fiscal Year 1989.¹⁵⁷ 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 during the reconciliation process: “The conferees expect that funds generate by this Account shall not be used for any purpose other than enhancing naturalization and adjudications programs. Additionally, naturalization and adjudications fees shall not be increased beyond the extent they would have been increased

¹⁵⁵ Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, P.L. 100-459 §209, 102 Stat. 2203 (codified as 8 U.S.C. § 1356(m)).

¹⁵⁶ See *supra* note 82 and accompanying text.

¹⁵⁷ H.R. 4782, 100th Cong. (2nd Sess. 1988).

absent the existence of the Account.”¹⁵⁸ There is no indication that House Committee members understood the implications of the bill.

As was explained earlier, 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, they were effectively removed from congressional budgetary oversight. Whether this was a neoliberal coup by the Reagan administration, or an abdication of responsibility by Congress, is a matter of interpretation. The upshot is, however, that a crucial democratic check on the power of the executive was removed.

The USCIS is an executive agency and thus functions at the behest of the President, who is subject to democratic control in the form of the ballot box, but like other administrative agencies, ultimate authority over its structure and function should remain with Congress.¹⁵⁹ The Constitution vests Congress with responsibility over immigration; therefore, democracy norms require that the power to control immigration policy lies with the people’s direct representatives on Capitol Hill. A principle means of exercising this control is through the power of the purse: Congress enjoys near plenary power over agency funding.¹⁶⁰ They have inherent power to set overall agency funding levels and to set temporal and subject-matter limitations.¹⁶¹ Moreover, they have the power to prohibit or condition the use of funds to direct agency action or to achieve specific policy goals.¹⁶² Crucially, agencies may not spend or withhold appropriated funds in a manner that is contrary to the intent of the original appropriation.¹⁶³ But now, thanks to its offsetting account, the USCIS can expend funds it receives from user fees as it, and the President, see fit. And as the agency’s actions betray, those priorities under the Trump

¹⁵⁸ H.R. REP. NO. 100-979 (1988) (Conf. Rep.).

¹⁵⁹ See *supra* notes 30–32 and accompanying text.

¹⁶⁰ U.S. CONST. art. I, § 8, cl. 1; 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.

¹⁶¹ TODD GARVEY & DANIEL J. SHEFFNER, CONG. RESEARCH SERV., R45442, CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 13 (2018).

¹⁶² U.S. GOV’T ACCOUNTABILITY OFF., OFF. OF THE GEN. COUNS., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 1–8 (4th ed. 2016).

¹⁶³ See *Train v. City of New York*, 420 U.S. 35, 42–49 (1975).

administration are more and more centered on enforcement, and not on the congressionally mandated mission of benefits adjudication.¹⁶⁴

In late May of 2020, the USCIS requested a \$1.2 billion bailout from Congress, citing the coronavirus pandemic as the primary cause of a budget shortfall that would require the agency to furlough more than 13,000 workers—more than a third of its workforce.¹⁶⁵ The USCIS’s official statement posits that the fiscal crisis was caused by a 50% drop in receipts coming from fees starting in March, but evidence suggests that the agency itself forecast the budget deficit well before the pandemic struck.¹⁶⁶ 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.¹⁶⁷ However, as late as November of 2019, the agency was predicting a deficit of nearly \$250 million for Fiscal Year 2019, estimated to grow to over \$1.5 billion in 2020.¹⁶⁸ If their numbers are to be believed, it would appear that the coronavirus pandemic has not been the direct 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 posited that the USCIS projected a fiscal shortfall because it “knew, well before the pandemic, that it was jacking up expenses even faster than revenues—especially payroll expenses.”¹⁶⁹ Under the Trump administration, the agency has increased its workforce from 15,000 in 2016 to over 18,000 today.¹⁷⁰ The reasons for this hiring blitz are twofold: First, the agency has prioritized

¹⁶⁴ “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.*” *Our History*, USCIS.GOV, available at <https://www.uscis.gov/about-us/our-history> (emphasis added).

¹⁶⁵ Geneva Sanders, *Immigration Agency Seeks Bailout, Plans to Charge More for Visa Applications*, CNN.COM (May 18, 2020), <https://www.cnn.com/2020/05/18/politics/uscis-emergency-funding-coronavirus/index.html>; Stuart Anderson, *USCIS Staff Furloughs Will Grind Legal Immigration to a Halt*, FORBES.COM (Aug. 17, 2020), [https://www.forbes.com/sites/stuartanderson/2020/08/17/uscis-staff-furloughs-will-grind-legal-immigration-to-a-halt/amp/](https://www.forbes.com/sites/stuartanderson/2020/08/17/uscis-staff-furloughs-will-grind-legal-immigration-to-a-halt/).

¹⁶⁶ 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 (2020).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Oversight of U.S. Citizenship and Immigration Services, before the Subcommittee on Immigration and Citizenship, U.S. House Committee on the Judiciary*, 116th Cong. (2020) (statement of Doug Rand, Senior Fellow, Federation of American Scientists), available at <https://www.congress.gov/event/116th-congress/house-event/110946>.

¹⁷⁰ Rand & Milliken, *supra* note 166.

anti-fraud measures, despite not providing evidence that such measures are needed;¹⁷¹ and second, the USCIS issued a series of policies that make individual case adjudications more complicated and onerous, thus requiring more staff to complete fewer cases.¹⁷² 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.¹⁷³

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.”¹⁷⁴ The Trump administration’s plans have had the intended effect of grinding legal immigration to a halt,¹⁷⁵ and deporting or inciting the self-deportation of hundreds of thousands of persons.¹⁷⁶ The USCIS has been a central feature of this concerted push: naturalization backlog has reached unprecedented levels,¹⁷⁷ disenfranchising some 300,000 potential voters before the presidential elections;¹⁷⁸ the costs to become a U.S. citizen has more than doubled;¹⁷⁹ and according to an American Civil Liberties Union (ACLU) lawsuit, the USCIS has coordinated with ICE to create deportation “traps” during regularly-scheduled immigration interviews.¹⁸⁰ Even the description of America as a “nation of immigrants” has been stripped from the USCIS’s mission statement.¹⁸¹

¹⁷¹ The agency has declared that it wished to more than double the 1,000 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.

¹⁷² Three such policies are quite consequential: one makes in-person interviews for employment-based green cards mandatory, even if they are only renewing, another eliminates a “prior deference” policy that subjects skilled workers to additionally scrutiny, and the third is the “public charge” rule which was discussed earlier. Rand & Milliken, *supra* note 166; *see supra* note 129 and accompanying text.

¹⁷³ DEPARTMENT OF HOMELAND SECURITY, USCIS BUDGET OVERVIEW, FISCAL YEAR 2019 CONGRESSIONAL JUSTIFICATION 8 (2019), *available at* <https://www.dhs.gov/sites/default/files/publications/U.%20S.%20Citizenship%20and%20Immigration%20Services.pdf>.

¹⁷⁴ MING HSU CHEN, PURSUING CITIZENSHIP IN THE ENFORCEMENT ERA (2020).

¹⁷⁵ Anderson, *supra* note 165.

¹⁷⁶ Ed Kilgore, *Trump’s Immigration Blitz: A ‘Self-Deportation’ Strategy Taken to Extremes*, NYMAG: THE INTELLIGENCER (Jan. 26, 2017), <https://nymag.com/intelligencer/2017/01/trump-goes-to-extremes-to-encourage-self-deportation.html>.

¹⁷⁷ See *Citizenship Delayed: Civil Rights and Voting Rights Implications of the Citizenship and Naturalization Backlog*, Report of Colorado Advisory Committee for the U.S. Commission on Civil Rights (September 2019) (reprinted in 91 U. COLO. L. REV. FORUM (2019)).

¹⁷⁸ Rand, *supra* note 169.

¹⁷⁹ USCIS Increases Fees, IMMIGRATIONPROF BLOG (Aug. 1, 2020), <https://lawprofessors.typepad.com/immigration/2020/08/uscis-increases-fees.html>.

¹⁸⁰ ICE and USCIS Conspired to Arrest, Detain Immigrants Wishing to Remain with Families, AM. CIV. LIBERTIES UNION OF R.I. (Aug. 14, 2018), <http://www.riaclu.org/news/post/ice-and-uscis-conspired-to-arrest-detain-immigrants-wishing-to-remain-with>.

¹⁸¹ About Us, USCIS.GOV, *available at* <https://www.uscis.gov/about-us> (last visited Oct. 9, 2020); Richard Gonzalez, *America No Longer a ‘Nation of Immigrants,’ USCIS Says*, NPR.ORG (Feb. 22, 2018),

Yet the instrumentalization of the USCIS's funding structure has not solely been a feature of the Republican political agenda. In 2014, then President Obama issued an executive order to create the popular Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) programs.¹⁸² Opponents in Congress determined to thwart the President's actions by attaching a rider to the USCIS's 2014 appropriations, only to discover that, much to their chagrin, the agency's self-funding foreclosed congressional control absent new legislation.¹⁸³

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.¹⁸⁴ 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 political 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 are bad—and undoubtedly, some are very, very bad indeed—but because the structure permits them to happen unchecked. Immigration is no longer a site of politics; it is a site of pure partisanship.

I chose to highlight the funding structure of USCIS because executive immigration policies have massive impacts on the lives of Americans and those who wish to become Americans. But the USCIS's funding structure is not an isolated phenomenon, it is part of a

<https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>.

¹⁸² Presidential Memorandum on Modernizing and Streamlining the U.S. Immigrant Visa System for the 21st Century, 79 Fed. Reg. 70,769, 70,769-70 (Nov. 21, 2014); see WILLIAM A. KANDEL, ET AL., CONG. RESEARCH SERV., R43852 THE PRESIDENT'S IMMIGRATION ACCOUNTABILITY EXECUTIVE ACTION OF NOVEMBER 20, 2014: OVERVIEW AND ISSUES (2015).

¹⁸³ DeMuth & Greve, *supra* note 1, at 562–63 (“The fact that many in Congress were unaware that an agency as important as the [USCIS] 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.”).

¹⁸⁴ See *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581 (1889).

much larger trend of power consolidation in the executive branch. 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 may not be. 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 paper 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.